No. 21-328

In the Supreme Court of the United States

ROBYN MORGAN, PETITIONER

v.

SUNDANCE, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of

[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

concern to the nation's business community. See, *e.g.*, *Badgerow* v. *Walters*, No. 20-1143 (2021).

Many members of the Chamber and the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. In reliance on the policy reflected in the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, and this Court's consistent endorsement of arbitration, Chamber members have structured millions of contractual relationships around arbitration agreements.

Businesses can appear as plaintiffs or defendants (or both) in litigation, and thus have strong interests in having clear, predictable, and balanced rules for how and when a defendant must invoke their right to arbitration. The business community also has strong reliance interests in having arbitral agreements enforced to the same degree as other state contract rights, as the FAA requires.

The FAA is properly understood to protect those interests—and those of all litigants—by directing federal courts to the Federal Rules of Civil Procedure for deciding the procedural questions at the heart of this case. The Federal Rules supply the necessary clarity, predictability, and balance, and they protect against anti-arbitration discrimination by treating arbitration the same way as every other contract-based affirmative defense. The Federal Rules encourage promptness by giving defendants a window to raise new defenses by right; they enable the court to forgive delay after that point in the absence of prejudice; and they enable the court to protect against gamesmanship, as that kind of prejudice is a sufficient basis to prohibit the belated invocation of arbitration.

Petitioner's no-prejudice approach, by comparison, would undermine both interests by making important arbitration rights hinge on amorphous state-law concepts of implied waiver. The rule is both unpredictable and harsh, as a party could lose important rights to arbitration based on an inconsequential delay that the court nonetheless views as too long. And because the standard is so ill-defined, it invites manipulation and "the kind of 'hostility to arbitration'" that the FAA is designed to combat and that this Court has repeatedly stepped in to prevent. *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1428 (2017) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)).

SUMMARY OF ARGUMENT

1. The right to invoke arbitration is important to many businesses, and the FAA establishes that it is not irrevocably lost merely because of inconsequential delays. Section 3 and Section 6 of the FAA together direct federal courts to the Federal Rules of Civil Procedure in deciding whether a defendant is "in default," 9 U.S.C. 3, and accordingly has lost their right to arbitrate a dispute due to delay in invoking arbitration in ongoing litigation. Section 3 provides that courts "shall" grant a stay of litigation unless the movant is "in default in proceeding with such arbitration." *Ibid.* The term "default" means "[t]he omission or failure to fulfill a duty." *Black's Law Dictionary* 342 (2d ed. 1910). And rules of procedure are the natural place to look for an answer to whether a party has "fulfill[ed] [their] duty" to timely invoke arbitration. Section 6 reinforces the point, by requiring a motion to be made "in the manner provided by law." 9 U.S.C. 6.

The Federal Rules establish a familiar framework governing the manner for making motions and otherwise raising defenses in federal court, including how long a defendant has a right to invoke a defense and when a defendant's delay is forgiven. The Federal Rules apply in "all" civil cases in federal court, including those involving the FAA. See Fed. R. Civ. P. 1, 81(a)(6)(B). And under the Federal Rules, leave is "freely give[n]" to add contract-based affirmative defenses belatedly, Fed. R. Civ. P. 15(a)(2), so long as the plaintiff does not suffer prejudice as a result. The most straightforward and predictable way to resolve this case is to conclude that this same familiar framework applies to arbitration as well: If the defendant moves for a stay at a time it can

still properly invoke a new defense under this framework, the defendant is not "in default" under Section 3, the motion was filed "in the manner provided by law," and the stay "shall" be granted. 9 U.S.C. 3, 6.

Petitioner asserts that the saving clause in Section 2 of the FAA applies and incorporates a body of state law that allows for "implied waiver" by litigation delay, without proof of prejudice. Pet. Br. 15, 32–37. That is wrong. Section 3 and Section 6 together specifically answer the procedural question at the heart of this case, directing federal courts to the rules of procedure in deciding whether the party seeking a stay is "in default" through their litigation conduct. Section 2 has no further role to play.

Moreover, even if Section 2 applied, an irrevocable default still would not occur when a delay does not prejudice the other side and instead is inconsequential. As respondent puts it, "all state-law roads lead to a prejudice requirement." Resp. Br. 4.

First, forfeiture, estoppel, or laches—not waiver—provide the proper rubric for determining whether a party is too late in raising an argument. And petitioner does not dispute that forfeiture, laches, and estoppel require prejudice. Pet. Br. 23–29. Petitioner's focus on "implied waiver" is thus misplaced. Petitioner's approach is also unpredictable, given the overlap and uncertain boundaries between implied waiver by delay, forfeiture, estoppel, and laches.

Second, even if "implied waiver" were the correct doctrine, the answer would still depend on the rules of procedure. State law is uniform that waiver implied from conduct arises only when that conduct is clearly and unequivocally inconsistent with an intent to arbitrate. If the defendant can still properly raise

arbitration as a defense as a matter of procedure (*i.e.*, the defendant can still invoke it by right or the defense is belated but there is no prejudice), then the defendant's conduct—participation in litigation before that point—is not clearly inconsistent with their intent to invoke arbitration in the future. A court thus need only ensure compliance with ordinary procedural requirements, and need not delve into any question of "implied waiver" under state contract law.

Third, in every state (with the possible exception of Louisiana), a defendant may *revoke* the waiver of an executory promise so long as the plaintiff has not made a material change in their position in reliance on the implied waiver. 13 Williston on Contracts § 39:20 (4th ed. 2021). And a promise to arbitrate an ongoing dispute is a quintessential example of an executory promise, because the dispute has not yet been resolved so performance remains in the future.

Accordingly, even state contract law recognizes that parties do not irrevocably lose important rights to future performance merely based on an "implied waiver." To make such a waiver irrevocable, there must be prejudice. In any event, the timeliness of a motion under Section 3 is a procedural question that is answered by ordinary rules of procedure.

2. Using the FAA's text and the Federal Rules to answer the question presented establishes a familiar and clear rule for defendants that seek to arbitrate: follow the rules of procedure. Defendants already need to follow those timelines whenever they are a defendant, and thus the framework above ensures evenhanded treatment of arbitration. In particular, the Federal Rules encourage prompt assertion of arbitration as a defense, by giving the defendant an entitlement to do so

only until the time of the initial answer or an amendment by right. Yet they also help to prevent against the loss of important rights based on inconsequential delays, as the Federal Rules ordinarily allow belated invocation of defenses in the absence of prejudice. And because they focus on prejudice, the Federal Rules protect victims of gamesmanship, as such prejudice readily justifies denial of leave.

By contrast, petitioner's no-prejudice rule is both unpredictable and harsh, triggering the loss of important rights due to inconsequential delays. Petitioner's rule cannot supply clear answers about when a defendant's delay is too "inconsistent" with the intent to invoke arbitration so as to constitute an implied waiver, thus leaving litigants in a fundamentally unpredictable position. And if the court determines the defendant has crossed an invisible line and is too late, even by a day, the right to arbitrate is permanently lost even if the delay is otherwise inconsequential.

To make matters worse, petitioner's amorphous rule of "implied waiver" invites discrimination against arbitration. Congress enacted the FAA to overcome hostility to arbitration and require that it be placed on equal footing with other state contract rights. But petitioner's rule would expose defendants to greater risk of hostility to arbitration by eliminating a critical limit on waiver that applies to every contract defense and every other executory obligation. Petitioner's view would thus undermine the very antidiscrimination principle that petitioner purports to protect. The better path is simply to treat arbitration like any other defense, subject to ordinary procedural rules, under which prejudice is the touchstone.

ARGUMENT

I. Prejudice Dictates Whether A Defendant May Belatedly Invoke Arbitration In Federal Litigation

The FAA establishes a "national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). To implement that policy, the FAA empowers a defendant to file a motion for a stay to halt litigation of a dispute that should be arbitrated. See 9 U.S.C. 3. The FAA requires that parties seeking to stay litigation file a motion that complies with applicable rules of procedure. 9 U.S.C. 6. In federal court, the ordinary rule is that a defendant can belatedly assert a defense in the absence of prejudice. That same rule is properly understood to apply to arbitration as well. An inconsequential delay is thus insufficient to trigger the permanent loss of that important right.

A. The FAA Directs Federal Courts To the Federal Rules of Civil Procedure In Deciding Whether Arbitration Has Been Timely Raised

Section 3 provides that a court "shall" grant a motion to stay litigation of a dispute that is subject to an arbitration agreement, "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. 3. The stay is accordingly mandatory so long as the party is not "in default."

The FAA does not define "default," but dictionaries from the time of the FAA's enactment define the term to mean "[t]he omission or failure to fulfill a duty." *Black's Law Dictionary* 342; Walter A. Shumaker & George Foster Longsdorf, *Cyclopedia Law Dictionary* 293 (2d ed. 1922) (similar); John Bouvier, *Bouvier's Law Dictionary and Concise Encyclopedia* 814 (1914)

(similar). That meaning has not changed since the FAA's enactment. See *Black's Law Dictionary* (11th ed. 2019) ("The omission or failure to perform a legal or contractual duty."); *Webster's New International Dictionary* 686 (2d ed. 1950) (similar); *Random House Dictionary of English Language* (unabridged ed. 1967) (similar). Section 3 thus requires the party moving for a stay of litigation—usually, the defendant—to "fulfill [their] duty" under the law, and in particular to "fulfill [their] duty" to invoke arbitration in a timely manner as required by applicable law.

Neither the FAA nor any other federal statute sets a time limit for moving for a stay of arbitration. In the absence of a contract that itself sets a time limit, a defendant must fulfill its duty to raise arbitration in the manner required by applicable rules of procedure. After all, the questions are essentially (1) when a defense must be invoked; (2) whether the belated invocation of a defense can be forgiven; and (3) if so, under what circumstances. Those are ordinary procedural questions that arise in countless other cases. And the Federal Rules provide the framework for answering those questions in federal court. See, *e.g.*, *Klunder* v. *Brown Univ.*, 778 F.3d 24, 34–35 (1st Cir. 2015).

The FAA's text confirms the point. Section 6 provides that any request to arbitrate, whether by a motion to stay (under Section 3) or compel (under Section 4), "shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise … expressly provided" by the FAA. 9 U.S.C. 6. The FAA does not expressly provide time limits, so Section 6 points to the ordinary rules governing "the manner" of "making and hearing of motions." See *ibid.*

The Federal Rules establish those rules in federal court.[2] Federal Rule of Civil Procedure 1 states that the Federal Rules apply "in *all* civil actions and proceedings … except as stated in Rule 81." Fed. R. Civ. P. 1 (emphasis added). And Rule 81 provides that the Federal Rules "govern proceedings under" Title 9 "relating to arbitration," unless the FAA explicitly "provide[s] other procedures." Fed. R. Civ. P. 81(a)(6)(B). The FAA does not provide otherwise, so the Federal Rules govern whether the right to arbitrate has been raised in a timely manner. See *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995).

B. The Federal Rules of Civil Procedure Permit The Movant To Belatedly Raise Arbitration As A Defense, Absent Prejudice To the Nonmovant

The Federal Rules provide a clear and familiar framework for determining whether a defendant has raised arbitration in a timely manner or instead is in default due to delay: The same framework that governs the timeliness of invoking other affirmative defenses, including other contract defenses, before trial. The defendant should invoke such defenses by the time of the answer. But beyond that point, the Federal Rules are permissive and courts should freely allow the assertion of the defense, so long as the delay has not caused prejudice sufficient to justify denying the request. Prejudice is central to determining whether the right to invoke arbitration has been irretrievably lost.

1. As an initial matter, the Federal Rules do not establish the harsh rule that the right to invoke

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[2] In state court, state procedural rules would govern the timeliness of the demand for arbitration, subject to the FAA's ordinary limitation that those procedures cannot be discriminatory.

arbitration is permanently lost if the defendant fails to move for a stay in a pre-answer motion. The Federal Rules impose that strict regime for only a handful of expressly enumerated defenses—such as personal jurisdiction and improper venue—which must be raised in an answer or pre-answer motion, or else be permanently waived. See Fed. R. Civ. P. 12(h)(1), 12(b)(2)–(5). Motions to stay litigation or to compel arbitration are conspicuously absent from that list. The Federal Rules thus do not provide that arbitration rights are defaulted if not raised at the first opportunity.

2. The Federal Rules are otherwise more permissive and do not trigger default without prejudice when raising a defense before trial. Under the Rules, "any" other "avoidance or affirmative defense" must be raised in the answer, Fed. R. Civ. P. 8(c), filed within 21 days, Fed. R. Civ. P. 12(a)(1)(A)(i). But those defenses are not permanently lost simply because the defendant does not include them in its answer. There is a window to file an amended answer as a matter of right. Fed. R. Civ. P. 15(a)(1). And even after the time to file an amended answer has expired, courts still "should freely give leave" to amend and add additional defenses before trial "when justice so requires." Fed. R. Civ. P. 15(a)(2).

Prejudice is central to the analysis of whether leave should be granted. As this Court has explained, Federal Rule of Civil Procedure 15 establishes a "liberal rule[]" that is "designed to facilitate the amendment of pleadings *except where prejudice to the opposing party would result*." *United States* v. *Hougham*, 364 U.S. 310, 316 (1960) (emphasis added). Elsewhere, this Court has explained that, "[i]n the absence of … undue delay, bad faith or dilatory motive," "repeated failure to cure deficiencies," "undue prejudice to the opposing party," or

"futility of amendment," then "the leave sought should, as the rules require, be 'freely given.'" *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). The prejudice inquiry includes all of the various considerations listed in *Foman*, thus providing a capacious standard that gives courts the necessary tools to ensure fair play and protect against gamesmanship. Under that standard, "if the court is persuaded that no prejudice will accrue, the amendment should be allowed." 6 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 1487 (3d ed. 2021).

It is also well-recognized that this same prejudice-based approach applies to the timeliness of asserting a new defense by motion. A defendant may interpose an "unpleaded Rule 8(c) affirmative defense[] … by pretrial motion," so long as the filing will not produce "prejudice to the opposing party." 5 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 1278 (4th ed. 2021). So whether added by motion or pleading, an inconsequential pretrial delay is not a basis for denying leave to assert a defense. Prejudice is required.

3. The same familiar rules govern the timeliness of a motion for a stay of litigation or to compel arbitration under the FAA, as there is no sound basis under the Federal Rules to set time limits for invoking arbitration that are unlike the time limits for raising "any" other "avoidance or affirmative defense." Fed. R. Civ. P. 8(c). "[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)) (internal quotation marks omitted). Arbitration is an "avoidance or affirmative defense," Fed. R. Civ. P 8(c), because it "does not tend to controvert the opposing party's prima

facie case as determined by the applicable substantive law." *Hassan* v. *U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988) (quoting 2A J. Moore, Moore's Federal Practice ¶ 8.27[3] (2d ed. 1985)) (internal quotation marks omitted). Rule 8(c) also expressly lists other contract-based affirmative defenses, like "accord and satisfaction" and "arbitration and award," for when an arbitration has already completed. Fed. R. Civ. P. 8(c). A request to arbitrate an ongoing dispute should be treated the same way.

This familiar framework makes the rule simple: a defendant is not "in default" if it invokes arbitration in a timely manner, as determined by the Federal Rules. Though formal amendment to the answer is not required, a motion for a stay of litigation is timely filed and therefore the defendant is not "in default" so long as it is not too late to interpose that defense in a pleading, *i.e.*, so long as the defendant can still raise arbitration as a matter of right, or the court would grant leave to raise it because of the absence of prejudice. These standard procedural rules provide the most straightforward way to resolve the question presented.

C. Section 2's Saving Clause Does Not Apply To Waiver By Litigation Conduct

Contrary to petitioner's argument, the FAA does not make this familiar question of procedure hinge upon substantive state contract law doctrines of waiver, forfeiture, estoppel, or laches. Section 2 of the FAA provides 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. That "saving clause permits agreements to arbitrate to be invalidated by 'generally

applicable contract defenses.'" *Concepcion*, 563 U.S. at 339 (citation omitted). But "generally applicable contract defenses" do not ordinarily govern the question of whether a defendant has timely raised a defense during ongoing litigation. Those questions—when to invoke a defense in litigation and when a defense is permanently lost due to litigation delay—are ordinarily questions of procedure, not substantive contract law. See pp. 9–10, *supra*.

Congress reinforced that point in Section 3, directing that a court "shall" grant a motion to stay litigation unless the applicant is "in default." 9 U.S.C. 3. Section 2, by comparison, does not speak directly to a party's litigation conduct. It addresses "the enforceability of arbitration agreements" generally. *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009). And under the "general/specific canon," "the specific presumptively governs[.]" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 648 (2012). Otherwise, the FAA would make the very same question subject to overlapping yet different and potentially conflicting standards, with a defendant's delay preventing them from invoking arbitration even when they are not "in default" within the meaning of Section 3. That would allow Section 3's specific "in default" language to be "swallowed by the [more] general [language in Section 2]," thus "violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Id.* at 645 (citation and internal quotation marks omitted). Petitioner identifies no sound basis for interpreting the FAA in such a strange and self-defeating manner.

Moreover, Section 2's exception does not even encompass an implied waiver of the ability to invoke

arbitration of a particular dispute because of delay in invoking the defense in ongoing litigation of that same dispute. Section 2 "permits … generally applicable contract defenses, such as fraud, duress, or unconscionability," *Concepcion*, 563 U.S. at 339 (citation and internal quotation marks omitted), to revoke a contract or otherwise "to invalidate arbitration agreements." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). But the so-called "waiver" at issue here is a *dispute-specific* defense. It limits only the defendant's rights to invoke arbitration of the particular dispute in the particular litigation because of the defendant's delay. Even if the defendant is barred from invoking arbitration within the particular court due to their conduct in that particular litigation, the arbitration clause would remain fully valid and enforceable for any subsequent dispute between the parties. The litigation waiver is thus properly understood not to affect the "valid[ity]," "enforceab[ility]," or "irrevocab[ility]" of the agreement itself, and thus to fall outside the scope of Section 2's exception. 9 U.S.C. 2. Rather, the party would be "in default" and thus unable to obtain to a stay.

D. Even If Section 2 Applies, Prejudice Would Still Be Required

Even if petitioner were correct that Section 2 means that substantive state contract law doctrines of waiver, forfeiture, estoppel, and laches apply to the procedural question of whether to permit the belated invocation of arbitration as a defense, petitioner would still be wrong to exclude prejudice from the analysis. State law incorporates a prejudice requirement into the analysis by at least three separate routes.

First, the question here is more aptly described as an issue of forfeiture, estoppel, or laches. Those doctrines all require prejudice, Pet. Br. 23–29, and petitioner provides no sound basis for treating "implied waiver" so differently from its brethren, particularly when the lines between them are so malleable. See *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004) ("jurists often use the words [forfeiture and waiver] interchangeably."). A court that finds no "forfeiture" because the delay is inconsequential could repackage that same delay as an "implied waiver" and thereby deny a motion to stay that the FAA would otherwise require the court to grant. That is a recipe for discrimination, not even-handed treatment of arbitration.

Second, even if "implied waiver" were the proper rubric, the threshold state-law question of whether a defendant's litigation conduct constitutes an implied waiver would turn on their ability to raise arbitration under applicable rules of procedure.[3] Consider the ordinary standard: "An intent to waive will not be inferred from doubtful or equivocal acts or language"; "there must be a clear, unequivocal, and decisive act … so consistent with an intention to waive that no other

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[3] If this case arises under Section 2, the Court does not need to answer any questions of state contract law, other than identifying the role the rules of procedure and prejudice play under relevant aspects of the state law of forfeiture or waiver. Note, however, that even petitioner (Pet. Br. 23 n.11) concedes several states require prejudice in some form in the waiver analysis. See, *e.g., Maak* v. *IHC Health Servs., Inc.*, 372 P.3d 64, 73 (Utah Ct. App. 2016); *Hyre* v. *Denise*, 449 S.E.2d 120, 124 (Ga. Ct. App. 1994) ; *Anderson* v. *Coop Ins. Cos.*, 895 A.2d 155, 159 (Vt. 2006); *Guar. Title & Tr. Co.* v. *Babbitt Bros. Trading Co.*, 53 P.2d 734, 736 (Ariz. 1936); *Masser* v. *London Operating Co.*, 145 So. 79, 83 (Fla. 1932).

reasonable explanation is possible." 13 Williston on Contracts § 39:28. If, under applicable procedural rules, the defendant can still properly invoke arbitration as a defense, then their participation in litigation before that point is not "unequivocal[ly]" inconsistent with their intent to invoke arbitration in the future. See *ibid.* And because prejudice is a factor in deciding the procedural question, it is a factor in deciding whether the delay triggers an implied waiver in the first place.

Third, even if waiver can be implied from conduct as a matter of state contract law without a showing of prejudice, waiver standing alone is not sufficient to decide the question presented. What matters is not whether a defendant has *waived* their ability to invoke arbitration through their delay. Rather, what matters is whether the defendant can *revoke* any prior implied waiver and invoke arbitration notwithstanding their earlier delay. And in every state (with the possible exception of Louisiana), a defendant can revoke a prior waiver of an executory obligation like a promise to arbitrate, so long as the plaintiff has not yet relied to their detriment on the waiver.[4]

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[4] Ala. Code § 7-2-209(5); Alaska Stat. Ann § 45.02.209(e); *AGA S'holders, LLC* v. *CSK Auto, Inc.*, 589 F. Supp. 2d 1175, 1185 (D. Ariz. 2008) (citing Ariz. Rev. Stat. Ann. § 47-2209(E)); *Bio-Tech Pharmacal, Inc.* v. *Int'l Bus. Connections, LLC,* 184 S.W.3d 447, 452 (Ark. Ct. App. 2004) (quoting Ark. Code Ann. § 4-2-209(5)); *Lally* v. *Allstate Ins. Co.*, 724 F. Supp. 760, 763 (S.D. Cal. 1989), *aff'd*, 930 F.2d 28 (9th Cir. 1991) (Tbl); *Lease Fin., Inc.* v. *Burger*, 575 P.2d 857, 861–62 (Colo. App. 1977) (quoting Colo. Rev. Stat. Ann. § 4-2-209(5)); *RBC Nice Bearings, Inc.* v. *SKF USA, Inc.*, 123 A.3d 417, 426 (Conn. 2015); *Amirsaleh* v. *Bd. of Trade of City of N.Y., Inc.*, 27 A.3d 522, 530 (Del. 2011); *BMC Indus., Inc.* v. *Barth Indus., Inc.,* 160 F.3d 1322, 1332–34 (11th Cir. 1998); *Integrated Micro Sys., Inc.* v. *NEC Home Elecs. (USA), Inc.*, 329 S.E.2d 554, 559 (Ga. Ct. App.

1985); Haw. Rev. Stat. Ann § 490:2-209(5); Idaho Code Ann. § 28-2-209(5); *Cent. Ill. Pub. Serv. Co.* v. *Atlas Mins., Inc.*, 965 F. Supp. 1162, 1173 (C.D. Ill. 1997), *aff'd*, 146 F.3d 448 (7th Cir. 1998); Ind. Code Ann. § 26-1-2-209(5); *Found. Prop. Invs., LLC* v. *CTP, LLC*, 186 P.3d 766, 776 (Kan. 2008); *Ky. Utils. Co.* v. *S. E. Coal Co.*, 836 S.W.2d 392, 400–01 (Ky. 1992), *as modified on denial of reh'g* (Aug. 25, 1992) (quoting Ky. Rev. Stat. Ann. § 355.2-209(5)); *Cives Corp.* v. *Callier Steel Pipe & Tube, Inc.*, 482 A.2d 852, 857 (Me. 1984) (quoting Me. Rev. Stat. Ann. tit. 11 § 2-209(5)); *Brockington* v. *Grimstead*, 933 A.2d 426, 442–43 (Md. Ct. Spec. App. 2007), *aff'd*, 10 A.3d 168 (Md. 2010); *Dynamic Mach. Works, Inc.* v. *Mach. & Elec. Consultants, Inc.*, 831 N.E.2d 875, 877 (Mass. 2005) (quoting Mass. Gen. Laws ch. 106, § 2-209(5)); *Johnson Controls, Inc.* v. *Jay Indus., Inc.*, 459 F.3d 717, 725 (6th Cir. 2006) (citing Mich. Comp. Laws Ann § 440.2209(5)); *Thompson* v. *Truesdale*, 63 N.W. 259, 259–60 (Minn. 1895); Miss. Code Ann. § 75-2-209(5); *Meyer Milling Co.* v. *Baker*, 43 S.W.2d 794, 796–97 (Mo. 1931); *Westmont Tractor Co.* v. *Viking Expl., Inc.,* 543 F. Supp. 1314, 1319–20 (D. Mont. 1982) (discussing Mont. Code Ann. § 30-2-209(5)); Neb. Rev. Stat. Ann. UCC § 2-209(5); Nev. Rev. Stat. Ann. § 104.2209(5); N.H. Rev. Stat. Ann. § 382-A:2-209(5); *Bleyer* v. *Veeder*, 183 A. 203, 206 (N.J. Ch. 1936); *In re W. Wood Prod., Inc.*, No. 11-12-10057 JS, 2013 WL 1386285, at *15 (Bankr. D.N.M. Apr. 4, 2013) (quoting N.M. Stat. Ann. § 55-2-209(5)); *Comput. Strategies, Inc.* v. *Commodore Bus. Machs., Inc.*, 483 N.Y.S.2d 716, 722 (App. Div. 1984) (quoting N.Y. U.C.C. Law § 2-209(5)); *Thermal Design, Inc.* v. *M & M Builders, Inc.*, 698 S.E.2d 516, 523 (N.C. Ct. App. 2010) (quoting N.C. Gen. Stat. Ann. § 25-2-209(5)); *Dangerfield* v. *Markel*, 252 N.W.2d 184, 188 (N.D. 1977) (quoting N.D. Cent. Code Ann. § 41-02-16 (2-209)); Ohio Rev. Code Ann. § 1302.12(E); *Westinghouse Credit Corp.* v. *Shelton*, 645 F.2d 869, 872–73 (10th Cir. 1981) (quoting Okla. Stat. Ann tit. 12A § 2-209(5)); *Wallstreet Props., Inc.* v. *Gassner*, 632 P.2d 1310, 1315 (Or. Ct. App. 1981); *Daniels* v. *Phila. Fair Hous. Comm'n*, 513 A.2d 501, 502 (Pa. Commw. Ct. 1986); R.I. Gen. Laws Ann. § 6A-2-209(5); S.C. Code Ann. § 36-2-209(5); S.D. Codified Laws § 57A-2-209(5); *First Tenn. Bank, N.A.* v. *Nunn & Assocs., Inc.*, No. 03A019103CH96, 1991 WL 119293, at *5 (Tenn. Ct. App. July 8, 1991) (quoting Tenn. Code Ann. § 47-2-209(5)); *Hart* v. *Sims*, 702 F.2d 574, 579 (5th Cir. 1983) (quoting Tex. Bus. & Com. Code

"Under general principles of contract law, a party who has waived an executory provision of a contract may retract the waiver by notifying the other party that strict compliance … will be required unless the retraction would be unjust in light of a material change of position undertaken in reliance on the waiver." 13 Williston on Contracts § 39:20; see also U.C.C. § 2-209(5) ("A party who has made a waiver affecting an executory portion of [a] contract may retract the waiver … unless the retraction would be unjust in view of a material change of position in reliance on the waiver."); Farnsworth on Contracts § 8.05 (4th ed. 2018 & Supp. 2022-2) (similar). The Restatement states the same rule in somewhat different terms: a "manifestation of assent to … discharge" an executory obligation is not binding without consideration or its equivalent, unless "it has induced such action or forbearance as would make a promise enforceable." Restatement (Second) of Contracts § 273 (1981).[5]

A promise to arbitrate an unresolved dispute is an "executory" promise because it involves "future activity that is not yet completed." *Gaugert* v. *Duve*, 579 N.W.2d 746, 753 (Wis. Ct. App. 1998); 1 Williston on Contracts

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Ann. § 2.209(e)); Utah Code Ann. § 70A-2-209(5); Vt. Stat. Ann. tit. 9A, § 2-209(5); Va. Code Ann. § 8.2-209(5); *Cornerstone Equip. Leasing, Inc.* v. *MacLeod*, 247 P.3d 790, 796 (Wash. Ct. App. 2011); W. Va. Code Ann. § 46-2-209(5); Wis. Stat. Ann. § 402.209(5); Wyo. Stat. Ann. § 34.1-2-209(e).

[5] This ability to revoke a waiver is a specific application of the general rule that modification without consideration is not binding, unless there has been a "material change of position in reliance on the promise[d]" amendment. Restatement (Second) of Contracts § 89; 28 Williston on Contracts § 70:156 (same); 2 Corbin on Contracts § 7.6 (2021) (same).

§ 1:19; cf. 11 U.S.C. 365(b)(1). "[A]n arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought." *Highland Cap. Mgmt., L.P.* v. *Dondero (In re Highland Cap. Mgmt., L.P.)*, No. 19-34054, 2021 WL 5769320, at *6 (Bankr. N.D. Tex. Dec. 3, 2021) (internal citation and quotation marks omitted). Indeed, the FAA was adopted to override the common-law rule against the enforceability of executory arbitration agreements. See, *e.g., Atl. Fruit Co.* v. *Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924) ("[A]ny agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted."). Arbitration agreements remain executory with respect to any particular dispute until "the time for occurrence of the condition has expired"—*i.e.*, until judgment has been entered or the dispute has otherwise been resolved. Farnsworth on Contracts § 8.05.

Petitioner has no answer, and does not even mention executory obligations. Petitioner asserts that "*most* contractual rights can't be reinstated through retraction or revocation of the waiver." Pet. Br. 23 (emphasis added). But the qualifier "most" ignores the relevant exception: a waiver of an executory obligation *can* be revoked absent detrimental reliance. For example, petitioner cites Iowa case law. Pet. Br. 23 n.10 (citing *Scheetz* v. *IMT Ins. Co. (Mut.)*, 324 N.W.2d 302 (Iowa 1982)). But that case itself recognizes that waiver can be revoked for arbitration of present or "*future*" disputes. *Id.* at 304 n.2. And an Iowa statute confirms the point. See Iowa Code § 554.2209(5) ("A party who has made a waiver affecting an executory portion of the

contract may retract the waiver … unless the retraction would be unjust in view of a material change of position in reliance on the waiver.").

Petitioner's premise that "implied waiver" of arbitration is irrevocable is thus unfounded as a matter of ordinary state contract law. To the contrary, under ordinary principles of state contract law, a defendant can retract a so-called "waiver" and reassert their right to invoke arbitration, so long as the plaintiff has not made a material change in their position in reliance on the implied waiver.

Finally, even if state law ordinarily allowed for irrevocable implied waivers of other executory obligations, without proof of prejudice, the FAA still would not foreclose a pro-arbitration rule that an arbitration clause nonetheless remains valid and enforceable. Section 2 sets a floor, not a ceiling, in establishing a "'liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Whenever this Court has preempted state laws under Section 2, it is because those laws singled out arbitration for uniquely disfavorable treatment compared to other contractual rights, see, *e.g., Doctor's Assocs.*, 517 U.S. at 683, 687–88; *Kindred Nursing Ctrs.*, 137 S. Ct. at 1424–28; *Concepcion*, 563 U.S. at 340–44, 346–52, and not because state laws enunciated a pro-arbitration doctrine. Petitioner has identified no justification for transforming this Court's Section 2 jurisprudence.

In sum, an inconsequential delay is not enough to trigger the irrevocable loss of the right to invoke arbitration. For the reasons set forth above, the proper inquiry is simply to look at the Federal Rules to

determine whether the defendant is "in default," as the timeliness of making a motion in federal court is a quintessential question of procedure. And even if state substantive contract law were relevant, prejudice would still be required before mere litigation delay will trigger the binding loss of the right to invoke arbitration.

II. Petitioner's Harsh and Unpredictable Rule Would Harm The Interests of Parties to Arbitral Agreements and Invite Anti-Arbitration Discrimination

Businesses have structured countless contracts in reliance on the FAA and this Court's precedents interpreting it. This Court, like the Congress that enacted the FAA, has recognized that arbitration confers many advantages over litigation. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasizing arbitration's "simplicity, informality, and expedition"). It was to ensure that parties could enjoy arbitration's benefits and avoid courts' "'hostility to arbitration' that led Congress to enact the FAA." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1428 (citation omitted). Despite numerous warnings from this Court, state courts continue to devise "a great variety of devices and formulas" to flout the FAA's command to enforce arbitration agreements evenhandedly and as written. *Concepcion*, 563 U.S. at 342 (citation and internal quotation marks omitted).

Businesses can be both plaintiffs and defendants, and indeed businesses appear on both sides of the "v" in many arbitration cases. Their interest is accordingly the same as any party to an arbitration agreement who cannot know in advance whether they will appear as a plaintiff or as a defendant: Any such party would want

a balanced rule that takes into account both perspectives, is clear, familiar, and predictable, and protects against anti-arbitration discrimination. The framework established in the FAA's text and the Federal Rules advances all of those interests, and accordingly advances the interests of the FAA itself.

First, this approach provides clear guideposts for when a defendant must invoke their right to arbitration: The same timeframe that applies for invoking virtually any other defense in federal court. So long as the defendant moves for a stay when they can still raise new defenses as a matter of right, or moves after that but the delay has not caused prejudice so leave would be granted to add arbitration to an amended pleading, then the defendant is not "in default" and the motion "shall" be granted. That rule encourages prompt assertion of arbitration as a defense, when the defendant still may do so as a matter of right. It enables proper flexibility, allowing belated assertion of the defense when there is no prejudice. But it also protects against gamesmanship or other bad-faith or harmful delays, as such conduct provides ample basis to deny leave and thus to deny the motion as untimely and accordingly "in default." Finally, this approach subjects arbitration to the same timeliness rules as every other contract-based affirmative defense, and thus protects against anti-arbitration discrimination.

By contrast, petitioner's rule—that irrevocable waiver is triggered by "inconsistent" litigation conduct without regard to prejudice—is damaging because it is both unpredictable and unduly harsh and invites the very discrimination petitioner purports to avoid.

First, whereas the Federal Rules establish familiar guideposts for when to invoke defenses, petitioner's

approach lacks guideposts at all, leaving litigants guessing about when litigation conduct will be deemed sufficiently "inconsistent" with arbitration to constitute an implied waiver through conduct. Must arbitration appear in the very first filing? The first responsive pleading? The pre-answer motion? Before a mediation? What if there is other motion practice? Does it matter if the other motion practice is slow? What if discovery begins but duplicates what would be available in arbitration? A party may never know. And the answers could vary from state to state, without any uniformity in federal court, creating a patchwork of indiscernible and virtually unknowable rules.

Petitioner's amorphous inquiry would allow courts to find waiver even in situations where the defendant could still raise arbitration *by right* under the Federal Rules or comparable state procedures, so long as the court viewed the delay up to that point as "inconsistent" with future arbitration, thus depriving defendants of an important and familiar safe harbor. And if the defendant's delay oversteps a line that it cannot even see, the result is severe: permanent loss of the important right to arbitrate a dispute even when the delay is otherwise inconsequential and causes no prejudice. An approach that is *both* unpredictable *and* unduly harsh has little to commend it.

Petitioner asserts its harsh rule is necessary to protect against "gamesmanship." Pet. Br. 46–50. But "gamesmanship" is just a label for a kind of bad faith conduct that causes prejudice to the court or the opposing party. The prejudice inquiry under the Federal Rules already accommodates those considerations, without the harshness and unpredictability that attend petitioner's view. See pp. 11–12, *supra*. By contrast,

petitioner's focus on "inconsistency" standing alone provides no basis for even considering whether the other side is a victim of gamesmanship, because prejudice is not a factor.

In practice, petitioner's rule is also discriminatory because it exposes arbitration alone to a harsh regime that applies to no other comparable state-law contract rights. First, in the absence of consideration, parties justifiably expect to be able to revoke a waiver of an executory obligation and thereby to enforce a contractual commitment against the other side, so long as the counterparty has not yet changed position in reliance on the waiver. See pp. 17–20, *supra*. Petitioners' view thwarts those settled expectations by treating arbitration waiver as uniquely irrevocable, and thus worse than all other executory obligations. That is exactly the kind of discrimination Congress enacted the FAA to prevent. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1428. Petitioner's rule would also discriminate against arbitration as a matter of procedure, subjecting it to a less predictable and harsher regime than all other contract-based affirmative defenses.

At bottom, the Federal Rules and their prejudice-based approach provide a clear, fair, and appropriate approach to addressing when a party is "in default" because they were slow in invoking a defense. That approach applies evenly to all affirmative defenses and contractual rights in litigation. It balances the interests in encouraging prompt assertion of the right, while also avoiding harsh rules of waiver from trivial or inconsequential delays. And it is predictable because it draws upon a settled body of law that litigants understand and already need to follow in all civil cases: follow the rules of procedure.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted.

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