No. 21-328

In The

Supreme Court of the United States

ROBYN MORGAN, ON BEHALF OF HERSELF AND ALL SIMILARLY SITUATED INDIVIDUALS,

Petitioner,

v.

SUNDANCE, INC.,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a party asserting a laches defense to an arbitration demand must show that the delay in demanding arbitration prejudiced it.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* urging this Court to stop end-rounds of the Federal Arbitration Act. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015).

WLF's legal studies division also regularly publishes papers on the benefits of arbitration. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Setting The Record Straight About The Benefits Of Pre-Dispute Arbitration*, WLF LEGAL BACKGROUNDER (June 7, 2019); John M. Masslon II, *Forthcoming Supreme Court Case Critical For Cost-Effective Dispute Resolution*, WLF LEGAL BACKGROUNDER (Oct. 2, 2009). WLF believes that courts must give the FAA its plain-language meaning and compel arbitration when the parties have agreed to arbitrate.

INTRODUCTION

The plaintiffs' bar and anti-business activists continue to push novel theories about why the FAA does not govern disputes covered by an arbitration agreement. These attempts range from asserting that the number of people bringing a claim affects the

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. All parties have filed blanket consents.

enforceability of the arbitration agreement to claiming that an airport ramp supervisor who never leaves Chicago need not comply with the FAA.

This case is yet another attempt to evade federal law and obtain policy objectives through the courts. Activists cannot achieve their goals through the political process because Congress realizes that arbitration is a more cost-effective way to resolve disputes than litigation. Morgan seeks to flip this reality on its head by arguing that the FAA rewards her for breaching her contract with Sundance. The absurdity of the argument is self-evident.

Plaintiffs who, by contract, must arbitrate their disputes often breach their contracts by suing in court. Morgan did so here. Now she argues that this contractual breach entitles her to pursue the claim in court rather than in arbitration. How can a contractual breach lead to such an unjust result? According to Morgan, because Sundance did not immediately demand that the case be sent to arbitration, it waived its right to arbitrate the parties' dispute.

Morgan's argument mangles at least two areas of law. First, it commits a sin that this Court has repeatedly admonished—calling something waiver when it is in fact something else. Second, it distorts the FAA, which embodies Congress's policy choice favoring arbitration. If the Court uses the correct law on either point, Morgan's whole argument crumbles. The Court should affirm the Eighth Circuit's decision that Morgan must comply with the contract.

STATEMENT

When Morgan began working for Sundance, she signed an employment contract. That contract provided that the parties would arbitrate any wage-and-hour dispute. J.A. 77-78. This was "instead of going to court." *Id.* at 77. But Morgan did not last long. She quit her job less than three months later.

Morgan held a grudge against Sundance after she quit. Two years later, she filed a putative class action in Iowa federal court alleging that Sundance violated the Fair Labor Standard Act. This was not an original suit. Rather, it was a copy-and-paste job from a lawsuit filed in Michigan federal court.

Given the overlap between the two suits, Sundance sought to stay this case pending resolution of the Michigan action. When the District Court denied that request, the parties to both suits entered mediation. As soon as that attempt at resolving the parties' dispute failed, Sundance moved to compel arbitration.

The District Court inexplicably denied the motion to compel because, it found, Sundance had "waived" its right to arbitrate the parties' dispute. In other words, it rewarded Morgan for her breach of contract. The Eighth Circuit, however, saw through this error and reversed. It held that for a party to waive its right to arbitrate claims, the party opposing arbitration must show that it was prejudiced by the delay. As Morgan could not satisfy this burden, the Eighth Circuit reversed the District Court's incorrect ruling and ordered the parties to arbitrate the dispute.

SUMMARY OF ARGUMENT

I. The Court often chides parties and lower courts for confusing waiver with other doctrines. Waiver is the knowing, intelligent, and voluntary relinquishment of a legal right. Here, there is no evidence that Sundance knowingly and voluntarily gave up its right to demand that Morgan arbitrate the parties' dispute.

A. Morgan's claims are best analyzed as a laches defense. This defense requires showing that Sundance unjustly delayed asserting its right to arbitrate the parties' dispute. More importantly, however, prejudice is a key element of any laches defense. The prejudice requirement flows naturally from the equitable nature of the laches defense. Because Morgan's argument is properly seen as a laches defense, the Eighth Circuit correctly held that she must show prejudice to stay in federal court.

B. If the Court does not believe that Morgan's claim sounds in laches, then it is a forfeiture argument. She is arguing that Sundance did not timely object to the court proceedings and request that the District Court compel arbitration. This, of course, differs from a waiver argument. Many courts apply a prejudice requirement for claims that the opposing party forfeited a defense. The prejudice requirement is even more appropriate here because both parties knew of the arbitration agreement and a ruling for Morgan would lead to perverse incentives for those who agree to arbitration clauses but breach their contracts.

C. If sounding in neither laches nor forfeiture, Morgan's argument is properly viewed as an estoppel-by-silence argument. She argues that Sundance was estopped from demanding arbitration because it was silent right after she sued in federal court. The problem with this argument is that, like laches and forfeiture, she must show prejudice to prevail on this defense. Because she cannot show prejudice, the Court can affirm the Eighth Circuit's decision on this alternative ground.

II. A group of law professors—most whose scholarship does not focus on arbitration—argue that this Court should hold that federal law does not favor arbitration. This argument is off base for three reasons First, the argument is forfeited. Second, it conflicts with the Court's longstanding precedent. Finally, the text and history of the FAA strongly supports the Court's precedent that there is a federal policy favoring arbitration.

ARGUMENT

I. THIS CASE DOES NOT INVOLVE WAIVER.

Waiver is "[t]he voluntary relinquishment or abandonment — express or implied — of a legal right or advantage." Black's Law Dictionary (11th ed. 2019). This Court must often remind parties that just because a party can no longer pursue an argument, that does not mean that the party has waived the argument. *See Puckett v. United States*, 556 U.S. 129, 138 (2009).

The imprecise use of "waiver" language leads to many problems. Take the difference between waiving

a claim and forfeiting a claim. In the criminal context, an appellate court may not review most arguments that have been waived. But an appellate court may review those same arguments if they were forfeited. *See* Fed. R. Crim. P. 52(b). This is a critical difference. For example, a defendant may knowingly, voluntarily, and intelligently waive his right to be indicted. But if he doesn't object to the government's proceeding on an information, the court of appeals can decide whether that was plain error requiring reversal.

Morgan uses similarly imprecise language here. There is no evidence that Sundance waived its right to arbitrate the parties' dispute. Sundance did not affirmatively agree to litigate the case in federal court after Morgan sued. Nor did Sundance sue in federal court—which would act as an implicit waiver of the right to arbitrate the parties' dispute. Rather, Morgan's argument for why the case should continue in federal court falls under other legal theories. These differences are important because under each of these doctrines, prejudice is a key element required to succeed on the defenses.

A. Morgan Invokes Laches.

1. Although Morgan's claims concern whether Sundance properly paid her for work she performed, the dispute about whether to arbitrate is a breach-of-contract issue. *Cf. GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643 (2020) (explaining that arbitration agreements are contracts (citation omitted)). Under Iowa law, a party may assert laches as a defense in a breach-of-contract action. *See*

Corsiglia v. Summit Ctr. Corp., 348 N.W.2d 647, 651 (Iowa App. 1984) (citing *Davenport Osteopathic Hosp. Assn. v. Hosp. Serv.*, 154 N.W.2d 153, 162 (Iowa 1967)); *see also Int'l Harvester Credit Corp. v. Leaders*, 818 F.2d 655, 658 (8th Cir. 1987) (citation omitted). Here, despite her protestations to the contrary, Morgan raised a laches defense to Sundance's breach-of-contract argument. That breach-of-contract claim just happened to come in the form of a motion to compel arbitration—as required by the parties' contract.

Morgan's argument for why she should not have to arbitrate her claims is most analogous to a laches defense. Laches is grounded in equity, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002), but can be used as a defense in many civil actions because of the merger of equity and law in 1938. *Cf.* Fed. R. Civ. P. 2 note (explaining the elimination of equity and law actions).

"Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961) (citing *Gardner v. Panama R. Co.*, 342 U.S. 29, 31 (1951) (*per curiam*); *S. Pac. Co. v. Bogert*, 250 U.S. 483, 488-90 (1919); *Galliher v. Cadwell*, 145 U.S. 368, 372 (1892)).

Morgan's claim is properly viewed as a laches defense. She argues that Sundance did not act with due diligence in moving to compel arbitration after she filed suit in federal court. She cannot avoid this straightforward application of basic legal principles by saying that she did not plead prejudice and thus

did not raise a laches defense. Although prejudice is a key component of any laches defense, the core substantive argument is that the other party acted without due diligence. This is exactly the argument that Morgan makes here.

Morgan cannot argue that Sundance knowingly, intelligently, and voluntarily waived its right to compel arbitration. Sundance did not sue in federal court. Rather, Morgan breached the parties' contract which required the parties settle disputes by "arbitration, instead of going to court." J.A. 77. She now seeks a reward for this breach—maintaining her suit in federal court.

2. Unfortunately for Morgan, Sundance acted with due diligence. Although it did not move to compel arbitration immediately after Morgan sued, its delay was justified and showed diligence. Rather than waste the District Court's time by moving to compel arbitration, Sundance reasonably decided to include Morgan in a mediation. If that mediation succeeded, there would have been no need to waste judicial resources or the parties' resources. Very soon after the mediation failed, Sundance moved to compel arbitration. That is acting with due diligence.

The second element of a laches defense shows why the Eighth Circuit is on the right side of the split in authority. All the Court's laches precedent, from 1799 to the present, has recognized the need for prejudice to a party for that party to succeed on the laches defense. *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954, 960 (2017) (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678 (2014); 1 Dan Dobbs, *Law of Remedies*

§ 2.3(5), 89 (2d ed. 1993)); *Sims' Lessee v. Irvine*, 3 U.S. 425, 457 (1799).

This requirement to show prejudice to succeed makes sense given the equitable roots of laches. "[E]quity courts arose in fourteenth-century England alongside common law courts as religiously-based institutions grounded in spirituality and as a way of charity." Cortney E. Lollar, *Invoking Criminal Equity's Roots*, 107 Va. L. Rev. 495, 503 (2021) (cleaned up). "[T]heological conception of conscience was the one general principle that more than any others influenced equity." *Id.* (cleaned up).

In other words, equity practice was "the ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation." Martha C. Nussbaum, *Equity and Mercy*, 22 Phil. & Pub. Affs. 83, 85 (1993). It is impossible to consider all the circumstances of a case without deciding whether one party was prejudiced by the other party's actions. This is why the equitable defense of laches is different from many legal defenses. Rather than focus on black-and-white standards, an equitable defense includes a more subjective prejudice inquiry.

Morgan's attempt to attack the Eighth Circuit's decision requiring her to show prejudice to defeat the motion to compel arbitration therefore fails. Properly construed, her argument is that laches barred Sundance from requesting that the parties comply with their contractual obligations. This laches defense required that she show prejudice; a showing she failed to make. Thus, the Court should require Morgan to comply with her contract and arbitrate the parties' dispute.

B. If Not Laches, Morgan's Argument Is That Sundance Forfeited Its Right To Arbitrate The Parties' Dispute.

"Waiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). The difference is simple: "forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id.* (cleaned up). As described above, Sundance never intentionally abandoned its right to demand that Morgan comply with the parties' contract and arbitrate the parties' dispute. If this Court believes that Morgan's argument does not sound in laches, then the argument is one of forfeiture.

Morgan argues that Sundance did not timely assert its right to arbitrate the parties' dispute. This argument fits the definition of forfeiture like a glove. Contrast that with the definition of waiver, which requires a showing that Sundance intentionally abandoned its right to arbitrate the claims. There is no evidence, either direct or circumstantial, that Sundance intentionally abandoned its right to arbitrate. Rather, at most Sundance failed to timely assert its right to arbitrate.

The rules about forfeiture vary from jurisdiction to jurisdiction and from claim to claim. But many jurisdictions require a party asserting forfeiture as a defense to show prejudice to prevail on that defense. A decision from this Court proves the point.

Under California's notice-prejudice rule, an insurance company that argues a policyholder forfeited her right to insurance proceeds must show that the delay in presenting the claim prejudiced the insurance company. *See UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 366 (1999) (citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 760-61 (1993)). This rule "bear[s] out the maxim that law abhors a forfeiture." *Id.* at 370 (cleaned up).

California's notice-prejudice rule applies to specific contractual claims. Requiring that a party show prejudice to prevail on a forfeiture defense is therefore well known to the law. The Eighth Circuit's requirement that a party asserting forfeiture of a contractual claim show prejudice fits with general contract-law principles.

Yet it also fits with forfeiture in other areas of law. This Court acknowledged that in California a party asserting forfeiture of the right to seek fees and costs must show prejudice to succeed on its defense. *UNUM*, 526 U.S. at 371 n.3 (citing *Conservatorship of Rand*, 49 Cal. App. 4th 835 (1996)). This shows that the requirement to show prejudice when asserting a forfeiture defense is not limited to breach-of-contract actions. Rather, it is applied in varied circumstances.

It is appropriate to require a showing of prejudice to prevail on a claim that a party forfeited its right to arbitrate the parties' dispute. In the insurance context, only the policyholder normally knows that a claim is forthcoming. In a conservatorship case, rules about fees and costs may be obscure. But in a case about whether to enforce an arbitration clause, both parties are fully aware of

their contractual obligation to resolve disputes using arbitration. Because both parties have full information about their contractual requirements from the outset, a showing of prejudice before finding that one party forfeited its right to arbitrate makes sense.

Similarly, the insurance and conservatorship cases requiring prejudice did not encourage a party to violate the law or breach a contract. But that is what a ruling for Morgan would do. It would encourage parties who agreed to arbitrate to ignore those contracts and sue in federal court. At worse, the case will be dismissed and the plaintiff will be compelled to arbitrate his claims. Yet there is also a chance that the district court will find that the defendant did not demand arbitration fast enough. The Court should not encourage non-efficient breaches of contract. Rather, it should affirm the Eighth Circuit's decision and send a strong message that parties may not have a freeroll by breaching their contractual obligations.

C. Alternatively, Morgan's Argument Is That Sundance Is Estopped From Demanding Arbitration.

Finally, if the Court believes that Morgan's argument sounds in neither laches nor forfeiture, it is properly viewed as an estoppel-by-silence argument. "The ancient, but still viable, principle of estoppel by silence holds that a party may not keep silent when he ought to speak and allow other parties to be misled to their prejudice by his silence." *Cabinet for Health & Fam. Servs. v. Marshall*, 606 S.W.3d 99, 104 (Ky. App. 2020) (cleaned up). In other words, "a man may be denied a right which he may have asserted because

of his neglect to do something which he should have done at a proper time." *Id.* (cleaned up).

Morgan's argument also fits the definition of estoppel by silence. She argues that Sundance was silent—by not immediately moving to compel arbitration—when it ought to have spoken. The only thing that Morgan does not argue is that she was prejudiced by Sundance's silence. But as described above, she does not plead prejudice because she suffered none.

This Court has long recognized the defense of estoppel by silence. But "[t]o constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation." *Wiser v. Lawler*, 189 U.S. 260, 270 (1903). Sundance may have had a chance to demand arbitration earlier. It did not, however, have an obligation to demand arbitration within seconds of Morgan breaching the contract by suing in federal court. Rather, it only had to raise the issue promptly within a reasonable time, which it did.

The Court has recognized prejudice as an essential element to an estoppel-by-silence defense. *See Wiser*, 189 U.S. at 270. This decision tracks not only more recent state-court decisions but also decisions from Iowa courts. *See, e.g.*, *Anfenson v. Banks*, 163 N.W. 608, 616-17 (Iowa 1917). The failure to plead and prove prejudice dooms an estoppel-by-silence defense.

Even if the Court construed Morgan's argument as one of estoppel by litigation rather than estoppel by silence, the result is the same. Under both

doctrines, the party asserting the defense must show prejudice. *See* Resp. Br. 35-37.

Morgan tries valiantly to present this case as a straightforward question of waiver. Yet she simply cannot meet the high burden of showing that Sundance voluntarily gave up its right to arbitrate the parties' dispute. The Court should thus reject the premise of her question presented. Her claim can be construed as one of at least three doctrines: laches, forfeiture, or estoppel. But those doctrines all require a showing of prejudice. So her failure to plead prejudice does not reveal the substance of her argument. Rather, it is a red herring to be ignored.

Thus, the Court need not reach whether federal or state law controls the prejudice inquiry if a party waives their right to arbitration. It can simply affirm the Eighth Circuit's decision on another ground—the fact that Morgan did not make a viable waiver argument.

II. THE COURT SHOULD REAFFIRM THE WELL-SETTLED PRINCIPLE THAT FEDERAL LAW FAVORS ARBITRATION.

A.1. A group of law professors—who do not focus on arbitration—filed an *amicus* brief supporting Morgan. They argue that no federal policy favors arbitration. Br. *Amicus Curiae* of Law Professors at 16-25. The Court should soundly reject this attempt at overturning decades of precedent. Rather, the Court should reaffirm the well-settled principle that federal policy strongly favors arbitration.

First, Morgan does not make the argument in her brief. It is therefore forfeited. (Although Morgan might incorrectly state that she waived the argument.) It is well-settled that this Court will not reach non-jurisdictional issues raised only by an *amicus*. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 268 n.4 (2010) (citing *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991)).

Second, if this Court addresses whether federal policy favors arbitration, the Court's case law resolves the question. This Court has consistently reaffirmed the principle that the FAA embodies a federal policy favoring arbitration. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 n.5 (2019) (citation omitted); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (citation omitted); *Epic Sys.*, 138 S. Ct. at 1621 (citation omitted); *DIRECTV*, 577 U.S. at 58 (citations omitted). These four decisions, all issued in the past seven years, show how well-established the federal policy favoring arbitration is.

This does not mean that the Court had an epiphany in the 2010s about Congress's intent behind the FAA. The Court has recognized this federal policy favoring arbitration for over sixty years. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (citation omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). Thus, Congress has known for over six decades that the Court has interpreted federal law as codifying this policy

favoring arbitration. And Congress has not acted to dissuade the Court from this interpretation.

2. Of course, the law professors' *amicus* brief does not even engage the stare decisis factors. The silence is deafening. Their brief cannot explain why overturning decades of precedent is appropriate because all the stare decisis factors support keeping the Court's jurisprudence.

The current rule is very workable. For over six decades, both this Court and the lower federal courts—except the Ninth Circuit—have understood what it means for Congress to have a policy of favoring arbitration. It means that arbitration agreements cannot be treated worse than other contracts.

Other decisions also support this understanding. For example, 29 U.S.C. § 185 evidences Congress's policy favoring arbitration of labor disputes. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010). This too is not a new understanding of the statute. Rather, it has been recognized for decades. *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 439 (1967).

Similarly, no recent legal developments commend overruling the Court's precedent. In fact, the pace of decisions recognizing the federal policy supporting arbitration has only increased over the past decade.

Reconsidering the federal policy favoring arbitration would also cause reliance problems. Many companies have structured their businesses and

contracts based on the Court's interpretation of the FAA. This includes the Court's decisions that federal policy favors arbitration. If the Court were to overturn that holding, it would cause great uncertainty for millions of contracts nationwide.

So it is illogical to argue that there is no federal policy favoring arbitration. Multiple federal statutes reflect this federal policy. And this Court's longstanding precedent supports the policy. All the stare decisis factors point to keeping this precedent. The Court should thus soundly reject the law professors' position.

B. Even if the Court were to decide the issue on a blank slate, the FAA reflects a federal policy favoring arbitration. Before the FAA, "courts considered agreements to arbitrate unenforceable executory contracts," a breach of which led to "nominal legal damages." Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 Fla. L. Rev. 711, 719 (2015) (citations omitted). This was because American courts adopted the common-law doctrines of ouster and revocability. *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1225-26 (2013). During World War I, however, many prominent jurists started to question these doctrines. *E.g. Meacham v. Jamestown, F. & C.R. Co.*, 105 N.E. 653, 656 (N.Y. 1914) (Cardozo, J., concurring).

Congress agreed with this sentiment and passed the FAA "to overrule [courts'] longstanding refusal to enforce [arbitration] agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20

(1985). As the House of Representatives said, the FAA's purpose was "to make valid and [enforceable] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction [of] admiralty, or which may be the subject of litigation in the Federal courts." H.R. Rep. No. 68-96, 1 (1924). The Senate concurred: The FAA's purpose was "[t]o make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." S. Rep. No. 68-536, 1 (1924).

Even the transportation-worker exception to the FAA shows a federal policy favoring arbitration. "[R]ailroad employees were among the first to organize nationally." Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 337, 382 (1983). The federal government spotted the need for streamlined dispute resolution for the rail industry long before it saw the need for it in the wider market. "Reacting to a drastic increase in [railroad worker] strikes, President Grover Cleveland recommended to Congress in 1886 the creation of a permanent board for voluntary arbitration of railroad labor disputes." *Id.*

Although this first attempt at establishing labor peace failed, Congress collaborated with the railroads and their workers to create a special rail-industry arbitration regime. Around the same time Congress was considering the FAA, in fact, "railway executives and union officials" were holding "a series of conferences aimed at drafting a new law." Nolan & Abrams, 35 U. Fla. L. Rev. at 386. This resulted in the Railway Labor Act of 1926. It created a

comprehensive process for resolving labor grievances for unionized railway workers. *Id.* at 386-87.

The FAA's history thus shows that Congress passed the FAA—and similar statutes—because of a federal policy favoring arbitration. The law professors' argument that the FAA does not reflect this policy is belied by history and the reality of dispute resolution. The Court should therefore reject their call to reconsider this Court's holding about the FAA's purpose.

* * *

The question presented is misleading and does not fit the facts or legal theories advanced in the lower courts. If the Court looks through the inaccurate labels that Morgan uses, it should affirm because the doctrines of laches, forfeiture, and estoppel by silence all require a showing of prejudice. But if the Court assumes that Sundance waived its right to arbitrate the parties' dispute, the Court should reaffirm that there is a federal policy favoring arbitration. Applying that policy, a party asserting waiver as a defense to a motion to compel arbitration must show prejudice. Thus, there are multiple paths for this Court to affirm the Eighth Circuit's decision.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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