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 *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This case involves questions of substantial importance to the fields of both arbitration law and contract law. *Amici* are law professors with expertise in contracts and arbitration. They have an interest in ensuring the proper interpretation of contract law and arbitration law principles in federal and state courts. They file this brief to give the Court the benefit of their many years of practical experience and scholarly study. Because the view that waiver requires prejudice rests on a misapplication of the Federal Arbitration Act, amici request that this Court reverse the decision below.

A full list of *amici curiae* is attached as Appendix A to this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

The text of the Federal Arbitration Act contains a straightforward instruction: Arbitration contracts must be treated as "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. In other words, arbitration contracts must be placed on the same footing as any other.

But when it comes to the contractual defense of waiver, the lower courts have refused to heed this instruction. Instead of applying the ordinary contract law of waiver, they have created a unique, arbitration-specific rule: Although waiver does not ordinarily require prejudice, a party can't waive a contractual right to arbitrate

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

unless the other party has suffered prejudice as a result of its conduct. What constitutes prejudice varies by circuit and by case—but it is typically a very high bar.

This rule blatantly flouts the text of the FAA. The lower courts have barely even bothered to argue otherwise. Instead, they have appealed to the so-called liberal federal policy favoring arbitration —a policy first articulated by this Court in dicta decades after the enactment of the FAA. But that policy cannot justify a special waiver rule. As this Court has made clear, the policy favoring arbitration requires only what the text of the FAA itself requires: that arbitration contracts be treated like any other contracts. And in any event, no federal policy could justify disregarding that plain text.

That is all this Court needs to decide this case. But the Court should take note of the extraordinary confusion that its language about a federal policy favoring arbitration has generated—not just in this context, but in many others. And it should take this opportunity to clarify that no federal policy permits courts to craft their own special rules for arbitration contracts.

ARGUMENT

I. The Federal Arbitration Act's equal-treatment principle prohibits courts from imposing an arbitration-specific waiver rule.

The Federal Arbitration Act establishes a straightforward rule: Arbitration contracts must be placed "on equal footing" with all other contracts. *EEOC v. Waffle House*, 534 U.S. 279, 293 (2002).[2] This rule comes directly from the text of the statute—and it is the statute's core

[2] Unless otherwise noted, all internal quotation marks, citations, alterations, and emphases are omitted.

command. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Arbitration contracts, the statute says, must be treated as "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.

This equal-treatment principle prohibits courts from constructing "legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *see also, e.g.*, *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (the FAA prohibits a state law that imposes on arbitration contracts a special notice requirement not applicable to contracts generally). And it forbids courts from construing an arbitration contract "in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

This principle, however, does not render arbitration contracts *more* enforceable than other contracts. The ordinary rules of state contract law—from the rules of contract interpretation to ordinary contract defenses—apply to arbitration contracts just like any others. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (the FAA does not "purport[] to alter" the "background principles of state contract law"). In other words, the equal-treatment principle requires that arbitration contracts be exactly "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).

Yet when it comes to one specific contractual defense—waiver—most courts refuse to heed this instruction, adopting a special, arbitration-specific rule. The equal-treatment principle forbids this approach.

As the Petitioner explains, under the ordinary contract law of most states, waiver is unilateral. *See* Pet. Br. at 16–23. It occurs when a party intentionally relinquishes a known right, or when a party engages in conduct that implies the intentional relinquishment of a known right. *See* 28 Am. Jur. 2d Estoppel & Waiver § 35 (2011); *id.* §§ 183, 187; *see also, e.g.*, *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001). The impact on the nonwaiving party is irrelevant. Waiver thus ordinarily does not require any showing of prejudice. *See, e.g.*, *Podesta v. U.S. Fid. & Guar. Co.*, 504 S.E.2d 135, 143 (W. Va. 1998) ("There is no requirement of prejudice or detrimental reliance by the party asserting waiver."); *Brown v. State Farm Mut. Auto. Ins. Co.*, 776 S.W.2d 384, 387 (Mo. 1989) (en banc) ("A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position." (quoting *Farm Bureau Mut. Auto. Ins. Co. v. Houle*, 102 A.2d 326, 330 (Vt. 1954))).

Nevertheless, when it comes to *arbitration* contracts, most of the lower courts have imposed a special rule: No matter how much a party delays or otherwise acts inconsistently with its right to arbitrate, courts will not find waiver unless the other party was prejudiced as a result. *See, e.g.*, *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356 (6th Cir. 2003); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990); *David v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 440 N.W.2d 269, 274 (N.D. 1989).

And, in many cases, these courts have set the bar for prejudice unreasonably high. *See, e.g.*, *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 246–48 (4th Cir. 2001) (employee failed to demonstrate prejudice sufficient for arbitration waiver even where her employer had sued her three times in federal and state court and the parties had

engaged in substantial discovery); *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 680 (3d Cir. 2000) (obtaining a ruling on a motion to dismiss was insufficient to demonstrate prejudice absent a showing that the arbitrator would have decided the merits of the claim differently); *Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, 898 (5th Cir. 2005) (engaging in extensive discovery could not cause prejudice unless the allegedly waiving party "shower[ed]" the opposing party with discovery requests); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 207 (4th Cir. 2004) (party could not show prejudice based on discovery unless it could prove that same discovery was not also available in arbitration); *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (even "pretrial expense and delay" are insufficient, "without more," to "constitute prejudice sufficient to support a finding of waiver").

The equal-treatment principle articulated in Section 2 of the FAA expressly bars this arbitration-specific approach. Again, the fundamental rule of the FAA is that arbitration contracts must be placed "upon the same footing as other contracts." *Waffle House*, 534 U.S. at 289. Requiring a party to prove an additional element to assert waiver merely because the underlying contract concerned arbitration manifestly disregards that instruction.

II. The arbitration-specific approach to waiver cannot be saved by the so-called liberal federal policy favoring arbitration.

Lacking any textual support for an arbitration-specific waiver rule, many courts applying this rule have set the text of the FAA aside and instead rely upon the purported liberal federal policy favoring arbitration. *See infra* pages 10–13.

But that "policy" cannot justify an arbitration-specific waiver rule. This Court has made plain that the so-called policy favoring arbitration requires only that arbitration contracts be "place[d] . . . upon the *same* footing as other contracts." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 302 (2010) (emphasis added). And even if the policy meant something more, it can't override the FAA's plain text. The lower courts' reasoning to the contrary must be rejected.

What's more, any policy favoring arbitration is not even served by the unique waiver rule lower courts have adopted in the arbitration context. That rule undermines arbitration by encouraging parties to disregard their arbitration contracts unless and until they believe court no longer works for them and by negating the core benefits of arbitration—speedy and efficient dispute resolution.

A. The federal policy favoring arbitration is just the policy that arbitration contracts must be placed on equal footing with other contracts.

For decades following the enactment of the FAA, this Court said nothing about a "liberal federal policy" favoring arbitration. That's unsurprising. Nothing in the text of the statute even hints that courts should *favor* arbitration—it requires that arbitration contracts be treated *equally*. Thus, for years, this Court observed only that in enacting the FAA, Congress had given its "approval" to arbitration as a means of dispute resolution, *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449, 453 (1935), and explained that that approval required arbitration contracts to be enforced according to their terms—no more or less, *Prima Paint*, 388 U.S. at 404 n.12; *see also, e.g.*, *The Anaconda v. Am. Sugar Refin. Co.*, 322 U.S. 42, 44 (1944) (By enacting the FAA, "Congress overturned the existing rule that

performance of [arbitration] agreements could not be compelled by resort to courts of equity or admiralty.").

But for the first time in 1983, this Court—in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*—pronounced the existence of "policy favoring arbitration." 460 U.S. 1, 24 (1983).

This pronouncement was pure dicta. *Moses H. Cone* wasn't really about the FAA at all, but about *Colorado River* abstention—whether it was proper for the federal district court, presiding over a lawsuit seeking to compel arbitration, to stay the suit pending the resolution of an earlier-filed state-court case seeking a declaration that arbitration could not be compelled. *Id.* at 13. The FAA, the Court observed, applies in both state and federal court. *Id.* at 25. So the FAA's only role in the Court's decision was to support the conclusion that the source of law underlying the parties' dispute did not necessitate the surrender of federal jurisdiction—because the FAA was a federal statute. Of course, the FAA is a federal statute regardless of any policy favoring arbitration.

Nevertheless, Justice Brennan, writing for the Court, decided to take that opportunity to assert that "Section 2" amounts to "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Id.* at 24. Justice Brennan's opinion purported to root this policy in Section 2, but he did not explain how the text of Section 2—which requires *equal* treatment—could possibly support the declaration of a policy *favoring* arbitration contracts. *See id.*[3]

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[3] The Court did include a footnote citing a series of lower-court decisions—but all those decisions offered were their own policy arguments about the value of arbitration. *See Moses H. Cone*, 460 U.S. at 24 n.31. A few years later, this Court added a new citation when it spoke about the "policy": caselaw explaining the labor-law rule

And viewed in context, it's not at all clear that the Court intended its dicta to usher in a new framework for interpreting the FAA. In explaining what this policy means, the Court relied entirely on *Prima Paint*, the case in which this Court explained that "the purpose" of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so," *Prima Paint*, 388 U.S. at 404 n.12. That would be an odd choice for a Court determined to render arbitration contracts uniquely more enforceable than other agreements.

Since then, this Court has routinely treated the so-called federal policy favoring arbitration as virtually synonymous with the equal-treatment principle. "[T]his policy," the Court has explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock*, 561 U.S. at 302. Its purpose "is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*,

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favoring arbitration in the collective-bargaining context. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985) (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)). But even then, the Court did not explain why a rule arising in a different context, and premised on a different statute, provided any meaningful guidance as to the scope and nature of the FAA. *See Calderon v. Sixt Rent a Car, LLC*, 5 F.4th 1204, 1216–18 (11th Cir. 2021) (Newsom, J., concurring) (explaining that, in the labor context, the text of the relevant statute—the Taft-Hartley Act of 1947—"explicitly" provides "a bona fide substantive preference for arbitration," whereas the FAA has no such provision); *see also United Steelworkers*, 363 U.S. at 577–78 & n.4 (explaining that, as a key instrument for achieving industrial peace, the Taft-Hartley Act of 1947 makes "the arbitration agreement . . . the quid pro quo for the agreement not to strike").

489 U.S. 468, 476 (1989); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (explaining that the policy in favor of arbitration, along with the "fundamental principle that arbitration is a matter of contract," means that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms").

Indeed, this Court has repeatedly *rejected* the contention that any policy favoring arbitration can override the ordinary rules of contract interpretation that would otherwise apply. *See, e.g.*, *Volt*, 489 U.S. at 476; *Arthur Andersen*, 556 U.S. at 630 n.5; *see also Granite Rock*, 561 U.S. at 303 ("We have applied the presumption favoring arbitration . . . only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended.").[4]

And it has also rejected the notion that the policy in favor of arbitration can override the text of the FAA. *See New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). The text of the FAA makes one thing abundantly clear: The same rules must be applied to arbitration contracts as to other contracts. *See Arthur Andersen*, 556 U.S. at 630 (explaining that the FAA does not "purport[] to alter" the "background principles of state contract law," but rather ensures arbitration contracts are just as subject to that

[4] To be sure, this Court will not apply state contract law principles if they conflict with the "foundational FAA principle" that arbitration is a matter of consent. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (holding that the contract principle of *contra proferentem* could not be used to require parties to submit to class arbitration where the parties did not expressly agree to do so). But that principle is irrelevant here. A party that waives its right to arbitrate cannot possibly claim that by recognizing this waiver, a court is forcing it to arbitrate in a manner it did not consent to.

law as any other contract). Courts are not "free to pave over" this text "in the name of" some vague, unwritten policy of favoring arbitration. *New Prime*, 139 S. Ct. at 543.

B. Contrary to the text of the FAA and this Court's repeated instructions, lower courts have relied on the policy favoring arbitration to treat arbitration contracts differently from other contracts.

But the lower courts have not heeded this Court's instruction—or the text of the FAA. Rather than placing arbitration contracts on "equal footing" with other agreements, the lower courts have repeatedly applied unique rules solely to arbitration clauses. Treating arbitration contracts differently, these courts claim, is *required* by the federal policy in favor of arbitration. So, too, they contend, is disregarding the text of the FAA entirely.

Take, for example, the common law doctrine of equitable estoppel. This Court has held that Section 2 of the FAA requires that courts apply "traditional" state-law "principles" of equitable estoppel to arbitration contracts, just as they would to any other contract. *See Arthur Andersen*, 556 U.S. at 631. Under these traditional contract-law principles, the heart of equitable estoppel is detrimental reliance: If you lead someone to believe something, and they rely on it to their detriment, you are precluded from later arguing otherwise. *See Lyng v. Payne*, 476 U.S. 926, 935 (1986); Estoppel, *Black's Law Dictionary* (11th ed. 2019); *see also* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 Rev. Litig. 377, 388 (2008) (describing the contours of equitable estoppel). And in every jurisdiction in every context, this is how the doctrine is applied—every context, that is, except arbitration.

In the arbitration context, many courts apply entirely *different* rules that have nothing to do with detrimental reliance. *See* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531, 581–87 (2014).[5] They first began to do so, they said, because the federal policy in favor of arbitration required them to. *See, e.g.*, *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (without these rules, "the federal policy in favor of arbitration" would be "effectively thwarted"); *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 527 (5th Cir. 2000) (similar); *Pearson v. Hilton Head Hosp.*, 733 S.E.2d 597, 601 (S.C. Ct. App. 2012) (similar); *see also AtriCure, Inc. v. Meng*, 12 F.4th 516, 520 (6th Cir. 2021) (describing giving this sort of weight to the federal policy favoring arbitration as "dice-loading"). And, to this day, many courts continue to apply arbitration-specific equitable estoppel rules—despite this Court's clear instruction to follow "*traditional*" state-law principles, *Arthur Andersen*, 556 U.S. at 631 (emphasis added). *See, e.g.*, *supra* note 5.

In the name of the policy favoring arbitration, courts have also ignored other parts of the FAA's text. Many courts, for example, held for years that the statute's exemption for transportation workers did not apply to

[5] The unique rules applied in this context vary by jurisdiction. But in the most common version, parties can be forced to arbitrate with people they never agreed to arbitrate with if they bring claims (a) that are somehow "intertwined" with the contract in which an arbitration clause is found, or (b) that allege "substantially interdependent and concerted misconduct" between a signatory to a contract containing an arbitration clause and a non-signatory. *See, e.g.*, *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373–74 (4th Cir. 2012); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126–27 (2d Cir. 2010)). Such an approach bears no relationship to the ordinary state-law rules of equitable estoppel that apply in every other context.

independent contractors—even though its plain meaning, at the time the FAA was passed, says otherwise. *See Oliveira v. New Prime, Inc.*, 857 F.3d 7, 17–18 (1st Cir. 2017) (citing cases), *aff'd*, 139 S. Ct. 532 (2019). Many did so because they believed the policy favoring arbitration mandated it. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co. (AZ)*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003); *Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC*, 2015 WL 2408477, at *4 (S.D. Ga. 2015). This Court was required to step in to explain that any policy favoring arbitration cannot overcome the actual text of the statute. *New Prime,* 139 S. Ct. at 543.

Lower courts' arbitration-specific approach to waiver is just another example of courts' disregarding the text of the FAA—and its mandate to treat arbitration contracts equally—based on a misguided view that some policy favoring arbitration compels them to do so. *See, e.g.*, *MicroStrategy*, 268 F.3d at 249 ("[I]n light of the federal policy favoring arbitration," the circumstances giving rise to waiver "are not to be lightly inferred."); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (given the "strong federal policy favoring enforcement of arbitration agreements," waiver is "disfavored" and requires a showing of prejudice); *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 . . . may be found only when prejudice to the other party is demonstrated.").

This reasoning is directly contrary to this Court's mandate that arbitration contracts must be placed on equal footing with other contracts—and its mandate that that text must take precedence over policy. As this Court has emphasized, "no amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland*, 141 S.

Ct. 1474, 1486 (2021). "[C]ourts do not apply federal policies; they apply federal statutes." *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 14 F.4th 856, 868 (8th Cir. 2021). Those lower courts that rely on the policy favoring arbitration to disregard the FAA's commands violate this Court's plain instructions.

C. No policy favoring arbitration is even served by allowing litigants to avoid waiver based on a lack of prejudice.

And even if the policy in favor of arbitration could override the equal-treatment principle demanded by the FAA's text, that policy is not served by imposing a special prejudice requirement for waiver in the arbitration context. Arbitration is supposed to "reduc[e] the cost and increas[e] the speed of dispute resolution." *AT&T Mobility*, 563 U.S. at 345; *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (arbitration offers the "promise of quicker, more informal, and often cheaper resolutions for everyone involved"). And, if nothing else, it is supposed to *avoid* litigation in court.

Injecting a prejudice requirement into the waiver analysis turns these objectives on their head. Once parties know they can sit on their arbitration rights without consequence, they face every incentive to try for two bites at the apple: Disregard your arbitration contract and try your luck in court, knowing that you can raise your arbitration defense later—whenever an unfavorable judge is assigned, decision is issued, or other hiccup arises. *See, e.g.*, *MicroStrategy*, 268 F.3d at 246–48 (employer sued employee three different times in federal and state court, and only asserted a right to arbitration after the employee filed her own suit); Pet. App. 6–9, 17 (defendant in this case attempted to litigate the plaintiff's claims in federal court until its motion to dismiss was denied and it failed at

obtaining a classwide settlement); J.A. 19–43 (motion to dismiss); J.A. 56–74 (answer failing to mention arbitration).

In creating that "heads I win, tails you lose" situation, *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995), courts have perversely engineered the very problem the FAA was enacted to prevent: parties' trying out one forum until it no longer suits them, and then invoking another. *See infra* pages 16–17.

And when litigants act on these incentives to try litigation before arbitration, it undermines the primary benefit of arbitration itself: Arbitration is no longer a speedy and efficient means of resolving disputes if parties have to litigate in court for months or years before getting there. Indeed, enabling this gamesmanship turns arbitration on its head, allowing parties to use arbitration clauses not to simplify dispute resolution but as a tactic to further delay and complicate it.

Allowing defendants to escape a waiver because of a purported lack of prejudice thus undermines the very "liberal federal policy favoring arbitration" that supposedly justifies the prejudice requirement. It is, in fact, *hostile* to arbitration to transform it from an efficient form of neutral dispute resolution to an opportunity for sophisticated parties to game the system. Courts do not ordinarily tolerate delaying arbitration "as a strategy to manipulate the legal process." *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008). This Court should ensure they cannot do that here.

III. The Court should take this opportunity to clarify that the only policy required by the FAA is the policy its text commands—that arbitration contracts be placed on equal footing with all other contracts.

There is no basis for enforcing a policy that treats arbitration contracts differently than any other contract: The FAA's text says just the opposite. So too does its legislative history. As does this Court's own case law.

But while this Court has come to treat the pronouncement of a policy favoring arbitration as reflecting the equal treatment principle, lower courts have struggled to understand what, if anything, the policy requires of them—and how to reconcile that policy with the command of the FAA's text (and this Court) that arbitration contracts be treated equally. After all, it is difficult to both favor arbitration contracts and treat them the same.

As a result, rather than serving as a useful guide to courts interpreting the FAA, the invocation of a "policy favoring arbitration contracts" has come to cause widespread confusion—undermining courts' ability to determine what legal rules should apply to arbitration contracts and contracting parties' ability to predict in advance how courts are likely to interpret their contracts. It is long past time for this Court to do away with this language and clarify that the only policy courts must apply in the arbitration context is the policy found in the text of the FAA itself: that arbitration contracts are to be placed on equal footing with all other agreements.

A. There is no basis—textual or otherwise—for a liberal policy favoring arbitration.

As discussed above, there is no basis in the FAA's text for applying a policy that loads the dice in favor of arbitration. The plain text of the FAA requires *equal* treatment of arbitration contracts—not favored treatment. *See supra* Part I.

Nor is there any basis in the legislative history or statutory context of the FAA for such a view. To the contrary, both context and history reflect the same focus the text does. As the principal drafter of the FAA explained at the time, the goal of the statute was to ensure that arbitration contracts be "regarded in the same light as other contractual obligations." Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 270 (1926); *see also id.* at 278.

The FAA was not passed because Congress wanted to privilege arbitration contracts; it was passed because Congress wanted to ensure they were enforceable in court at all. Leading up to the enactment of the FAA, merchants who agreed to send disputes to arbitration were consistently stymied by the courts. *See id.* at 279. Under the "ouster" doctrine, courts routinely refused to enforce contracts that shifted this sort of dispute resolution to private arbitrators. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 13–15 (1924) (statement of principal drafter of the FAA Julius Henry Cohen, ABA). Meanwhile, the "dual agen[cy]" doctrine led courts to treat arbitrators as agents of both the parties—which allowed either party to revoke the arbitrator's authority at any time, creating perverse incentives for parties to give arbitration a try, only to later "revoke" their agreement if the arbitration didn't go their

way. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33, 74 (1997).

To prevent courts from *dis*favoring arbitration contracts by refusing to enforce them, Congress settled on a simple solution: Tell them not to. It did this by adopting the equal-treatment principle, requiring that arbitration contracts be treated like any other. *See* Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. at 270, 278 (chief advocates for the FAA explaining that arbitration clauses should be "as inviolable as any other business contract"); H.R. Rep. No. 68-96, at 1 (1924) (explaining that the purpose of the FAA was to place each arbitration agreement "upon the same footing as other contracts, where it belongs," that "[a]rbitration agreements are purely matters of contract," and that "the effect of the bill is simply to make the contracting party live up to [the] agreement"); *see also Arbitration of Interstate Commercial Disputes*, 68th Cong. 38 (statement of principal drafter of the FAA, Julius Henry Cohen, ABA) ("An agreement for arbitration is in its essence a business contract. It differs in no essential from other commercial agreements. It should stand upon the same plane and be regarded by the law in the same light.").

Nowhere does this legislative history suggest that Congress thought arbitration contracts should be *more* enforceable than ordinary contracts. Thus, there is no basis in text, context, or history for any purported policy *favoring* arbitration contracts.

B. Any liberal federal policy favoring arbitration contracts over other sorts of contracts conflicts with this Court's caselaw.

Placing a thumb on the scale in favor of arbitration also conflicts with this Court's own case law.

First and foremost, it conflicts with the equal treatment principle this Court has repeatedly held is actually embodied by the FAA. *See, e.g.*, *Volt Info. Scis., Inc.*, 489 U.S. at 478. By its very definition, applying a special policy to arbitration contracts, and arbitration contracts alone, fails to treat those contracts like ordinary contracts.

The policy is similarly irreconcilable with this Court's longstanding caselaw emphasizing that arbitration under the FAA is "a matter of consent, not coercion," *Volt*, 489 U.S. at 479—and, thus, arbitration must be "a matter of contract," *see, e.g.*, *Concepcion*, 563 U.S. at 351; *Rent-A-Center*, 561 U.S. at 69. As this Court has long explained, the FAA requires courts and arbitrators to "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt*, 489 U.S. at 479); *see also, e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("A party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). In doing so, it does not alter the basic "background principles of state contract law regarding the scope of agreements"—including "the question of who is bound by them." *Arthur Andersen*, 556 U.S. at 630.

If arbitration is a matter of contract, it should occur when, where, and to the extent the parties agreed to it. *See Stolt-Nielsen*, 559 U.S. at 683–84 ("Arbitration is . . . a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." (quoting

First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995))). There is no room in that analysis for a separate federal policy placing its thumb on the scale in favor of arbitration.

All the more so because this Court has routinely emphasized that courts may not "use policy considerations as a substitute for party agreement." *Granite Rock*, 561 U.S. at 303; *accord, e.g.*, *Waffle House*, 534 U.S. at 294 ("[W]e look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement."). Yet that is exactly what some lower courts have understood the liberal federal policy favoring arbitration to require.

And that is only the beginning. A judicially-created policy favoring arbitration departs from this Court's ordinary instruction that courts are bound to "apply the law as [they] find it," *Niz-Chavez*, 141 S. Ct. at 1480, not to engage in some kind of "freewheeling judicial inquiry" into what the law might be, *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011). As the Court observed recently, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role" under the structure of the Constitution. *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020). There are "few and restricted" contexts in which federal judges may appropriately craft the rule of decision: where such a rule is "necessary to protect uniquely federal interests," or where "Congress has given the courts the power to develop substantive law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

Neither circumstance is present here. The first "exists only in such narrow areas" as those where "the authority and duties of the United States as sovereign are intimately involved" or where "the interstate or international nature

of the controversy makes it inappropriate for state law to control." *Id.* at 641. Arbitration implicates none of those interests.

And the second just sends us back to the text of the FAA—which gives no indication that Congress gave courts the power to develop their own substantive law. *See id.* Rather, as this Court explained in *Arthur Andersen*, the only "substantive law" the FAA creates is the requirement that arbitration contracts be placed "upon the same footing as other contracts." 556 U.S. at 629–30. This "substantive mandate" in no way "purports to alter background principles of state contract law" regarding the scope of arbitration contracts. *Id.* This is not an invitation to craft separate federal common-law contract principles.

This Court ordinarily disapproves, in no uncertain terms, of interpreting federal statutes by "[i]nvoking some brooding federal interest or appealing to a judicial policy preference." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (lead opinion of Gorsuch, J). After all, as the Court has emphasized, "[i]f courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal," they would "risk failing to take account of legislative compromises essential to a law's passage"—and as a result "thwart rather than honor the effectuation of congressional intent." *New Prime*, 139 S. Ct. at 543.

Yet that is exactly what the lower courts that apply the liberal federal policy favoring arbitration to override the text of the FAA are doing. Not only is the policy, in the form they have applied it, entirely divorced from statutory text, but as explained above it even conflicts with that text—by setting aside the equal-treatment principle in favor of a judicially-invented alternative.

C. The liberal federal policy favoring arbitration has generated confusion and chaos.

Because the federal policy favoring arbitration is vague and unmoored from any textual anchor, it has caused widespread confusion in the lower courts. Courts have no idea how to apply it—it is applied differently court by court or even case by case. And this Court regularly has to intervene to correct their application. Courts' attempts to apply a policy favoring arbitration—rather than just the text of the FAA—also make the law unpredictable, jettisoning centuries-old contract law doctrines for newly-invented arbitration-specific rules. This undermines parties' ability to draft arbitration contracts because they can't possibly know in advance how they will be enforced.

1. To begin with, courts have no idea how to actually implement the vague prescription that there is a policy favoring arbitration. That means not only that courts apply the policy differently from one another; but the same courts, at times, apply the policy differently from case to case. That is intolerable.

In some cases, for example, courts have "emphatically applied" a "strong" version of the "federal policy favoring arbitration." *Leadertex*, 67 F.3d at 25. That version treats arbitration clauses differently—as more enforceable—than other contracts. *See id.* at 25–26 (giving a "healthy regard" to that policy in the waiver context, and accordingly requiring a showing of prejudice, including showing more than mere "expense and delay"); *see also, e.g.*, *Suqin Zhu v. Hakkasan NYC LLC*, 291 F. Supp. 3d 378, 385 (S.D.N.Y. 2017) ("It is difficult to overstate the strong federal policy in favor of arbitration."); *supra* pages 10–13.

In other cases, however, courts have held that the policy favoring arbitration essentially makes no difference at all—it means just that arbitration is a matter of contract, and arbitration contracts should be enforced no differently than any other contracts. *See, e.g.*, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 105 (3d Cir. 2000) ("[T]he liberal federal policy favoring arbitration agreements . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements." (quoting *Mitsubishi*, 473 U.S. at 625)); *Southard v. Newcomb Oil Co.*, 7 F.4th 451, 454 (6th Cir. 2021) (similar). In these cases, courts have rejected alternative constructions as unacceptable "dice-loading." *AtriCure*, 12 F.4th at 520.

Such divergent approaches even exist within *the same* court or circuit. *Compare, e.g.*, *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 333–34 (4th Cir. 2017) (citing the federal policy favoring arbitration alongside the equal-treatment principle), *and Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 339–40 (4th Cir. 2020) (the FAA places "arbitration agreements on an equal footing with other contracts"), *with Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996) (same circuit relying on the federal policy favoring arbitration to carve out a special rule of waiver); *compare also, e.g.*, *Sandvik*, 220 F.3d at 105 (the liberal federal policy favoring arbitration is simply the equal-treatment principle), *and Century Indem. Co. v. Certain Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, & 950646*, 584 F.3d 513, 532 (3d Cir. 2009) ("Because the FAA requires us to place arbitration agreements on an equal footing with other contracts . . . we cannot subject a purported arbitration agreement otherwise within the scope of the FAA" or apply "a standard more demanding

than that which we would apply to other agreements under the applicable state law."), *with Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 219 n.10 (3d Cir. 2007) ("*Moses H. Cone* established . . . that arbitrability defenses such as waiver should be addressed with a healthy regard for the federal policy favoring arbitration."), *and Chassen v. Fid. Nat'l Fin., Inc.*, 836 F.3d 291, 295 (3d Cir. 2016) (circuit precedent identifies factors to determine when arbitration has been waived, such as the prejudice requirement, based on the background premise that there is a "strong preference to enforce arbitration agreements").

This confusion is untenable. Courts cannot apply a policy if they cannot figure out what it means.

2. Worse, lower courts' divergent attempts to apply the policy have made the law governing arbitration contracts unpredictable—which, in turn, makes it impossible for drafting parties to know how their arbitration contracts will be enforced. If courts simply followed the FAA's instructions, they would apply ordinary state contract law to arbitration contracts. This ordinary contract law is predictable and stable: It's typically backed by centuries of precedent, resulting in a detailed set of principles enabling parties to predict how their agreements will be interpreted. *See* Howard O. Hunter, Modern Law of Contracts § 4:1; *Rooney v. Tyson*, 697 N.E.2d 571, 693 (N.Y. 1998); Benjamin N. Cardozo, *The Nature of the Judicial Process* 69, 113, 141 (1921). When lower courts eschew this approach in the name of the policy favoring arbitration, they have no authority to turn to—so they simply make up new law. *See* Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. at 563, 554–81 (explaining how courts have done this in the context of waiver, equitable estoppel, and agency).

That new, made-up law is often difficult to apply—and almost impossible to predict. "[C]ontractual . . . rights" are "matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994). That's because "[m]ost contract rules are default rules, that is, rules the parties can contract around." Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049, 1066 (2006). "It is important," therefore, "that [parties] know what the rules are so that they can draft accordingly." *Id.*

The creation of everchanging arbitration-specific contract rules undermines parties' ability to draft arbitration contracts to ensure that they will be enforced according to the parties' intent.

3. These problems have led to widespread criticism. Courts and scholars alike have questioned the policy extensively. *See, e.g.*, *Northport Health Servs.*, 14 F.4th at 868; *Calderon*, 5 F.4th at 1215–21 (Newsom, J., concurring) (criticizing policy favoring arbitration as "just made up" and stating "I'm not aware of a single [] attempt to defend" such "an interpretation of the FAA's text."); *Stone v. Doerge*, 328 F.3d 343, 346 (7th Cir. 2003) (Easterbrook, J.) (Just "[a]s there is no thumb on the scale in favor of one judicial forum over another, there is no preference for arbitration over adjudication either."); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 123 (2006) (policy favoring arbitration "appears to be one created by the judiciary out of whole cloth"); Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. at 563, 554–81.

And members of this Court have likewise begun to wonder at its shaky origins. *See, e.g.*, *Henry Schein, Inc.*,

v. Archer and White Sales, Inc., Case No. 19-963, Tr. at 15:6–18 (S. Ct. Dec. 8, 2020) (Alito, J.) (questioning what is the "basis for saying there is this federal policy" favoring arbitration); *id.* at 24:6–21 (Gorsuch, J.) (asking for the statutory basis for the policy in light of the fact that "Section 2 seems to suggest we follow normal contract rules in trying to discern the parties' intentions"); *id.* at 25:19–25 (Gorsuch, J.) ("I'm still waiting for a statutory argument, though.").

* * *

This Court should take this opportunity to announce that it's seen enough: It's time to jettison the judicially-created liberal federal policy favoring arbitration, and make clear that the only policy that applies to the FAA is the policy written into the statute's text: the equal-treatment principle.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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