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“Heads I win, tails you lose”: The End of Employers’ Exploitation of the Federal Arbitration Waiver Prejudice Requirement

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NOTE

"Heads I win, tails you lose": The End of Employers' Exploitation of the Federal Arbitration Waiver Prejudice Requirement

Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).

Peyton E. Rosencrants[*]

I. INTRODUCTION

On its face, an arbitration agreement suggests a straightforward process: should a dispute between the parties subject to the agreement arise, the dispute will be resolved through arbitration rather than litigation.[1] But sometimes the parties do not follow this seemingly predetermined path. For example, many employers include mandatory, boilerplate arbitration agreements as conditions of employment. As is often the case, what happens when an employee sues her employer without knowledge of the contract's arbitration clause? What if the employer allows the lawsuit to proceed for several months before it decides that it would fare better before an arbitrator? Must a court compel arbitration even if the plaintiff employee has spent considerable resources to pursue her claim in court? The Supreme Court of the United States addressed this question in *Morgan v. Sundance*.[2] Plaintiff Robyn Morgan, an hourly Taco Bell employee, sued her employer's parent corporation for withholding wages at her already low-wage job.[3] After months of substantial litigation activity and to Ms. Morgan's detriment, Sundance

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[1] *Arbitration Basics*, ARBITRATION INFO (May 12, 2020), https://law.missouri.edu/arbitrationinfo/2020/05/12/arbitration-101/ [https://perma.cc/QPK5-8YHP].

[2] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711 (2022).

[3] Morgan v. Sundance, Inc., No. 4:18-CV-316, 2019 WL 5089208 at *1 (S.D. Iowa Mar. 5, 2019).

pulled out the pre-dispute arbitration agreement that Ms. Morgan was required to sign when hired.[4]

As with all other types of contracts, parties may elect to waive arbitration and resolve the dispute by litigation. Employers such as Sundance have been allowed to "test the waters" in court before deciding they will achieve more favorable results by turning to arbitration.[5] Prior to *Morgan v. Sundance*, American courts were split about what exactly constitutes waiver of an arbitration agreement.[6] For most state and federal courts, so long as one party had not substantially prejudiced the other while vacillating on whether to waive arbitration, this sort of behavior was perfectly fine.[7] But allowing employers to test the waters wastes the court's and opposing party's time and resources. For employees who are already at a disadvantage due to a pre-dispute mandatory arbitration agreement, this provides yet another way for large employers to get ahead. In response to some of these concerns, the Supreme Court held in *Morgan v. Sundance* that arbitration waiver analyses must not include a prejudice requirement.[8]

This Note highlights the disadvantages for employees that existed under the federal and state majority approach to arbitration waiver analysis. Part II summarizes the underlying facts and holding of *Morgan v. Sundance*, a case in which an Iowa district court, the Eighth Circuit, and the Supreme Court of the United States considered arbitration waiver requirements. Part III discusses the history of employment arbitration and the prior circuit and state split regarding arbitration waiver analysis. Part IV dissects the rationale of the Supreme Court's unanimous opinion. Lastly, Part V examines the implications of *Morgan* for courts, employees, and employers alike in light of the Court's failure to provide a clear and consistent framework for arbitration waiver analysis.

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[4] Morgan v. Sundance, Inc., No. 4:18-CV-316, 2019 WL 5089208 at *1–2 (S.D. Iowa Mar. 5, 2019).

[5] *See, e.g.*, Mark S. Askanas & Mitchell F. Boomer, *Employer Did Not Waive Right to Arbitration Despite One-Year Delay, California Court Rules*, JACKSON LEWIS (June 3, 2014), https://www.jacksonlewis.com/resources-publication/employer-did-not-waive-right-arbitration-despite-one-year-delay-california-court-rules [https://perma.cc/Z8P6-D6PJ].

[6] Naomi Barrowclough, *SCOTUS to Address Circuit Split Over Arbitration Waiver*, JDSUPRA (Feb. 1, 2022), https://www.jdsupra.com/legalnews/scotus-to-address-circuit-split-over-9035796/ [https://perma.cc/G3EP-MC9A].

[7] *Id.*

[8] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022).

II. FACTS AND HOLDING

Robyn Morgan was an hourly employee at a Taco Bell in Iowa, one of the more than 150 Taco Bell locations owned by Sundance, Inc.[9] During Morgan's employment, she claimed that Sundance would "shift" employees' hours to the next week to cap their paychecks at eighty hours for each two-week pay period—and thus avoid paying overtime to any employee.[10] The Fair Labor Standards Act sets minimum wage requirements and guarantees increased pay for overtime work.[11] On September 25, 2018, Morgan filed suit against Sundance in the U.S. Southern District of Iowa on behalf of herself and a proposed putative class for these alleged violations of the Fair Labor Standards Act.[12]

When Morgan filed her lawsuit, a nearly identical lawsuit, *Wood v. Sundance, Inc.*,[13] had already been pending for years in Michigan.[14] On November 8, 2018, Sundance filed a Federal Rule of Civil Procedure 12(b)(3) motion to dismiss or alternatively stay Morgan's claims because of this other, seemingly duplicative suit.[15] Sundance's motion made no mention of an arbitration agreement.[16] Four months later, in March, the Iowa district court denied Sundance's motion because the two lawsuits had sufficiently distinct classes of plaintiffs—the Michigan suit's class was limited to the state while Morgan's suit sought nationwide class certification.[17] Sundance then filed its Answers and Affirmative Defenses, which again made no mention of its arbitration agreement with Morgan.[18] On April 15, 2019, Morgan voluntarily attended a class-wide mediation that included the Michigan plaintiffs in an attempt to resolve all claims against Sundance.[19] To prepare for the mediation, Morgan claimed that she had already retained an expert, and Sundance had already produced thousands of documents.[20] Sundance disputed the characterization of this

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[9] Morgan v. Sundance, Inc., No. 418-CV-316-JAJ-HCA, 2019 WL 5089205 at *1 (S.D. Iowa June 28, 2019), *rev'd and remanded*, 992 F.3d 711 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. 1708 (2022).

[10] Morgan, 2019 WL 5089208, at *1.

[11] *Id.*

[12] *Id.*

[13] Collective Action Complaint and Jury Demand, Flanagan v. Sundance, Inc., No. 2:16CV13598 (E.D. Mich. filed Oct. 7, 2016).

[14] *Morgan*, 2019 WL 5089208, at *1.

[15] *Id.*

[16] Morgan v. Sundance, Inc., No. 418-CV-316-JAJ-HCA, 2019 WL 5089205 at *2 (S.D. Iowa June 28, 2019), *rev'd and remanded*, 992 F.3d 711 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. 1708 (2022).

[17] *Morgan*, 2019 WL 5089208, at *5.

[18] *Id.*

[19] *Morgan*, 2019 WL 5089205, at *2.

[20] *Id.*

activity as "discovery."[21] The parties did not resolve Morgan's claims at this mediation.[22]

On May 3, 2019, nearly eight months after Morgan filed her lawsuit, Sundance filed a Motion to Compel Individual Arbitration and Dismiss Plaintiff's Complaint.[23] Sundance asserted that Morgan's employment application included an arbitration clause just above the signature line.[24] Morgan claimed that Sundance did not notify her counsel of the existence of an arbitration agreement until May 1, 2019.[25] Sundance did not deny Morgan's claim.[26]

The issue before the court was whether Sundance waived its right to compel arbitration.[27] On June 28, 2019, the court denied Sundance's motion to compel, finding that Sundance had waived its right to arbitration.[28] To reach its decision, the court applied the Eighth Circuit's *Lewallen* test, which provides that a party waives its right to arbitration if it: "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts."[29] The court determined that all three prongs of the *Lewallen* test were met; thus, Sundance had waived its right to arbitrate the dispute with Morgan and the court could not compel arbitration.

A three-judge panel on the Eighth Circuit Court of Appeals reversed the district court's order denying its motion to compel arbitration of Morgan's claims.[30] The court applied the same *Lewallen* test that the district court utilized but reached a different conclusion.[31] In applying this test, the court concluded that the district court erred in determining that Sundance waived its right to arbitrate because Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan.[32] The court agreed that the first element, as to Sundance's

[21] *Id.*

[22] *Id*. at 3.

[23] *Id*. at 1.

[24] *Id*. at 1–2. The arbitration clause stated, "because of the delay and expense of the court systems, Taco Bell and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and Taco Bell, its related companies, and/or their current or former employees." *Id*.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 3.

[28] *Id.* at 8.

[29] *Id.* at *4 (citing Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007)).

[30] Morgan v. Sundance, Inc., 992 F.3d 711, 713 (8th Cir. 2021), *cert. granted*, 142 S. Ct. 1708 (2022).

[31] *Id.* at 714.

[32] *Id.*

knowledge of the arbitration agreement, was undisputed.[33] As to the second element, the court raised additional issues: specifically, the court noted that the time during which Sundance's motion to dismiss was under advisement constituted half of the delay that the district court attributed to Sundance.[34] Additionally, the court characterized mediation as an effort to *avoid* invoking the litigation machinery, which weighed in Sundance's favor.[35] However, Sundance's delay to assert its right to arbitration until after filing a motion to dismiss and answer "demonstrates an active participation in the litigation process and seemingly an invocation of the litigation machinery."[36] Significantly, however, the motion to dismiss was not on the merits.[37] Thus, despite the delay, the parties spent very little time actively litigating and no time on the merits of the case, so shifting to arbitration would not duplicate the parties' efforts.[38]

As to the third element, the Eighth Circuit held that Morgan was not prejudiced by Sundance's litigation strategy.[39] Sundance did not cause four months of the delay, but rather spent that time waiting for the disposition of Sundance's motion to dismiss.[40] Neither party conducted discovery, the record lacked any evidence that Morgan would have to duplicate her efforts during arbitration, and most of Morgan's work focused on the "quasi-jurisdictional issue, not the merits of the case."[41]

Morgan subsequently petitioned for a writ of certiorari to the Supreme Court of the United States.[42] The Court granted certiorari to address the circuit split regarding a prejudice requirement.[43] It held that courts cannot include a prejudice requirement in an arbitration waiver analysis.[44] In deciding this, the Court reexamined the text of the Federal Arbitration Act ("FAA") and what it means to have a "federal policy favoring arbitration."[45] It concluded that the FAA and its policy favoring arbitration was intended to put arbitration agreements on equal footing as other contracts rather than encourage courts to devise rules favoring arbitration over litigation.[46] Thus, the Court concluded that the Eighth Circuit must eliminate the prejudice requirement from its arbitration

[33] *Id.*
[34] *Id.* at 714.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 715.
[40] *Id.*
[41] *Id.*
[42] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712 (2022).
[43] *Id.*
[44] *Id.* at 1714.
[45] *Id.* at 1713.
[46] *Id.*

waiver analysis and reevaluate Sundance's conduct under a revised or new procedural framework.[47]

III. LEGAL BACKGROUND

Over the past century, arbitration has emerged as a hugely popular form of alternative dispute resolution, first in the realm of labor and commercial law, and subsequently expanding to areas such as employment law.[48] Not only is arbitration popular with employers, but it is popular with the courts as well.[49] The Supreme Court of the United States has repeatedly interpreted the FAA expansively to favor arbitration rights.[50] The heart of the FAA, Section 2, makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[51] The Court has described Section 2 as "a congressional declaration of a liberal federal policy favoring arbitration agreements,"[52] and it has stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[53]

In the seminal *Rent-A-Center* case, the Court stated that the FAA "reflects the fundamental principle that arbitration is a matter of contract."[54] Significantly, the FAA "places arbitration agreements on an equal footing with other contracts."[55] The Court emphasized this requirement and reiterated its policy favoring arbitration in *AT&T v. Concepcion*.[56] In *Concepcion*, the Court held that Section 2 "preserves

[47] *Id.* at 1714.

[48] Daniel Centner & Megan Ford, *A Brief History of Arbitration*, ABA (Sept. 19, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration/ [https://perma.cc/J4RH-BYCF].

[49] Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG LAW (Oct. 28, 2021), https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it [https://perma.cc/AM3R-D9YC].

[50] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[51] 9 U.S.C. § 2.

[52] *Moses*, 460 U.S. at 24.

[53] *Id.* at 24–25.

[54] Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

[55] *Id.*

[56] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

generally applicable contract defenses" but does not protect state laws that interfere with the FAA's objectives.[57]

As with other contracts, however, parties may still voluntarily or involuntarily waive arbitration agreements.[58] Section 3 of the FAA provides that if a party is "in default in proceeding with such arbitration," it is not entitled to a stay of the trial of the action.[59] However, the FAA provides no further insights on what constitutes a default or waiver, and federal and state courts have long been split on the topic of waivers.[60] When a party explicitly and intentionally waives its right to arbitration, no problem exists. However, the issue of waiver may arise when a party's *conduct* implies that it waives its right to arbitrate, such as by engaging in litigation.[61] A party may obtain certain advantages by engaging in litigation before it invokes its right to arbitrate, such as seeing if it wins a certain motion, getting discovery, or running up the costs to an opposing party operating on limited resources.[62] These advantages to one party may be seen as "prejudicial" to the other party.[63] However, courts have taken a variety of approaches in answering whether the prejudice toward the opposing party should be an element or factor in a waiver analysis.[64]

Federal and state courts alike have disagreed on the proper standard for determining when a party has waived its right to arbitrate—specifically, whether the party seeking to avoid arbitration must show that it has been prejudiced.[65] The majority approach considered prejudice in its arbitration waiver analysis;[66] it was followed by most state supreme courts and nine federal courts of appeals, including the Eighth Circuit in

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[57] *Id.* at 343.

[58] *See* 9 U.S.C. § 3.

[59] *Id.*

[60] *See* Timothy Leake, *Arbitration Waiver and Prejudice*, 119 MICH. L. REV. 397, 400–01 (2021).

[61] *Id.* at 400.

[62] *See, e.g.*, Morgan v. Sundance, Inc., No. 4:18-CV-316, 2019 WL 5089208 at *2 (S.D. Iowa Mar. 5, 2019).

[63] *Id.* at *3.

[64] Barrowclough, *supra* note 6.

[65] *Id*.

[66] *Id*. Generally, the majority approach has held that a party waives its right to arbitration if it "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007); Morgan v. Sundance, Inc., No. 4:19-cv-00316-JAJ-HCA, 2019 WL 5089205 at *4 (S.D. Iowa June 28, 2019), *rev'd* 992 F.3d 711 (8th Cir. 2021), *and vacated*, 142 S. Ct. 1708 (2022).

Morgan.[67] Additionally, there is the overarching policy that arbitration should prevail when there is any uncertainty regarding its waiver.[68]

These jurisdictions analyzed prejudice to varying degrees; for some, prejudice was treated as one of many factors rather than as a required element. For example, the Tenth Circuit applied a less rigid multifactor test that considered prejudice as one factor among many.[69] The First Circuit also took a much milder approach to its prejudice requirement, holding that the arbitration waiver components are "undue delay and a *modicum* of prejudice to the other side."[70] Under this approach, the arbitration clause should be "invoked at the earliest opportunity."[71] The Second Circuit fell at the opposite end of the prejudice-requirement spectrum, describing prejudice as "the key to a waiver analysis."[72] In the Second Circuit, prejudice could include "when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration," or "when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense."[73] Failure to plead arbitration in an answer alone did not constitute prejudice.[74] The Third Circuit considered prejudice a "touchstone" for determining waiver, and has provided a "nonexclusive list of factors relevant to the prejudice inquiry."[75] The Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits similarly put a heavy burden on the nonmovant to show prejudice out of deference toward the FAA's policy of arbitration.[76]

The minority approach to arbitration waiver disposed of the prejudice requirement completely.[77] The Seventh and D.C. Circuits and a handful of states—Alaska, Florida, Maryland, and West Virginia—applied a traditional contractual waiver test that looked at whether a party's

[67] *See* Barrowclough, *supra* note 6.

[68] Messina v. N. Cent. Distrib., Inc. 821 F.3d 1047, 1050 (8th Cir. 2016) (quoting Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007)).

[69] Barrowclough, *supra* note 6.

[70] Rankin v. Allstate Ins. Co., 336 F.3d 8, 12 (1st Cir. 2003) (emphasis added).

[71] *Id.* at 13.

[72] Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 105 (2d Cir. 2002).

[73] *Id.* (quoting Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991)).

[74] *See id.* (quoting Rush v. Oppenheimer Co., 779 F.2d 885, 889 (2d Cir. 1985)).

[75] Nino v. Jewelry Exch., Inc., 609 F.3d 191, 208–09 (3d Cir. 2010) (quoting Ehleiter v. Grapetree Shores, Inc., 382 F.3d 207, 222 (3d Cir. 2007)).

[76] *See, e.g.*, MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001) (quoting Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir. 1985)); Walker v. J.C. Bradford & Co., 938 F.2d 575, 577 (5th Cir. 1991).

[77] *See* Barrowclough, *supra* note 6.

litigation conduct was inconsistent with an intent to arbitrate without regard to prejudice.[78] The Seventh Circuit held that a party presumptively waived its right to arbitrate if it proceeded before a “nonarbitral tribunal” to resolve a contract dispute.[79] The Seventh Circuit imposed this hard cutoff at the start of litigation because “the intention behind such [arbitration] clauses, and the reason for judicial enforcement of them, are not to allow or encourage the parties to proceed, either simultaneously or sequentially, in multiple forums.”[80] Further, ordinary contract law does not require proof of consideration or detrimental reliance to constitute waiver.[81] To further complicate matters, some state courts do not follow the same approach as the federal circuit they fall within.[82] This has created additional confusion for parties who may be subject to disputes in multiple jurisdictions.

Given the significant confusion, it is unsurprising that the Supreme Court of the United States has previously expressed its interest in this issue.[83] In 2011, the Court granted certiorari to address this circuit split regarding arbitration waivers, but the parties settled the dispute before the Court could issue a ruling.[84] After ten additional years of waiting, the Court has finally addressed this important question.

IV. Instant Decision

In an opinion written by Justice Elena Kagan, the Supreme Court of the United States unanimously held that federal courts cannot create arbitration-specific procedural rules based on the FAA’s “policy favoring arbitration.”[85] In doing so, the Court rejected the circuit majority’s arbitration-specific waiver rule requiring a showing of prejudice.[86] The Court defined waiver as the “intentional relinquishment or abandonment of a known right,” focusing on the actions of the person who held that right

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[78] Barrowclough, *supra* note 6; Ryan A. Glasgow & Timothy Kim, *U.S. Supreme Court Will Address Circuit Split on Arbitration Waiver*, NATL L. REV. (Dec. 15, 2021), https://www.natlawreview.com/article/us-supreme-court-will-address-circuit-split-arbitration-waiver [https://perma.cc/9JL2-LKMX].

[79] Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995).

[80] *Id.*

[81] *Id*.

[82] Barrowclough, *supra* note 6.

[83] *See* Citibank v. Stok & Assocs., 387 F. App’x 921, 923 (11th Cir. 2010), *cert. dismissed*, 563 U.S. 1029 (2011).

[84] Paul Bennett IV, *“Waiving” Goodbye to Arbitration: A Contractual Approach*, 69 WASH. & LEE L. REV. 1609, 1615 (2012).

[85] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711 (2022).

[86] *Id.* at 1712.

rather than the effects on the other party.[87] The Court's definition applies to waiver in any context; arbitration is no exception.[88] The Court clarified that its frequent reference to the FAA's "policy favoring arbitration" does not permit courts to create rules favoring arbitration over litigation; rather, the policy is simply to make "arbitration agreements as enforceable as other contracts, but not more so."[89] For support, the Court cited Section 6 of the FAA, which directs federal courts to apply the "usual" federal procedural rules and therefore effectively bars custom-made rules such as a prejudice requirement.[90] The Court remanded the case back to the Eighth Circuit to resolve the dispute under the new "waiver" framework—that is, whether Sundance knowingly gave up its right to arbitration by acting inconsistently with that right.[91] Alternatively, the Court provided that the Eighth Circuit could adopt a different procedural framework, but left it up to the lower court to determine what that framework might be.[92]

V. COMMENT

The *Morgan v. Sundance* Court held that arbitration-related procedural disputes may not be subject to different rules than other contract disputes.[93] In doing so, it correctly excluded any prejudice requirements from arbitration waiver analysis—aligning with the Court's well-established precedent of treating arbitration agreements the same as it treats all other contracts.[94] But the Court should have gone further: it should have adopted a uniform waiver test to provide additional clarity and consistency for the courts. In line with this test, the Court should have reversed the Eighth Circuit's holding in *Morgan* rather than remanding it. Its failure to do so leaves employees unprotected from burdensome pre-trial litigation tactics like those used by Sundance in the case at hand.

A. The Interests of Employees Who Are Subject to Pre-Dispute Arbitration Agreements Need to be Better Protected

In recent years, pre-dispute mandatory arbitration agreements have become increasingly popular in the employment realm.[95] By signing a

[87] *Id.* at 1713.
[88] *Id.*
[89] *Id*. (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
[90] *Id.* (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967)).
[91] *Id.* at 1714.
[92] *Id.*
[93] *Id.* at 1713.
[94] *Id.* at 1714.
[95] Mulvaney, *supra* note 49.

pre-dispute mandatory arbitration agreement, workers waive their right to litigation before any dispute arises. This alone puts employees at a disadvantage. Employment disputes can include sexual harassment, discrimination, wage theft, and more.[96] Sixty million U.S. workers are subject to mandatory arbitration procedures, with nearly fifty-four percent of nonunion, private-sector employers having such policies in place.[97] The number of employment claims resolved by arbitration has continued to rise in recent years,[98] and the Economic Policy Institute estimates that nearly eighty percent of American workers will be bound to arbitration by 2024.[99]

Proponents of arbitration accurately point out that it often provides a more efficient, cost-effective, and private form of dispute resolution to parties. It is an excellent alternative, even in the employment context, when both parties are on equal footing and decide it is their best option.[100] For example, unionized workers may have collective bargaining representatives review and advocate for necessary changes to their contracts.[101] In the non-union sector, when an arbitration clause is individually negotiated or part of a post-dispute agreement, it is more likely to be a mutually beneficial alternative to litigation to which the employee knowingly and voluntarily agreed.[102]

Most of these opportunities, however, are not available to the vast majority of employees. Individual negotiations and post-dispute

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[96] Employers’ use of mandatory arbitration has come under fire in the wake of the #MeToo movement for the role it has consistently played in silencing victims of workplace harassment and abuse. *See* Jathan Janove, *Mandatory Employment Arbitration—Yes or No?*, SHRM (Dec. 3, 2021), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/humanity-into-hr/pages/mandatory-employment-arbitration.aspx [https://perma.cc/CCP5-K482]; In March 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which bars the enforcement of mandatory arbitration for sexual assault or harassment claims. Mark Godstein & Carew S. Bartley, *Workplace arbitration agreements: where we are and where we’re going*, REUTERS (Aug. 15, 2022), https://www.reuters.com/legal/legalindustry/workplace-arbitration-agreements-where-we-are-where-were-going-2022-08-15/ [https://perma.cc/F4DJ-YJTW].

[97] Mulvaney, s*upra* note 49.

[98] *Id*.

[99] Megan Leonhardt, *The huge diversity issue hiding in companies’ forced arbitration agreements*, CNBC (June 7, 2021), https://www.cnbc.com/2021/06/07/arbitrators-are-male-and-overwhelming-white-heres-why-it-matters.html [https://perma.cc/VQJ2-DQM7].

[100] Janove, s*upra* note 96.

[101] Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECON. POL’Y INST. 1, 4 (April 6, 2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/2VJ2-BE6J].

[102] STEPHEN J. WARE & ALAN SCOTT RAU, ARBITRATION 78 (Saul Levmore et al. eds., 4th ed. 2020).

agreements are typically available only to high-salaried employees.[103] Most non-union, lower-paying, and commonly hourly positions involve a uniform contract with no option to negotiate the terms; in other words, the arbitration agreement must be signed as a condition of employment.[104] Most employees have far less bargaining power than their sophisticated employer and do not get to choose whether arbitration is their best option.[105] For these employees, mandatory arbitration may not be beneficial for their individual claims.

"Arbitration that is imposed on employees as a condition of employment before any dispute has arisen . . . has been deservedly controversial since its inception."[106] When forced to engage in arbitration, employees often give up a more favorable forum and factfinder.[107] Studies in 2020 continued to show that "employee win rates in arbitration are lower than those found in state and federal court. In addition, monetary award amounts and percentage of claim amounts awarded to employees who prevail in their cases are significantly lower in arbitration than in state and federal jury trials."[108] Members of Congress have recently recognized the dangers of imposing mandatory pre-dispute arbitration agreements on workers.[109] On March 17, 2022, the House of Representatives passed the Forced Arbitration Injustice Repeal ("FAIR") Act, which would ban employers from enforcing pre-dispute arbitration agreements against employees.[110] The FAIR Act's predominantly partisan support makes it unlikely that it will pass in the current Senate, but suggests that the federal arbitration policy may continue to shift toward employees' favor.[111]

Employees are further disadvantaged when employers hedge whether they are actually going to pursue arbitration. Employers' delay in pursuing arbitration puts employees who have already begun to engage in litigation at a disadvantage—it wastes time, money, and the court's and employee's resources. Thus, the "testing the waters" approach undercuts most of the benefits that arbitration is supposed to hold over the litigation process in

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[103] *Id.*

[104] Colvin, *supra* note 101, at 6.

[105] *Employment Arbitration Statistics: Is it Working?*, ADR TIMES (May 26, 2021), https://www.adrtimes.com/employment-arbitration-statistics/ [https://perma.cc/E632-55DW].

[106] WARE & RAU, *supra* note 102.

[107] Mark Gough, *A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation*, 74 LR REV. 875, 875 (2021).

[108] *Id.*

[109] Lisa Nagele-Piazza, *House Passes Bill to Ban Pre-Dispute Employment Arbitration Pacts*, SHRM (Mar. 21, 2022) https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/house-passes-bill-to-ban-pre-dispute-employment-arbitration-pacts.aspx [https://perma.cc/K8ND-4R6N].

[110] *Id.*

[111] *See* Godstein & Bartley, *supra* note 96.

the first place. State and federal courts alike have employed different tests in determining waiver.[112] The majority of both state and federal systems have added an additional prejudice requirement.[113] To preserve the integrity of the arbitration process and its own precedent, the Supreme Court correctly removed the prejudice requirement from the arbitration waiver analysis, but the Court should have gone a step further by explicitly adopting a uniform traditional waiver analysis.

B. The Court Was Correct in Banning a Prejudice Requirement

The circuit majority’s use of a prejudice requirement in arbitration waiver analysis was unique, unnecessary, and contrary to precedent.[114] At the time *Morgan* was decided, only the Court of Appeals for the Seventh and D.C. Circuits followed the traditional waiver analysis.[115] However, most courts *used* to follow this equal-treatment approach.[116] Since the mid-1900s, courts have made a slow migration to the pro-employer policy of including a prejudice requirement, and the Supreme Court of the United States did not intervene.[117] Although the Court has repeatedly held that pre-dispute arbitration agreements should be placed on “an equal footing with other contracts,”[118] many of these jurisdictions did not apply the same prejudice requirement to non-arbitration contractual waiver analyses. Nor does the FAA require a showing of prejudice.[119] As *Morgan* demonstrates, the unclear prejudice requirement not only allowed but *incentivized* employers to undermine the unique benefits of arbitration—it burdened the court system, wasted time, and increased costs to the other party. According to the National Academy of Arbitrators, “[a]llowing a party to participate in litigation until they cause prejudice leads to games and inefficiencies and should be soundly rejected.”[120] Had the Court ruled differently, it would have perpetuated the problems that employees like Morgan faced—a plaintiff would be needlessly forced to spend time and money on discovery and early motion practice, only for the employer to decide to force arbitration.[121]

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[112] *Supra* Part III.

[113] *Supra* Part III.

[114] Barrowclough, *supra* note 6.

[115] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712 n.2 (2022).

[116] *Id.* at 1714.

[117] *Id.* at 1713.

[118] Rent-A-Center, W. v. Jackson, 561 U.S. 63, 67 (2010).

[119] *Morgan*, 142 S. Ct. 1708, 1714 (2022).

[120] Brief for National Academy of Arbitrators as Amici Curiae Supporting Petitioner, Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022) (No. 21-328), 2022 WL 123240, at *13 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)).

[121] Lindsay Sampson Bishop & John L. Gavin, *U.S. Supreme Court to Address Prejudice Requirement for Waiver of Arbitration Agreements*, NAT’L REV. (Feb. 28,

The additional burden of a prejudice requirement also would have further exacerbated the pro-employer tendency of arbitration in the United States. Over sixty million American workers cannot pursue their claims in court and instead must submit to arbitration procedures that research shows overwhelmingly favor employers.[122] Most of these workers were subject to boilerplate terms in an employment agreement that they had no power to negotiate in a field in which employers are repeat players.[123] Corporations have also been criticized by consumers and employees alike for "burying" arbitration clauses within long agreements, or worse, in the fine print.[124] Decades ago, Montana tried to address this concern by enacting a statute that made a contract's arbitration clause unenforceable unless a notice of the clause was "typed in underlined capital letters on the first page of the contract."[125] However, the Supreme Court of the United States held that the FAA preempted this special arbitration notice requirement.[126] Employer-promulgated pre-dispute arbitration agreements in the nonunion workplace are commonly referred to as "mandatory arbitration."[127] The loss of transparency and publicity accompanying the shift from litigation to arbitration further disadvantages workers.[128] Companies that require employees to arbitrate future legal disputes "can often draw a heavy veil of secrecy around allegations of misconduct and their resolution. That means that firms have less to worry about if they violate the law."[129]

The Supreme Court correctly resolved this issue by banning federal courts from factoring in prejudice. It puts arbitration on the same footing as all other contracts, promotes efficiency, and levels the playing field between employees and employers.[130] Judge Posner put it aptly in his Seventh Circuit opinion favoring this approach:

2022), https://www.natlawreview.com/article/us-supreme-court-to-address-prejudice-requirement-waiver-arbitration-agreements [https://perma.cc/6W79-NX35].

[122] Alexander J.S. Colvin, *The growing use of mandatory arbitration*, ECON. POL'Y INST. 1, 10 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/2VJ2-BE6J].

[123] *Id.* at 2.

[124] Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/ [https://perma.cc/Y5AJ-3NEG].

[125] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 684 (1996).

[126] *Id.* at 683.

[127] STEPHEN J. WARE & ALAN SCOTT RAU, ARBITRATION 78 (Saul Levmore et al. eds., 4th ed. 2020).

[128] *Id.* at 77.

[129] *Id.*

[130] Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

> In determining whether a waiver has occurred, the court is not to place its thumb on the scales; the federal policy favoring arbitration is, at least so far as concerns the interpretation of an arbitration clause, merely a policy of treating such clauses no less hospitably than other contractual provisions.[131]

C. The Court Should Have Adopted a Uniform, Traditional Contract Waiver Test

By getting rid of the prejudice requirement, the Court has made significant strides toward providing a more consistent federal standard for waiver analysis. Previously, there was not only inconsistency across states and circuits, but there was inconsistency within them, too.[132] Four state supreme courts shared the minority view that prejudice should not be required, and each fell in circuits that followed the majority view.[133] The Court recognized the importance of this issue when it granted certiorari to a similar case in 2011, but that lawsuit was dismissed before the Court could act.[134] The number of splits and variations speaks to the question's divisiveness and the need for courts to have a uniform test. Had the Court gone the extra step and adopted a traditional contractual waiver test, it would have provided consistency for courts to apply across a variety of contracts. Employers and employees stood to benefit from a uniform federal test, too. Sixty-five percent of companies with at least 1,000 employees use mandatory arbitration policies.[135] The use of arbitration by massive, nationwide employers creates confusion for companies and provides employers the opportunity to engage in forum shopping to seek out jurisdictions with more favorable waiver tests, or to file a federal claim if unsuccessful under the state court's test, or vice versa.[136]

The Court stopped short of providing such a uniform waiver test, however. Instead, it gave the Eighth Circuit the option to use what was left of its current test after removing the prejudice requirement, which asked whether Sundance knowingly relinquished its right to arbitration by acting inconsistently, *or* it could develop a different procedural framework.[137] The Southern District of New York pointed out that the

[131] Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995).

[132] Petition for Writ of Certiorari at 4, Morgan v. Sundance 142 S. Ct. 1708 (No. 21-328), 2021 WL 3931342 at *4.

[133] *Id.* at 20.

[134] Citibank, N.A. v. Stok & Assocs., P.A., 387 F. App'x 921 (11th Cir. 2010), *cert. granted*, 562 U.S. 1215 (2011), *and cert. dismissed*, 563 U.S. 1029 (2011).

[135] Colvin, *supra* note 101, at 2.

[136] Timothy Leake, *Arbitration Waiver and Prejudice*, 119 MICH. L. REV. 397, 420 (2021).

[137] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022).

Morgan Court essentially suggested that "the Eighth Circuit should merely strip analysis of prejudice from its existing test for waiver of the right to arbitrate, rather than applying the Circuit's standard test for evaluating waiver in cases not involving arbitration agreements."[138] Yet, the rest of the opinion seemingly instructs courts to adopt a general waiver analysis so that arbitration is on equal footing as other contracts.[139] For some circuits, the distinction between a traditional waiver test and an existing arbitration waiver test sans prejudice analysis may be mostly semantical. For example, the Eighth Circuit holds that general contractual waiver requires an intentional relinquishment of a known right, which is nearly identical to the stripped-down option of knowingly relinquishing a right to arbitration by acting inconsistently with that right.[140] But in the Second Circuit, where the Southern District of New York falls, more significant differences exist: "while the general test for waiver of a contractual right considers intent to waive, the test for waiver of the right to arbitrate considers only the length of time elapsed and the amount of litigation to date."[141] The Southern District of New York noted that courts may have to interpret whether *Morgan* instructs courts to adopt a general waiver analysis or to strip a prejudice requirement from their existing arbitration waiver analysis.[142] The Court could have prevented confusion and ensured that arbitration is placed on equal footing as other contracts by simply requiring federal courts to apply the same waiver test to *all* contracts, arbitration included.

D. The Court Should Have Reversed the Eighth Circuit's Holding in Morgan

The Court again stopped just short of resolving an issue by remanding *Morgan* rather than reversing it. Had the Court adopted and applied the traditional contractual waiver test, Morgan clearly would have prevailed, and the Eighth Circuit admitted as much.[143] The trial court found that Sundance had taken a number of actions that "substantially invoked the litigation machinery,"[144] including, but not limited to, filing over a dozen affirmative defenses, filing a motion to dismiss or stay, filing an answer,

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[138] Herrera v. Manna 2d Ave. LLC, No. 1:20-CV-11026-GHW, 2022 WL 2819072, at *7 (S.D.N.Y. July 18, 2022).

[139] *Id.*

[140] *Id.*

[141] *Id. at* 8.

[142] *Id.*

[143] Morgan v. Sundance, Inc., 992 F.3d 711, 714 (8th Cir. 2021), *cert. granted*, 142 S. Ct. 482 (2021), *and vacated and remanded*, 142 S. Ct. 1708 (2022).

[144] Morgan v. Sundance, Inc., No. 418-CV-316-JAJ-HCA, 2019 WL 5089205 at *6 (S.D. Iowa June 28, 2019), *rev'd and remanded*, 992 F.3d 711 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. 1708 (2022).

and making several requests for continuances, all without mentioning the arbitration agreement.[145] The fact that the Eighth Circuit repeatedly referred to Sundance's actions as its "litigation strategy" is an indication that it did in fact substantially invoke the litigation machinery.[146] Despite acknowledging that Sundance acted inconsistently with its right to arbitrate, the Eighth Circuit held that this did not prejudice Morgan.[147]

Even though the Court failed to expressly adopt a traditional contractual waiver test, it still should have reversed *Morgan* in accordance with the Federal Rules of Civil Procedure. The National Academy of Arbitrators filed a Brief for *Amicus Curiae* in Support of Petitioner and made a compelling argument that, because the Court has found that an arbitration clause is just "a specialized kind of forum-selection clause," which is also a matter of venue, Sundance waived this under Federal Rule of Civil Procedure 12(h) when it did not raise this statutory venue objection in the first pleading or motion.[148] Notably, Federal Rule of Civil Procedure 12(h) has no prejudice requirement.[149] Further, "a motion to compel arbitration is akin to a *forum non conveniens* motion invoking an ordinary forum-selection clause."[150] Accordingly, Sundance should have compelled arbitration at its earliest possible opportunity; by failing to do so, it waived this procedural right under the Federal Rules of Civil Procedure.

VI. CONCLUSION

The *Morgan* Court had the opportunity to firmly address the confusing question of arbitration waiver. The Court could have provided a uniform approach to waivers under contract law or reversed the Eighth Circuit to establish more clarity on the issue. It ultimately failed to fully answer the arbitration waiver question, but its decision was at least a first step in the right direction. While it stopped short of providing a uniform waiver analysis, the Court began to level the playing field between employees and employers bound by arbitration agreements by abolishing the prejudice requirement in waiver analysis. Employers who require job applicants to agree to mandatory arbitration begin the relationship with an imbalance of bargaining power. Employers' use, as in *Morgan*, of

[145] *Id.* at 7.

[146] *Morgan*, 992 F.3d at 715.

[147] *Id.* at 714–15. ("This all bears on the third element: prejudice. 'Whether inconsistent actions constitute prejudice is determined on a case-by-case basis.'").

[148] Brief for National Academy of Arbitrators as Amici Curiae Supporting Petitioner at 3, Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022) (No. 21-328), 2022 WL 123240, at *3 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)).

[149] *Id.*

[150] *Id.* at 9.

strategic delays in invoking arbitration wrongly disadvantages employees and undermines the attributes of arbitration that Congress sought to invoke when it enacted the FAA. Removing the prejudice requirement was an important step toward safeguarding employee rights.