

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SERVICIOS OJEDA, C.A.,

Plaintiff-Appellee,

v.

CHEVRON CORPORATION; CHEVRON USA, INCORPORATED,

Defendants-Appellants.

On Appeal from the United States District Court for
the Southern District of Texas (No. 4:25-CV-1762)

**BRIEF OF AMICUS CURIAE
WASHINGTON LEGAL FOUNDATION
SUPPORTING APPELLANTS AND REVERSAL**

October 19, 2026

Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

CERTIFICATE OF INTERESTED PERSONS

I certify that the following listed persons and entities, besides those listed in the parties' Certificates of Interested Persons, have an interest in this case's outcome. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Party	Counsel
Washington Legal Foundation (amicus curiae)	Cory L. Andrews <i>Washington Legal Foundation</i>

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

October 19, 2026

RULE 26.1 DISCLOSURE STATEMENT

Washington Legal Foundation is a not-for-profit corporation under Section 501(c)(3) of the Internal Revenue Code. It has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

October 19, 2026

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS	i
RULE 26.1 DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION & SUMMARY OF ARGUMENT.....	2
ARGUMENT	5
I. CHEVRON HAD NO RIGHT TO ARBITRATE UNTIL SERVICIOS TIED ITS CLAIM TO THE AGREEMENT	5
A. A nonsignatory’s right to arbitrate arises from the plaintiff’s claim, not from the contract	6
B. <i>Williams</i> , not <i>Garcia</i> , governs a nonsignatory’s knowledge.....	12
C. Chevron’s litigation conduct did not waive a right it did not yet have	16
II. THE DECISION BELOW GIVES PLAINTIFFS A TEMPLATE FOR EVADING ARBITRATION BY SUING AFFILIATES.....	18
A. The rule rewards strategic pleading.....	19
B. The rule punishes businesses for contracting through subsidiaries	22
C. The rule leaves defendants unable to know how to preserve the arbitration clause.....	23
CONCLUSION.....	25
CERTIFICATE OF COMPLIANCE.....	26
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

(continued)

	Page(s)
Cases:	
<i>Arthur Andersen LLP v. Carlisle</i> , 556 U.S. 624 (2009).....	6, 22
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011).....	18
<i>Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.</i> , 866 F.3d 709 (5th Cir. 2017).....	11
<i>Coinbase, Inc. v. Bielski</i> , 599 U.S. 736 (2023).....	22, 24
<i>Crawford Profl Drugs, Inc. v. CVS Caremark Corp.</i> , 748 F.3d 249 (5th Cir. 2014).....	6
<i>Epic Sys. Corp. v. Lewis</i> , 584 U.S. 497 (2018).....	1
<i>Forby v. One Techs., L.P.</i> , 909 F.3d 780 (5th Cir. 2018).....	24
<i>G.T. Leach Builders, LLC v. Sapphire V.P., LP</i> , 458 S.W.3d 502 (Tex. 2015)	8, 9, 12, 24
<i>Garcia v. Fuentes Rest. Mgmt. Servs. Inc.</i> , 141 F.4th 671 (5th Cir. 2025)	5, 6, 12, 13, 14, 15
<i>Goldman v. KPMG LLP</i> , 92 Cal. Rptr. 3d 534 (Cal. Ct. App. 2009).....	7
<i>Granite Rock Co. v. Int’l Bhd. of Teamsters</i> , 561 U.S. 287 (2010).....	25
<i>Grigson v. Creative Artists Agency L.L.C.</i> , 210 F.3d 524 (5th Cir. 2000).....	7, 19, 20, 21
<i>Hays v. HCA Holdings, Inc.</i> , 838 F.3d 605 (5th Cir. 2016).....	8, 9, 10, 12, 19, 22, 24
<i>In re Merrill Lynch Tr. Co. FSB</i> , 235 S.W.3d 185 (Tex. 2007)	19

TABLE OF AUTHORITIES

(continued)

	Page(s)
<i>In re Mirant Corp.</i> , 613 F.3d 584 (5th Cir. 2010).....	4, 13, 14, 17
<i>Kindred Nursing Ctrs. Ltd. P’ship v. Clark</i> , 581 U.S. 246 (2017).....	18
<i>Krinsk v. SunTrust Banks, Inc.</i> , 654 F.3d 1194 (11th Cir. 2011).....	21
<i>Morgan v. Sundance, Inc.</i> , 596 U.S. 411 (2022).....	4, 5, 6, 13, 17, 18, 25
<i>Newman v. Plains All Am. Pipeline, L.P.</i> , 23 F.4th 393 (5th Cir. 2022)	11
<i>QPro Inc. v. RTD Quality Servs. USA, Inc.</i> , 761 F. Supp. 2d 492 (S.D. Tex. 2011)	7
<i>Shearson /Am. Express Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	18
<i>St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.</i> , 969 F.2d 585 (7th Cir. 1992).....	17
<i>Subway Equip. Leasing Corp. v. Forte</i> , 169 F.3d 324 (5th Cir. 1999).....	17
<i>Trinseo Eur. GmbH v. Kellogg Brown & Root, L.L.C.</i> , 165 F.4th 399 (5th Cir. 2026)	19
<i>Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.</i> , 97 F. App’x 462 (5th Cir. 2004).....	5, 15, 21
<i>United States v. Bestfoods</i> , 524 U.S. 51 (1998).....	22
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	5
<i>Viking River Cruises, Inc. v. Moriana</i> , 596 U.S. 639 (2022).....	1, 18

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Williams v. Cigna Fin. Advisors, Inc.</i> , 56 F.3d 656 (5th Cir. 1995).....	4, 5, 12, 13, 15, 18
Statutes:	
9 U.S.C. § 2	18
9 U.S.C. § 3	18
Rules:	
Fed. R. Civ. P. 12(b)(6)	4

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 an amicus curiae in important Federal Arbitration Act cases. *See, e.g., Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018).

Modern commerce is made possible by innumerable contracts. Firms contract through subsidiaries, and those subsidiaries sign master agreements with arbitration clauses to secure a forum free from the expense and delay of litigation. Those arbitration clauses are priced into every bargain. Left to stand, the decision below offers an easy roadmap for any plaintiff who would rather litigate than arbitrate: Name the affiliate that did not sign, then withhold any reliance on the contract with the arbitration clause until the defendant has responded to the complaint as written. That roadmap would undercut valid agreements to arbitrate.

*No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. WLF's Motion for Leave to File accompanies this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

A party cannot litigate away a right to arbitrate that does not yet exist. That is the whole of this appeal.

Servicios chose its defendants. It sued Chevron Corporation and Chevron USA, neither of which signed the Master Services Agreement (MSA), rather than the Chevron subsidiary that did. That choice carried a consequence, because a nonsignatory's right to arbitrate rises and falls with the plaintiff's claim. Under the estoppel test the district court itself applied to Servicios's other contracts, an affiliate may invoke such a clause only when the plaintiff's claim depends on the contract. ROA.10352–53. So whether Chevron could arbitrate was never Chevron's decision to make. It was Servicios's. Chevron's right could arise no earlier than the moment Servicios rested its claim on the MSA. Before that moment there was nothing to waive. And because a stranger to the agreement has no contract to be charged with, its knowledge of that moment can come only from the plaintiff. Until the plaintiff speaks, there is no knowing waiver to find.

For nearly ten months, Servicios did not build its case on the MSA. Its operative complaint mentioned the MSA only in passing and called it

“the separate agreement.” ROA.2743, 2746, 2749. Even the district court could not tell what contract Servicios was suing on and ordered the parties to state their theories of formation. ROA.9133. Servicios claimed, for the first time, that Chevron had promised to pay “in exchange for Plaintiff agreeing to sign a new services agreement.” ROA.10122. Then on notice, Chevron moved to stay pending arbitration. ROA.10171.

The district court held that Chevron had waived the right before Servicios conferred it. It found that the amended complaint’s two mentions of the MSA made Chevron “aware of [its] right to compel arbitration.” ROA.10323. It then found that Chevron had substantially invoked the judicial process by moving to dismiss, by quoting one of those mentions back to the court in its reply, and by seeking arbitration only after a hearing at which the court said discovery would be “helpful.” ROA.10324–29. The court conceded that no single ground “individually matched the facts of this case,” that its finding of waiver rested on the three in “combination,” and that “no Fifth Circuit case has expressly affirmed the court’s logic.” ROA.11164.

This Court has warned against defendants that sit on a known right to arbitrate until they see how the case is going, playing “heads I win,

tails you lose.” *In re Mirant Corp.*, 613 F.3d 584, 590 (5th Cir. 2010) (cleaned up). But here it was Servicios that held both sides of the coin. Because a nonsignatory’s right to arbitrate arises from the plaintiff’s theory of the case, the plaintiff decides when that right exists. If waiver can accrue before the plaintiff reveals its reliance on the contract, the plaintiff can let the defendant litigate the case as pleaded and reveal that reliance only afterward.

Under such a rule, whichever way the Rule 12(b)(6) motion comes out, the plaintiff keeps its forum. If the defendant loses, the plaintiff anchors its claim to the agreement, and the arbitration clause is already gone. If the defendant wins dismissal with leave to amend, the plaintiff amends to plead the agreement, and the clause is gone just the same, because the “waiver” was complete before the plaintiff ever invoked the contract.

The decision below licenses that maneuver. Under its rule, a nonsignatory’s waiver clock can start before its right to arbitrate accrues, so that the plaintiff who decides when the right accrues also decides when it is lost. That novel rule is at war with *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), with this Court’s decision in *Williams v. Cigna Financial*

Advisors, Inc., 56 F.3d 656 (5th Cir. 1995), and with the settled expectations of every business that contracts through subsidiaries. The order should be reversed.

ARGUMENT

I. Chevron Had No Right to Arbitrate Until Servicios Tied Its Claim to the Agreement.

Waiver “is the intentional relinquishment or abandonment of a known right.” *Morgan*, 596 U.S. at 417 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). The question is whether the party “knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right.” *Id.* at 419; *Garcia v. Fuentes Rest. Mgmt. Servs. Inc.*, 141 F.4th 671, 676 (5th Cir. 2025). This Court has applied that definition to arbitration: “Litigating a dispute in ignorance of the right to arbitrate does not demonstrate” the desire to litigate rather than arbitrate that waiver requires. *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App’x 462, 465 (5th Cir. 2004) (per curiam). Both prongs of *Morgan*’s test presuppose a right in existence. A party cannot act inconsistently with a right it does not yet have and cannot know of a right that has not yet accrued.

Nor may courts adjust that test for arbitration. *Morgan* bars “custom-made rules, to tilt the playing field in favor of (or against) arbitration.” 596 U.S. at 419. Just as there is no presumption against waiver, *Garcia*, 141 F.4th at 676, there is none in favor of it. A rule that charges a party with knowledge of a right that does not yet exist would be just such a rule. It would tilt the field against arbitration as surely as the prejudice requirement *Morgan* struck down tilted it the other way.

A. A nonsignatory’s right to arbitrate arises from the plaintiff’s claim, not from the contract.

Arbitration is a matter of contract. A nonsignatory can enforce an arbitration clause only if “traditional principles” of state law allow it, through doctrines such as “assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.” *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (cleaned up); *Crawford Profl Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 257 (5th Cir. 2014). Chevron invoked estoppel, which turns on the plaintiff’s claim.

The district court itself applied the governing test, though to Servicios’s Petropiar contracts rather than the MSA. A nonsignatory may enforce such a clause, the court held, when the signatory “must rely on

the terms of the written agreement in asserting its claims against the” nonsignatory. ROA.10352 (quoting *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000)). The claim must “rely on the language of the agreement . . . rather than just presume its existence.” ROA.10353 (quoting *QPro Inc. v. RTD Quality Servs. USA, Inc.*, 761 F. Supp. 2d 492, 500 (S.D. Tex. 2011)). On that test, the court ruled that Servicios’s contract claims “presume[] the existence of” its Petropiar contracts but “do[] not depend on the terms of” them, so the defendants could not invoke those contracts’ forum clause against those claims. ROA.10353. California law, which the MSA selects, ROA.10211, draws the same line. It treats the difference between a claim that refers to a contract and one that relies on it as “significant,” *Goldman v. KPMG LLP*, 92 Cal. Rptr. 3d 534, 540 (Cal. Ct. App. 2009), and lets a nonsignatory compel arbitration “only when the claims against the nonsignatory are founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause.” *Id.* at 541 (allegations of “concerted misconduct . . . , standing alone, are not enough”). Texas law asks the same thing: whether the claim “depends on the contract’s existence and would be ‘unable to “stand independently” without the

contract.” *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 609 (5th Cir. 2016) (quoting *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 528 (Tex. 2015)). In each formulation, what matters is what the claim requires. The answer “turns on the substance of the claim, not artful pleading.” *Hays*, 838 F.3d at 609 (quoting *G.T. Leach*, 458 S.W.3d at 527).

The nonsignatory’s right is thus not a fixed feature of the case but a function of what the plaintiff pleads. It can appear, change, or vanish as the plaintiff’s theory does. Nor is a mere causal connection between the claim and the contract enough for that right to accrue. This Court has held that estoppel does not apply “even if the claim refers to or relates to the contract.” *Hays*, 838 F.3d at 609 (quoting *G.T. Leach*, 458 S.W.3d at 528). And when nonsignatory defendants sought to compel a signatory plaintiff to arbitrate in *G.T. Leach*, the Texas Supreme Court held that “the mere fact that the claims would not have arisen but for that contract is not enough to establish equitable estoppel.” 458 S.W.3d at 530.

The district court charged Chevron with knowledge based on “the two allegations in the First Amended Complaint that allege a ‘connection’ or ‘but for’ relationship between Servicios’s contract claims and the Master Services Agreement.” ROA.10323. That is the court’s own

description, and it is not the relationship that estoppel requires. It is the relationship the court itself found wanting when it held that claims that “presume[] the existence of” the Petropiar contracts gave the defendants no right to invoke those contracts’ forum clause. ROA.10353. A claim does not become arbitrable at a nonsignatory’s instance merely because it “refers to or relates to the contract,” *Hays*, 838 F.3d at 609 (quoting *G.T. Leach*, 458 S.W.3d at 528), and “the mere fact that the claims would not have arisen but for that contract is not enough,” *G.T. Leach*, 458 S.W.3d at 530. Estoppel attached when Servicios rested its claim on the MSA, and not before.

The allegations bear that out. The complaint mentions the MSA as the vehicle for new work Servicios was “pressured” to accept, ROA.2743–44, and says payment would follow once Servicios agreed to it, ROA.2746. But when the complaint states what Servicios gave in return for Chevron’s promise, it names the reconciliation process and a renewed relationship with Chevron’s joint ventures, *not* the MSA. ROA.2768. The paragraph that follows explains why Chevron made the promise, to secure Servicios’s future work for other Chevron ventures. It does not say

what Servicios gave for it. *Id.* It even calls the MSA “the separate agreement.” ROA.2749.

Read for substance, as *Hays* requires, the amended complaint pleaded an oral promise by Chevron to pay Petropiar’s debt. The MSA appeared in the complaint as the occasion for that promise, not its source, and a claim on an oral promise can be tried without regard to the MSA. Not until its supplemental brief did Servicios say the promise was made “in exchange for” signing the MSA. ROA.10122. The claim came to depend on the contract at that point, and Chevron’s right arose with it.

The district court read the record differently. The court stated that the amended complaint “includes allegations that Servicios’s ‘execution of the MSA was the consideration for, or a material term of, Chevron’s alleged promise,’” citing Chevron’s motion to stay for those words. ROA.10321. The cited page says that the amended complaint “did not clearly allege” any such thing and instead “mentioned a master agreement only in passing.” ROA.10174. Chevron’s description of the complaint is the accurate one, and the court’s finding that Chevron knew of its right from the amended complaint leans on its misreading of the motion. ROA.10321–23.

The court also thought the “but for” allegations enough to put Chevron on notice because the arbitration clause is “capacious,” reaching disputes that “would not have arisen or occurred but for the entering into this Contract,” and because the clause delegates arbitrability. ROA.10322–23. But that reasoning conflates two questions. The clause’s scope defines what the signatories agreed to arbitrate between themselves. Whether a stranger to the contract may invoke the clause at all is a different question. It is one of contract formation, which the court must decide at the outset under background principles of state law such as estoppel. *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 398–401 (5th Cir. 2022). A delegation clause does not change that. *Id.* at 399–400.

Newman read *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 714–15 (5th Cir. 2017), the case the district court cited, the same way. Before the nonsignatories there could invoke the delegation clause, the Court “had to decide the first-step, formation question” under principles “like equitable estoppel.” *Newman*, 23 F.4th at 399. For a nonsignatory, delegation follows estoppel, and estoppel follows the claim.

A clause that reaches but-for disputes tells the parties how far their own agreement extends. But it gives an affiliate no right to arbitrate a claim that does not depend on the contract, so an allegation of that relationship is not notice of any such right. *Hays*, 838 F.3d at 609 (quoting *G.T. Leach*, 458 S.W.3d at 528).

B. *Williams*, not *Garcia*, governs a nonsignatory's knowledge.

The key distinction is between a party whose right to arbitrate lies in a document it controls and one whose right lies in a pleading its adversary controls. This Court has already faced a waiver claim against a defendant that was a stranger to the arbitration agreement.

In *Williams*, the plaintiff argued that his employer, Cigna, “should have known” the dispute was arbitrable, since its own contract with the plaintiff required him to register with the NASD. 56 F.3d at 661 n.3. This Court’s response was to note that the plaintiff did not dispute that the employer had moved “shortly after it actually discovered that the dispute was arbitrable.” *Id.* The Court vacated the denial of the stay, crediting the employer for moving soon after “it discovered that the dispute was subject to arbitration.” *Id.* at 661. *Garcia* reads *Williams* the same way. This Court, it says, “rejected” the should-have-known argument and

instead “credited Cigna with filing a motion to stay shortly after actually discovering the arbitrable nature of the suit.” 141 F.4th at 681.

Garcia, decided after *Morgan*, did not disturb *Williams*. It distinguished *Williams* on the ground that matters here. The *Garcia* defendants had handed the plaintiff the arbitration agreement and kept her signed acknowledgment “in the Restaurant Defendants’ files.” 141 F.4th at 681. Their ignorance was “a crisis of their own creation.” *Id.* *Williams* was different, the Court explained, because the clause there sat in “an agreement to which Cigna was indisputably not a party.” *Id.* That was so even though the registration requirement came from Cigna’s own contract with the plaintiff. 56 F.3d at 661 n.3.

The “own files” rationale applies to a party whose right to arbitrate is written in its own agreement, which it has failed to read. It does not apply to a nonsignatory whose right depends on the plaintiff’s litigation strategy, which sits outside the nonsignatory’s files altogether. *Mirant* likewise distinguished *Williams* on what the defendant knew, and when. The defendant there “discovered that the plaintiff had signed an arbitration agreement only after the district court had denied its motion to dismiss” and moved “[a]s soon as [it] realized that the claims were

subject to arbitration.” 613 F.3d at 590 n.2. What matters in that account is the order of events. The motion to dismiss came before the right was known, and the motion to stay came after. That is Chevron’s sequence too.

The district court applied *Garcia* as though Chevron were a party to the MSA. It faulted Chevron for not claiming “that they were unaware of the Master Services Agreement or that it was not in their ‘files.’” ROA.10323 n.2. And it reasoned that Chevron “knew how to invoke dispute-resolution provisions in contracts to which they were not a party,” having moved to enforce a forum-selection clause in Servicios’s contracts with Petropiar. *Id.* But Chevron’s awareness of the agreement was never the question. The answer to whether Chevron had a right to arbitrate lay in Servicios’s theory of the case, not in Chevron’s files.

The district court’s Petropiar point cuts the other way. Servicios sued to collect invoices issued under its Petropiar contracts, and its sworn-account and fraudulent-transfer claims rested on those contracts, as the court itself held. ROA.10353–55. Chevron invoked the forum-selection clause in those contracts. By contrast, no claim in the operative complaint rested on the MSA’s terms, so Chevron did not invoke the

MSA's clause. A defendant that invokes the clause in the contracts behind the debt its adversary is suing to collect, and does not reach for a contract its adversary is not suing on, has not shown "poor foresight." ROA.10323 n.2 (quoting *Garcia*, 141 F.4th at 680). It has simply read the complaint.

Knowledge, then, is an element of waiver. It must be shown. For a party to the agreement, the agreement itself supplies it. That is what *Garcia* held on knowledge when it charged the restaurant with the contents of its own files. A nonsignatory is party to no agreement that could supply it. Its right, and its knowledge of that right, come from one place only—the plaintiff's claim. *Tristar* speaks of a party that litigates "in ignorance of the right to arbitrate," and *Williams* of the moment the defendant "actually discovered that the dispute was arbitrable." 97 F. App'x at 465; 56 F.3d at 661 n.3. For a nonsignatory, both point to the same place.

Under any account of the knowledge element, the source for a nonsignatory is the same, and until the supplemental brief arrived in this case, that source was silent. For a stranger to the agreement, the

knowledge element cannot be met before then. There is no contract to charge it with, only a pleading its adversary controls.

C. Chevron's litigation conduct did not waive a right it did not yet have.

The other prong of the test cannot be met for the same reason. The district court found substantial invocation on three grounds: the motion to dismiss, the reply's quotation of paragraph 61, and the timing of the motion to stay. ROA.10324–29. Each rests on the premise that Chevron held, from the filing of the amended complaint, a right that only Servicios could confer and had not yet conferred. Once that premise fails, the motion to dismiss becomes an ordinary response to the claims then pleaded, and the quotation of paragraph 61 becomes an argument about the contract claim's coherence.

Nor does the February 6 hearing change the answer. It came four days after the supplemental brief, on a motion briefed and first argued before any right existed. Finishing an argument already set for hearing is not a choice to litigate rather than arbitrate a dispute that had only just become arbitrable. ROA.10114, 10328, 11157. And a motion to stay filed six weeks after the supplemental brief is prompt, not a second bite at the apple. ROA.10114, 10171. Chevron had flagged the question even

earlier. Its first filing after the hearing told the court that the supplemental brief “raises new issues as to whether this Court or an arbitral tribunal is the proper forum.” ROA.10166.

Substantial invocation requires “some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration.” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999). A defendant cannot evince a desire to litigate an arbitrable dispute when the dispute is not yet arbitrable. Even *Mirant*, on which Servicios relied in seeking summary affirmance, recognized as much. See Appellee’s Mot. for Summ. Affirmance 9–11. When claims may not be arbitrable, “a motion to dismiss may not be inconsistent with a right to arbitrate; it might be necessary for the defendant to file the motion . . . to sort out the claims before it can intelligently decide whether to arbitrate.” 613 F.3d at 591 (quoting *St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992)); see ROA.10324 (district court acknowledging the point). That passage concerns whether a motion is “inconsistent with a right to arbitrate,” the inquiry *Morgan* preserved. And a defendant that moves to stay once “it

discovered that the dispute was subject to arbitration” has not substantially invoked the judicial process. *Williams*, 56 F.3d at 661.

II. The Decision Below Gives Plaintiffs a Template for Evading Arbitration by Suing Affiliates.

The FAA “establishes a federal policy favoring arbitration.” *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (cleaned up). The policy, as *Morgan* explained, is a commitment to enforce arbitration agreements like any other contract. 596 U.S. at 418. An arbitration clause in a contract involving commerce is “valid, irrevocable, and enforceable,” 9 U.S.C. § 2; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), subject only to defenses that apply to contracts generally, an “equal-treatment principle.” *Viking River*, 596 U.S. at 650 (quoting *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 581 U.S. 246, 251 (2017)). And a court must stay litigation of an arbitrable dispute on application of a party that is “not in default in proceeding with such arbitration,” 9 U.S.C. § 3.

A party that has waived the right cannot obtain that stay, and *Morgan* instructs that waiver be judged by ordinary procedural rules. 596 U.S. at 419. The rule adopted below is not ordinary, and its consequences reach well past this case.

A. The rule rewards strategic pleading.

Courts in this Circuit have long known that plaintiffs will try to plead around arbitration clauses by choosing their defendants with care. *See Grigson*, 210 F.3d at 530. “[A]llowing litigation to proceed that is in substance against a signatory though in form against a nonsignatory would allow indirectly what cannot be done directly.” *Hays*, 838 F.3d at 611 (quoting *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 193–94 (Tex. 2007)). This Court has said as much in another context this year. “The law should not reward artful pleading.” *Trinseo Eur. GmbH v. Kellogg Brown & Root, L.L.C.*, 165 F.4th 399, 422 (5th Cir. 2026) (cleaned up). Estoppel exists to stop signatories from avoiding arbitration “simply by suing ‘nonsignatory principals or agents for pulling the strings.’” *Hays*, 838 F.3d at 611 (quoting *Merrill Lynch*, 235 S.W.3d at 194). It is the courts’ answer to “strategic pleading.” *Id.* at 610 (quoting *Merrill Lynch*, 235 S.W.3d at 194).

The decision below takes that answer away. Estoppel attaches when the plaintiff’s claim comes to depend on the contract. If the defendant’s right can be waived before that moment, the plaintiff need only delay the moment. And this case supplies the template. Sue the

affiliate, plead the contract as background, and disclose the reliance only after the defendant has responded to the complaint as written. The defendant's right to arbitrate is deemed waived before it even accrues.

The court's second ground for waiver was that Chevron "relied on" the MSA in its reply. ROA.10327. What Chevron did was quote paragraph 61 of Servicios's own complaint to argue that the work Servicios described was governed by a contract to which Chevron was a stranger, so the contract claim against Chevron failed. ROA.10321–22. That is the opposite of reliance. The court reasoned that Chevron could not "have it both ways," citing *Grigson*. ROA.10327 (quoting 210 F.3d at 528). But *Grigson* said that about the *plaintiff*. A signatory "cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." 210 F.3d at 528. That describes Servicios's maneuver here.

That rule polices plaintiffs. It was announced in a case where the plaintiff dismissed its suit against the signatory once the signatory moved to compel arbitration, then sued nonsignatories for pressuring the

signatory into the very conduct complained of, “an obvious attempt to make an end-run around the arbitration clause.” *Id.* at 530. Here, the district court turned it around, and a rule built to stop plaintiffs from evading arbitration became the reason a plaintiff succeeded in evading it.

This Court saw the same pattern in *Tristar*, where the plaintiffs pleaded only an earlier contract with no arbitration clause and disclosed the operative one after it surfaced in discovery. The Court declined to find waiver. Whether the plaintiffs had “deliberately concealed” the agreement “hoping to induce a waiver” or had simply overlooked it, they were “not on a sound footing” in faulting the defendant for failing to discover the agreement earlier. 97 F. App’x at 466.

Even a defendant that has waived arbitration may seek it anew when an amended complaint “unexpectedly changes the scope or theory” of the claims. *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011). The point holds with more force here. If a defendant that held the right and lost it may reclaim it when the plaintiff changes theories, so may one that had no right to lose until the plaintiff’s theory changed.

B. The rule punishes businesses for contracting through subsidiaries.

The pattern recurs because it follows from how businesses are organized. “It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (cleaned up). Businesses of every size rely on that principle. They contract through operating subsidiaries. Those subsidiaries sign master services agreements with arbitration clauses for “the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like).” *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023). Plaintiffs, for their part, sue parents and affiliates because parents have deeper pockets. The FAA’s guarantee of enforceability is worth little if it can be easily defeated by the choice of defendant.

The law already accounts for this. Estoppel lets the nonsignatory affiliate enforce the clause when the plaintiff’s claim depends on the contract. *Hays*, 838 F.3d at 609; see *Arthur Andersen*, 556 U.S. at 631. What the law has never done is require the affiliate to anticipate, at the pleading stage, every contract the plaintiff might later invoke as a basis for suit.

Under the decision below, a parent served with a complaint that mentions an affiliate's contract has two options. It can move to compel arbitration on a contract the plaintiff has not sued on, and be denied, correctly, because the claim does not depend on the agreement. Or it can respond to the complaint as pleaded and be found to have forfeited the clause if the plaintiff later changes course. Neither is something a general counsel can plan around. Both burden the courts, the first with contingent motions and the second with litigation the parties agreed to keep out of court.

C. The rule leaves defendants unable to know how to preserve the arbitration clause.

Certainty is the baseline on which the business community calculates risk. Clear rules let decision-makers convert unpredictable outcomes into strategies, and those strategies determine where capital goes. An arbitration clause is a term of the bargain, priced into the contract along with everything else. Its value depends on knowing precisely what conduct will preserve it and what will forfeit it. The Supreme Court has recognized that a party denied arbitration and made to keep litigating may be “forced to settle to avoid the district court

proceedings (including discovery and trial) that [it] contracted to avoid through arbitration.” *Coinbase*, 599 U.S. at 743.

The decision below starts a nonsignatory’s waiver clock with allegations the court itself described as pleading a mere “connection” or “but for” relationship, ROA.10323, which creates no right to arbitrate. *Hays*, 838 F.3d at 609; *G.T. Leach*, 458 S.W.3d at 530. It treats a defendant’s quotation of the complaint as reliance on the contract. ROA.10327. And it counts as the “sense of the court’s view of the case” a hearing at which, by the court’s own account, the court ruled on no claim and stated no preference for either party’s theory. ROA.10329 (quoting *Forby v. One Techs., L.P.*, 909 F.3d 780, 784 (5th Cir. 2018)). The court did not consider the orders that followed “dispositive.” *Id.* A defendant cannot be expected to hear a ruling the court says it did not make.

A defendant reading the decision below cannot tell what it was supposed to have done differently, short of moving to compel arbitration in every case on every contract the plaintiff mentions. The district court said as much when it acknowledged that no controlling case matched these facts and that its finding of waiver rested on the three grounds in “combination.” ROA.11164.

The Supreme Court has insisted that the FAA “place[s] such agreements upon the same footing as other contracts.” *Morgan*, 596 U.S. at 418 (quoting *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010)). No other contractual right is lost by a party’s failure to invoke it before it exists. Arbitration should not be the exception.

CONCLUSION

The order denying Chevron’s motion to stay should be reversed and the case remanded.

Respectfully submitted,

October 19, 2026

/s/ Cory L. Andrews
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains exactly 5,025 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

October 19, 2026

CERTIFICATE OF SERVICE

I hereby certify that, on October 19, 2026, I served all counsel of record via the Court's CM/ECF system.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

October 19, 2026