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 FOR *AMICUS CURIAE* THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes." Gladys Gruenberg, Joyce Najita & Dennis Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997).

Under the Academy's stringent rules, only the most active and well-respected practitioners can be elected to membership, along with scholars who have made significant contributions to the field of labor law and relations. The Academy's roughly 600 members cannot serve as advocates or consultants in labor disputes, associate with firms that perform those functions, or serve as expert witnesses on behalf of labor or management. Their interest is in the betterment of a fair and impartial arbitration process.

Moreover, in keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in numerous cases concerning the law of arbitration. That includes cases implicating collective agreements: *AT&T Techs., Inc.* v. *Commc'ns Workers of America*, 475 U.S. 643 (1986), *Eastern Assoc. Coal Corp.* v. *United Mine Workers*, 531 U.S. 57

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[1] Petitioner's counsel consented to the filing of this brief, while Respondent's counsel filed a blanket consent. In accordance with Supreme Court Rule 37.6, *amicus curiae* National Academy of Arbitrators certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than *amicus* and its counsel contributed money to the preparation or submission of this brief.

(2000), and *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504 (2001). It also includes cases concerning arbitration of statutory claims: *Wright* v. *Univ. Maritime Serv. Corp.*, 525 U.S. 70 (1998), *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001), and *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247 (2009).

The Academy favors arbitration, and is not hostile to arbitration under employer-imposed mandate. The Academy is, however, deeply concerned to preserve the integrity of the arbitration process. When, as here, a party fails promptly to claim a right to arbitrate, and instead first tests the waters of the litigation process, arbitration no longer provides a fair, efficient, and beneficial alternative to litigation. Rather, it becomes a tactical device and simply serves to evade prompt and efficient resolution of the case—while flouting the prior commitment to resolve the dispute *only* in arbitration. The Court should hold that a party must assert its rights under an arbitration agreement at the first opportunity; that is the only way to enforce arbitration agreements consistent with the Federal Arbitration Act.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case arises at the intersection of state contract law, the Federal Arbitration Act, and federal procedural law and rules. Petitioner cogently explains why, as a matter of contract law and the FAA, waiver (unlike, e.g., estoppel) does not include prejudice as an element. Instead of repeating those points, *Amicus* focuses

upon federal procedural law and its implications for this case.

Waiver of an arbitration right can occur in multiple ways, some of which touch upon procedural law only tangentially. For example, a party to a contract may later sign a writing expressly waiving all rights to arbitrate; that should be enough to lose the right to arbitrate, without consideration of any prejudice. A party may waive the right to arbitrate by "filing suit without asserting an arbitration clause"; "short of directly saying so in open court, it is difficult to see how a party could more clearly evince a desire to resolve a . . . dispute through litigation rather than arbitration." *Nicholas* v. *KBR, Inc.*, 565 F. 3d 904, 908 (5th Cir. 2009) (quotation marks omitted). A party may also waive an arbitration right by seeking summary judgment on the merits, even if done in the alternative to arbitration. *Khan* v. *Parsons Global Servs., Ltd.*, 521 F.3d 421, 427–28 (D.C. Cir. 2008). These situations call for consideration of one's intent to arbitrate, and thus do not squarely call for consideration of federal civil procedure.

By contrast, in this case, the question is whether a defendant waives (or, really, forfeits) the right to arbitrate by litigating and failing timely to seek arbitration. In that scenario, the interplay of federal rules of practice and procedure are a critical consideration. The Federal Rules of Civil Procedure prescribe that certain defenses, including statutory venue objections, are "waive[d]" if not raised in the first pleading or motion—*without* considering prejudice. Fed. R. Civ. P. 12(h). An arbitration clause is just "a specialized kind of forum-selection clause"—

which is also a matter of venue. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). There is no warrant to accord greater protection to contractual venue restrictions (whether committing a dispute to another court or to arbitration) than to statutory venue restrictions. As we explain, that result finds no home in either the text of the FAA or the federal policy favoring arbitration that the Court has identified under it.

ARGUMENT

I. Non-Jurisdictional Venue Objections Can Be Waived Without A Showing Of Prejudice

There are precious few more basic principles in litigation than the maxim that "a party generally forfeits an affirmative defense by failing to raise it." *Arizona* v. *California*, 530 U.S. 392, 409 n.3 (2000). This applies by federal rule to statutory venue restrictions, and there is no warrant to treat contractual venue restrictions differently.

A. The Federal Rules of Civil Procedure prescribe that certain defenses and objections to federal-court adjudication must be raised within prescribed timeframes, or they are lost. The Rules distinguish between "threshold" objections, such as those going to venue, and "more substantial defenses," such as those going to subject-matter jurisdiction or the merits. Notes of Advisory Committee, Federal Rule of Civil Procedure 12 (1966).

The Rules thus provide that if a defendant fails to object with the first responsive pleading or motion that suit was filed in an "improper venue," or that the

federal court lacks jurisdiction over the person of the defendant, or that the defendant was improperly served, then the objection is deemed "waive[d]" and lost forever—prejudice or not. Fed. R. Civ. P. 12(h)(1). These "threshold defense[s]," the Advisory Committee opined, must all be "br[ought] forward" to "allow the court to do a reasonably complete job," as they "are of such a character that they should not be delayed." Notes of Advisory Committee, Federal Rule of Civil Procedure 12 (1966). By their nature, these defenses and objections do not go to the court's authority to act or the substance of a case.

By contrast, a defendant may always object that suit should have been brought in a state rather than federal court, because no federal question is presented and diversity is lacking, even after failing to raise it on first motion. *Ibid.* That is because such an objection concerns the power of the court to adjudicate, and "'[w]ithout jurisdiction the [federal] court cannot proceed at all in any cause.'" *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). If it were just a matter of venue, however, there is no question the objection would be waived if not raised at the first opportunity.

In contrast, a defendant does not lose the right to object that a claim fails as a matter of law despite not filing a motion to dismiss under Rule 12(b)(6), or that an indispensable party is lacking. *See* Fed. R. Civ. P. 12(h). But that is because, unlike threshold objections to venue, personal jurisdiction, and service, these defenses go to the merits. As a result, it is fair to permit a defendant to raise these substantial

objections for the first time later in the litigation process. Wright & Miller, *Federal Practice and Procedure* § 1392 (Certain "defenses have been singled out by the rulemakers for special treatment" and excused from the raise-it-or-waive-it rule "because they are obviously of greater importance . . . and are more closely enmeshed with the substantive merits").

B. More central to this case is the situation of litigation parties contracting to have their disputes resolved in a particular forum via a forum-selection clause. *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Again, this speaks to venue—"largely a matter of litigational convenience," *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 316 (2006)—and not to federal-court authority, the merits, or the substance of the case. As a result, it should receive the same waiver treatment as objections to statutory venue, although this has not been definitively addressed by the Court. *See* Wright & Miller, *Federal Practice and Procedure* § 1394 ("It is evident from a reading of the text of Rule 8(c), Rule 8(b)(6), and Rule 12(b)(3) that all affirmative defenses and denials must be pleaded by the defendant or, when appropriate, raised by motion under Rule 12(b), or they will be waived.").

As this Court has explained, a federal-court defendant objecting that a contract calls for a different court to hear the merits will invoke the doctrine of *forum non conveniens* rather than Rule 12(b)(3). Indeed, if transfer is sought to a different federal court, the defendant will move under 28 U.S.C. § 1404(a), which codifies the *forum non conveniens* doctrine "for the subset of cases in which the transferee forum is within the federal court system,"

and prescribes that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." *Atl. Marine Constr. Co.* v. *U.S. Dist. Court for the W. Dist. of Tex.*, 571 U.S. 49, 59–60 (2013). A federal-court defendant objecting that a forum-selection clause designated a state or foreign court simply will invoke the common-law doctrine of *forum non conveniens*. *Ibid.* As such, it should "behoove[] the defendant to raise th[is] *forum non conveniens* defense within a reasonable time of becoming aware of the circumstances supporting it," namely (because the defense already exists) at the case's outset. Wright & Miller, *Federal Practice and Procedure* § 3828.

This Court has not addressed *when* a forum-selection clause must be raised—and whether it is subject to Rule 12(h)(1)'s limitation—but it makes little sense to accord litigants more latitude in untimely raising venue objections rooted in contract than venue objections rooted in statute (the latter of which are expressly governed by Rule 12(h)). Indeed, a forum-selection clause does *not* "'oust[]' [a] District Court of jurisdiction over [an] action," *M/S Bremen*, 407 U.S. at 12, and "the doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision," *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 453 (1994). A *forum non conveniens* dismissal does not "deny audience to a case on the merits," *Ruhrgas v. AG Marathon Oil Co.*, 526 U.S. 574, 585 (1999); rather it is simply "a determination that the merits should be adjudicated elsewhere," *Sinochem Int'l Co.* v. *Malay. Int'l Shipping Corp.*, 549 U.S. 422,

432 (2007). Moreover, a *forum non conveniens* objection "is a matter that goes to *process* rather than *substantive* rights" of the litigants. *Am. Dredging Co.*, 510 U.S. at 453 (emphasis added); *see Sinochem*, 549 U.S. at 432.

Thus, a forum-selection-clause objection is a "threshold" defense that is akin to, and should be treated like, defenses deemed waived unless raised in the first pleading or motion, and not the more "substantial" defenses that are expressly preserved. Notes of Advisory Committee, Federal Rule of Civil Procedure 12 (1966). A defendant should be deemed to have waived a forum-selection clause by failing to raise it at first opportunity—regardless of whether raising it later would prejudice the plaintiff. *See Sharpe* v. *Jefferson Distrib. Co.*, 148 F.3d 676, 679–80 (7th Cir.1998), *abrogated on other grounds by Papa* v. *Katy Indus., Inc.*, 166 F.3d 937 (7th Cir. 1999) ("Although a forum-selection clause differs in some respects from an argument that statutory venue does not lie in the district plaintiff has chosen (the former is a question of contract, the latter of statutory authorization), the two are sufficiently close—and the need for prompt determination of a suit's location sufficiently great—that we group forum-selection clauses with statutory venue issues for purposes of Rule 12(h)(1).").

II. Arbitration Objections Should Be Treated Like Other Venue Objections

A. "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Scherk* v. *Alberto-Culver Co.*, 417

U.S. 506, 519 (1974). In other words, "[b]y agreeing to arbitrate . . . a party does not forgo [its] substantive rights . . . it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

As such, a motion to compel arbitration is akin to a *forum non conveniens* motion invoking an ordinary forum-selection clause. It says nothing about the merits of the underlying dispute. *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."). By the same token, a dismissal in favor of an arbitral forum does not speak to the federal court's authority to resolve the dispute (should the parties agree). *Cf. M/S Bremen*, 407 U.S. at 12. Indeed, the FAA refers to federal courts compelling arbitration in cases in which they "would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties" 9 U.S.C. § 4.

B. Because motions to compel arbitration, more than anything else, "concern venue," *Grasty v. Colorado Tech. Univ.*, 599 F. App'x 596, 597 (7th Cir. 2015), a defendant claiming arbitration should do so at the first opportunity on pain of waiver, and no showing of prejudice should be needed—just as it is not needed to find waiver for failure to object to improper statutory venue under Rule 12(b)(3).

There is nothing "unique" about a right to arbitrate, "prevent[ing] it from being established or

waived like other rights." *Ins. Corp. of Ir.* v. *Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 706 (1982). The Federal Arbitration Act prescribes that arbitration agreements "shall be 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. It provides that federal courts may compel arbitration when a dispute falls within their jurisdiction. *Id.* § 4. Requiring arbitration to be raised at first opportunity comports with these prescriptions—it holds *both* parties to their arbitration bargain, including (notably) the defendant, who may be inclined to test the waters of the court system first, but should not (if the contract is to be enforced according to the FAA).

Nothing in the FAA justifies treating an arbitration clause (just a type of forum-selection clause) differently from other forum-selection clauses (those designating another court). Nor does it make any sense, as explained above, to accord *higher* protection to *contractual* venue restrictions than to *statutory* venue restrictions, the latter of which are easily lost (prejudice or not) under Rule 12(h).

C. To be sure, this Court has also identified in the FAA a strong "national policy favoring arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984). But whatever that pro-arbitration policy may say beyond the statute's text, it points in the same direction here.

"A prime objective of an agreement to arbitrate," this Court has explained, "is to achieve streamlined proceedings and expeditious results." *Preston* v. *Ferrer*, 552 U.S. 346, 357–58 (2008); *see also AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011)

(same). This "prime objective" traces its root to the "unmistakably clear congressional purpose" of the FAA: that "the arbitration procedure" be "speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

Requiring a showing of prejudice flouts rather than furthers that purpose; it incentivizes gamesmanship and delay, hindering the promise of "quicker, more informal, and often cheaper" case resolutions, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Indeed, those courts requiring prejudice to find a waiver have been loath to find it even when a party moved to dismiss before seeking arbitration, just as happened below here. *See, e.g.*, *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1270–71 (9th Cir. 2002); *Rush* v. *Oppenheimer & Co.*, 779 F.2d 885, 889 (2d Cir. 1985). In other words, in Circuits where prejudice is required, "a party can seek to dismiss an action in court, and if the motion is granted they win. If the motion is denied, then the party can usually try again in arbitration." Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531, 568 (2014). This flouts the agreement and creates a "heads I win, tails you lose" situation. *Cabinetree of Wisconsin, Inc.* v. *Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995).

Perversely, requiring prejudice to find waiver introduces the very same problems the FAA sought to forestall—tactical games and inefficiencies. Ian R. Macneil et al., *Federal Arbitration Law* § 21.3.3 ("The requirement of prejudice, . . . protects the federal contract right to arbitrate at considerable cost to

efficiency."). Consider the words of a representative from the New York Chamber of Commerce, who testified at congressional hearings on the FAA nearly a century ago that parties were "back[ing] out" of arbitration "at the last moment when they see the case is going against them." Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the S. Comm. on the Judiciary and the H. Comm on the Judiciary, 68th Cong. 5, 7 (1924) (statement of Charles L. Bernheimer). Or consider the complaints of a representative from the American Bar Association, that "a party has been at absolute liberty to disregard his engagement to enter into arbitration at any time before the award actually is handed down," which was motivated by "the party, having no respect for his obligation . . . see[ing] an advantage in the delay and trouble to which his opponent will be put *Id*. at 35 (written statement of Julius Henry Cohen). A prejudice requirement reintroduces the same problem, only in reverse. *See* Frankel, *The Arbitration Clause as Super Contract*, *supra*, at 568 ("The prejudice requirement is particularly unsuitable for arbitration because one of the primary motivations of the FAA's drafters was to stop this kind of strategic behavior.").

* * *

Finding waiver *without* prejudice, just as Federal Rule 12(h) specifies for venue objections not timely raised, fosters efficiency in litigation and arbitration—and seeks to hold all parties to their arbitration bargain. As an organization comprised of arbitrators, *Amicus* is interested in maintaining the appeal of arbitration as an effective alternative to litigation—

and not turning arbitration into a device that is utilized for gamesmanship and delay. "Ultimately, the prospect of waiving their right to arbitrate should compel parties to choose a forum at the earliest possible stage." Jack Wright Nelson, *Waiving the Right to Arbitrate in the United States: Should the Prejudice Requirement be Discarded?*, Kluwer Arbitration Blog (May 22, 2015). Allowing a party to participate in litigation until they cause prejudice leads to games and inefficiencies, and should be soundly rejected.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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