

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

ROBYN MORGAN,)
)
 Petitioner,)
)
 v.) No. 21-328
)
SUNDANCE, INC.,)
)
 Respondent.)

Pages: 1 through 87

Place: Washington, D.C.

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10 Washington, D.C.

11 Monday, March 21, 2022

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14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:01 a.m.

17

18 APPEARANCES:

19

20 KARLA A. GILBRIDE, ESQUIRE, Washington, D.C.; on
21 behalf of the Petitioner.

22 PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf
23 of the Respondent.

24

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: Justice Thomas is unable to be present today but will participate in consideration and decision of the cases on the basis of the briefs and the transcripts of oral argument.

We will hear argument first this morning in Case 21-328, Morgan versus Sundance.

Ms. Gilbride.

ORAL ARGUMENT OF KARLA A. GILBRIDE
ON BEHALF OF THE PETITIONER

MS. GILBRIDE: Mr. Chief Justice, and may it please the Court:

Section 2 of the Federal Arbitration Act requires that an agreement to arbitrate be enforced unless a generally applicable contract defense renders it unenforceable. But the Eighth Circuit didn't apply a generally applicable contract defense here. It applied an arbitration-specific waiver defense that requires the person asserting waiver to prove prejudice, even though prejudice isn't required to establish waiver of other contractual rights in Iowa.

1 That's what the Eighth Circuit did
2 wrong, and that's why we're here. But there's
3 been a lot of discussion in the briefs about
4 Section 3 and default, so I wanted to quickly
5 explain what the Eighth Circuit should have done
6 instead.

7 First, it should have assessed Robyn
8 Morgan's waiver defense under generally
9 applicable Iowa law to determine if there was an
10 enforceable contract on which the procedural
11 provisions of the FAA could operate. If it
12 found waiver under state law, that would have
13 been the end of the inquiry.

14 If it found no waiver, meaning that
15 there was still a live contract for Sundance to
16 enforce, then, because Sundance sought a stay
17 under Section 3, the Court would still have had
18 to assess if Sundance's actions were in default
19 in proceeding with the arbitration.

20 So whether Sundance's actions
21 constituted default is a secondary question, not
22 a replacement for the first-order waiver
23 inquiry. And even if we get to default here,
24 nothing in that term connotes prejudice either,
25 for default, like waiver, is a unilateral

1 concept that focuses on the defaulting party's
2 failure to perform an obligation.

3 Sundance intentionally relinquished
4 its contractual arbitration rights by asking a
5 federal judge to dismiss this case and filing an
6 answer that didn't mention arbitration. Those
7 actions should have been sufficient for a
8 finding of waiver, and the same actions placed
9 Sundance in default within the meaning of
10 Section 3.

11 Prejudice has no part to play in
12 either of these inquiries, and the Eighth
13 Circuit was wrong to require it.

14 I welcome the Court's questions.

15 Because --

16 CHIEF JUSTICE ROBERTS: Ms. -- Ms.
17 Gilbride, what if the standards for waiver under
18 state law are different with respect to
19 arbitration and other provisions in the
20 contract? Then that would violate the Federal
21 Arbitration Act, right?

22 MS. GILBRIDE: Well, there are some
23 states that have -- as the majority of federal
24 circuits have, that have endorsed an
25 arbitration-specific waiver rule. That's true,

1 Your Honor, and the states that have done that,
2 by having a waiver defense that draws its
3 essence from the fact that an agreement to
4 arbitrate is at issue, they are not complying
5 with the equal treatment principle that is at
6 the core of the Federal Arbitration Act that's
7 codified at Section 2.

8 CHIEF JUSTICE ROBERTS: Well, then
9 don't you have to analyze precisely why waiver
10 is being applied in each case, to see if it is
11 the same? In other words, it would seem to be a
12 somewhat complicated inquiry if there --
13 there's, you know, occasional exceptions to
14 whether it's waiver because you haven't asked
15 for punitive damages or it's waiver in other
16 situations. Each situation would seem to be
17 unique, unless, I suppose, that the state had a
18 rule that any slight difference, sort of perfect
19 performance, constitutes a waiver. You know,
20 you're one minute late for the argument; you're
21 -- everything is waived.

22 It would seem to me it has to be kind
23 of an issue-by-issue inquiry.

24 MS. GILBRIDE: Yes, Your Honor, waiver
25 as a matter of common law, when you're looking

1 at contractual rights, which is what we're
2 looking at here, is a fact-dependent inquiry.
3 It's assessed on the totality of the
4 circumstances.

5 And what the Eighth Circuit did wrong
6 here, as -- as many other states that have
7 adopted an arbitration-specific test, is that
8 they added the prejudice requirement solely when
9 arbitration agreements are at issue.

10 But, if there are different standards
11 of waiver, if they're generally applicable, if,
12 as -- as this Court said in *Perry v. Thomas*, it
13 was a body of law that arose to govern the
14 validity, revocability, and enforceability of
15 contracts generally, then that's what the states
16 should apply. And that's why it would be proper
17 here for the Court to remand to the Eighth
18 Circuit to apply Iowa's generally applicable
19 waiver doctrines, which was never done here.

20 Both parties and the lower courts
21 assessed the waiver inquiry under federal law,
22 under governing Eighth Circuit precedent, which
23 requires prejudice based on a misapplication of
24 the FAA, erroneously believing that the FAA
25 requires a prejudice finding specific to the

1 arbitration context.

2 JUSTICE KAGAN: Ms. Gilbride, could --
3 could I assume for a moment that we should think
4 about this as a Section 3 case, and then, if --
5 if that's the way we think about it, this phrase
6 "in default in proceeding with such
7 arbitration," does that incorporate state
8 contract law principles?

9 MS. GILBRIDE: Well, Justice Kagan, if
10 the phrase "in default in proceeding" is
11 referring to default in proceeding under the
12 contract, then we would submit that state
13 contract law principles should be applied
14 because, you know, this Court said in First
15 Options of Chicago, in Arthur Andersen versus
16 Carlisle, that when you're looking at contract
17 questions, whether it's contract interpretation,
18 whether the agreement was formed, whether third
19 parties can enforce the contract, you look to
20 state contract law.

21 But, if what that phrase at the end of
22 Section 3 means is a statutory default, in other
23 words, that the party was in default in
24 proceeding with their rights under the FAA by
25 requesting a stay too late in the case, then

1 that is something that the Court could analyze
2 under federal common law because you're putting
3 content to what that procedural provision of
4 Section 3 --

5 JUSTICE KAGAN: And -- and do you --

6 MS. GILBRIDE: -- requires.

7 JUSTICE KAGAN: -- do you have a view
8 as to which of those two is the right way to
9 look at it?

10 MS. GILBRIDE: I think that if you put
11 Section 3 alongside Section 4, there are some
12 differences.

13 Now -- now, certainly, Sundance seems
14 to take the position that it's looking at
15 default under the contract. All of their cases
16 talk about contractual default and if the -- if
17 the contract has a set time limit, you do one
18 thing, but, if it -- if it doesn't, you know,
19 they say you -- you assert prejudice, which is
20 -- is not found in the contractual default
21 cases.

22 I think that there's reason to think
23 that Section 4 is talking about default in
24 proceeding under the contract. If you look at
25 Section 4, it says, if a party has a "failure,

1 neglect, or refusal of another to arbitrate
2 under a written agreement for arbitration," and
3 then later on in Section 4 you talk about if the
4 party has failed to comply therewith, meaning
5 failed to comply with the agreement for
6 arbitration, and the next time default is
7 mentioned, it is the failure, neglect, or
8 refusal to perform the same, again, perform the
9 agreement for arbitration.

10 Section 3 doesn't refer to the
11 contract in that way. When it says "in default
12 in proceeding," it says "in default in
13 proceeding with such arbitration." So that
14 could denote that an arbitration has already
15 commenced and -- and that the party seeking a
16 stay has engaged in some dilatory tactics with
17 respect to the arbitration itself.

18 That was the case in the -- in the New
19 Jersey Supreme Court case of Roach v. BM
20 Motoring, which we cited in our reply brief,
21 where the party -- the plaintiff had initiated
22 arbitration, and the defendant refused to pay
23 their portion of the arbitration fees, which
24 caused the arbitration to stall. And that
25 conduct could constitute default in proceeding

1 --

2 JUSTICE BARRETT: Ms. --

3 MS. GILBRIDE: -- because it -- it
4 delayed the arbitration.

5 JUSTICE BARRETT: -- Ms. Gilbride,
6 what about this provision, you know, from the
7 American Arbitration Association that was
8 incorporated into your contract, so if this is a
9 matter of substantive contract law, which says
10 that no judicial proceeding by a party relating
11 to the subject matter of the arbitration shall
12 be deemed a waiver of the parties' right to
13 arbitrate? Why doesn't that do more work if the
14 right place to look here is substantive contract
15 law?

16 MS. GILBRIDE: Well, Justice Barrett,
17 because the first place to look is Section 2,
18 and as a matter of state contract law, which is
19 the first step of the two-step inquiry, then, if
20 the -- an ordinary no-waiver provision could be
21 waived by the parties' subsequent conduct, then
22 there would be a waiver under state law and you
23 never get to Section 3.

24 And that's the case with respect to
25 the sort of language that you're -- you're

1 mentioning with respect to the -- the American
2 Arbitration Association.

3 Non-arbitration or non-waiver
4 provisions, I should say, are routinely waived
5 by subsequent conduct. We cite some cases to
6 that effect in our reply brief. It's
7 established in Williston at Section 3936, Corbin
8 Section 733.

9 So, according to that sort of
10 blackletter law about no waiver provisions, you
11 would never have occasion to get to Section 3 if
12 the conduct that Sundance --

13 JUSTICE BARRETT: But what's the point
14 of them then?

15 MS. GILBRIDE: -- engaged in here was
16 waiver.

17 JUSTICE BARRETT: What's the point of
18 including them then?

19 MS. GILBRIDE: Well, I -- the American
20 Arbitration Association may want, you know, the
21 parties to do some of the sorts of things that
22 -- that Sundance talked about in terms of -- of
23 defensive actions at the early stages in court.

24 I -- I can't speak for why the AAA put
25 that language in their contract, but it's been

1 in their standard rules for many years.

2 And many federal courts, including
3 federal courts that subscribe to the erroneous
4 view of the FAA that requires prejudice, have
5 looked at that language and said we're going to
6 find a waiver notwithstanding this language.

7 So whatever the AAA's reason for
8 including it, it hasn't stopped courts from
9 finding waiver if the parties' conduct rose to
10 the level of an intentional relinquishment of
11 their right to arbitrate.

12 The mistake that those courts have
13 made, even though they -- they didn't rely on
14 that -- that AAA rule language, was that they
15 analyzed the question under federal law
16 exclusively instead of first looking at whether
17 there was -- had been a waiver under generally
18 applicable contract principles of state law.

19 Basically, they continued this mistake
20 that the Eighth Circuit made here of applying an
21 arbitration-specific waiver defense instead of a
22 generally applicable one, and that's why this
23 Court should remand for the Eighth Circuit to
24 apply the correct generally applicable contract
25 test in the first instance.

1 JUSTICE BREYER: I -- I see the -- the
2 remand point too. I just want to know what I
3 should read. I -- I used to have nightmares
4 about teaching a class, and in my nightmare,
5 someone in the class would ask me something, and
6 I'd have to go into a long disquisition on
7 something I didn't know.

8 So I've written down here laches, in
9 default, forfeiture, waiver, estoppel, and there
10 are probably about six or seven others, which
11 are primarily contract or not entirely, but --
12 and state law questions, and I know very little
13 about them.

14 And suddenly this Court, writing a
15 treatise on that, could get laws in many, many
16 places really mixed up because judges sometimes
17 put the wrong words, if there are wrong words.
18 And so I -- what have you read that will prevent
19 me from getting into this nightmare?

20 That is to say, what of all the things
21 you've read -- and it's clear that both of you
22 have read an enormous amount -- what would you
23 recommend to me to try to get these different
24 concepts straight in my mind?

25 MS. GILBRIDE: That's a good question.

1 There are a lot of concepts here. And -- and I
2 think, you know, the reason that we put two
3 large block quotes in our opening brief about
4 early 20th Century cases distinguishing between
5 waiver and estoppel, one from the Supreme
6 Judicial Court of Maine and one from the Supreme
7 Court of Oklahoma, is that I think those two
8 opinions do a very good job of delineating
9 between those concepts, that waiver requires an
10 intentional relinquishment, that's what
11 distinguishes waiver, and estoppel requires
12 prejudice.

13 Often the two can be present in the
14 same case, but what distinguishes them, and
15 when, as here, you know, Ms. Morgan argued
16 waiver and she did not argue estoppel, what
17 should distinguish the doctrine is she would
18 need to prove that -- that Sundance did
19 something intentional, that it -- that it did
20 actions, committed actions that would lead to an
21 inference that it did not intend to rely on its
22 arbitration right.

23 But what she would not have to prove
24 is that she was harmed or prejudiced by
25 Sundance's actions. That is the key

1 distinguishing feature between waiver and
2 estoppel.

3 Laches is a doctrine that focuses
4 mostly on the delay of asserting a right, not
5 inconsistent actions by the waiving party.

6 JUSTICE SOTOMAYOR: Counsel --

7 JUSTICE ALITO: Your --

8 JUSTICE SOTOMAYOR: I'm sorry.

9 JUSTICE ALITO: Your argument now is
10 that this is governed by state law, not by
11 federal law, is that right?

12 MS. GILBRIDE: It's governed by both,
13 Justice Alito, because it would first be -- the
14 first question is was there a waiver, because
15 Ms. Morgan argued waiver.

16 Now, if she hadn't argued waiver, if
17 that wasn't present in the case, now that --
18 because it is, it has to be argued under state
19 law -- if she hadn't, but because Sundance
20 sought a stay under Section 3, then the Court
21 has an independent obligation under Section 3 to
22 assess whether the applicant for that stay was
23 in default in proceeding with the arbitration.
24 So that's where you get to the Section 3
25 question.

1 To Justice Kagan's question, that
2 could be state law too if it's only about rights
3 under the contract, but if it's about rights
4 under the statute, if it's about what does the
5 FAA require to -- for someone to be in default
6 in proceeding, then that would be a federal
7 question.

8 JUSTICE ALITO: Well, all the courts
9 of appeals, as I understand it, have applied
10 federal common law here, is that right?

11 MS. GILBRIDE: Yes. So most courts
12 have looked at this under Section 3 because
13 parties are seeking stays under Section 3. So
14 it's not, you know, incomprehensible as to why
15 the courts start looking at this as a Section 3
16 question when they're -- they're assessing a
17 motion that someone filed under Section 3.

18 JUSTICE ALITO: And you now want the
19 case to be remanded and decided under Iowa law,
20 am I right?

21 MS. GILBRIDE: That's correct. We
22 want the Eighth Circuit to have an opportunity
23 to apply generally applicable Iowa contract law.
24 And that also may require the Eighth Circuit --
25 and this Court may want to give instructions to

1 this effect -- to certify to the Iowa Supreme
2 Court to clarify Iowa law on this area because
3 Iowa, like many other states, has been tainted
4 by the same misapprehension of what the FAA
5 requires.

6 JUSTICE ALITO: Well, you -- you have
7 a strong argument and you might be right, but it
8 would represent a sea change, would it not?
9 Would -- it would --

10 MS. GILBRIDE: It -- it would follow
11 --

12 JUSTICE ALITO: -- require all the
13 courts of appeals to approach this question
14 differently from the way they have, is that
15 correct?

16 MS. GILBRIDE: Well, what it would do,
17 I think, which -- which would be in some ways a
18 sea change but in some ways continue a trend, it
19 would -- it would follow what this Court has --
20 has done in Arthur Andersen versus Carlisle and
21 First Options of Chicago, which is to say
22 questions of contract interpretation, contract
23 defenses, are analyzed under state law. And --

24 JUSTICE ALITO: Yeah. No, I
25 understand that. And as I said, you have a --

1 you have a cogent argument, but it would
2 represent a significant change.

3 And so this is -- this takes me back
4 to the Chief Justice's initial question. If we
5 are going to send the courts of appeals,
6 district courts off looking at state law on this
7 issue, are they going to find that state law
8 generally has arbitration-specific rules about
9 waiver, or are they going to find that state law
10 generally treats the waiver of arbitration
11 exactly the same as the waiver of other contract
12 defenses?

13 So let me give you three situations
14 and ask you to tell me whether they involve an
15 arbitration-specific rule.

16 The first one involves a state that
17 has a rule that says a -- rule of procedure that
18 says that arbitration has to be asserted in the
19 answer, but it does not provide that with
20 respect to any other contract defense. Then the
21 second situation is similar to the first, but
22 the rule also includes some but not all other
23 contract defenses. And the third involves a
24 situation where there isn't a state rule on this
25 issue at all, but if you look at state case law,

1 the state case law makes the waiver of
2 arbitration a lot easier than the waiver of
3 other contract defenses.

4 So are those -- are those
5 arbitration-specific rules or -- or not?

6 MS. GILBRIDE: I would say the first
7 and the -- the first and the third are
8 arbitration-specific because, as I understood,
9 the third rule is a judicial sort of consensus
10 in which arbitration waiver is treated
11 differently, is -- is a different standard or a
12 different test than waiver of other contractual
13 rights, and the first one would require an
14 arbitration defense to be stated in the answer,
15 setting it apart from all other defenses.

16 And so, if you look at Footnote 9 of
17 Perry v. Thomas, that says "state law, whether
18 of legislative or judicial origin" -- so that's
19 why your first and third would be treated the
20 same -- "is applicable if that law arose to
21 govern issues concerning the validity,
22 revocability, and enforceability of contracts
23 generally." Going -- continuing to quote, "A
24 state law principle that derives its meaning
25 precisely from the fact that a contract to

1 arbitrate is at issue does not comport with this
2 requirement of Section 2."

3 So I think the first and third rules
4 you described would be arbitration-specific.
5 The second, because some other contracts are
6 treated the way arbitration is treated, would be
7 a closer question, and I think, you know, the
8 state law should -- state court should have the
9 opportunity to look at that in the first
10 instance, but it might not be
11 arbitration-specific because other contracts are
12 treated similarly.

13 JUSTICE KAVANAUGH: Ms. Gilbride --

14 JUSTICE SOTOMAYOR: Ms. --

15 JUSTICE GORSUCH: No, go ahead.

16 JUSTICE SOTOMAYOR: Ms. Gilbride, I'm
17 a little confused by the answer you gave Justice
18 Kagan and Justice Alito. Justice Kagan limited
19 her question to say, if I believe Section 3 is
20 at issue, the "at fault," then tell me why you
21 win. I don't know how you win when you say that
22 federal law controls Section 3. Your entire
23 answer to her and your direct answer to Justice
24 Alito is, if you read Section 3 in light of
25 Section 4, federal law controls.

1 So how do we get from federal law to
2 state law? Your answer seemed to suggest to me
3 that you're saying federal law, common law. So
4 please get me out of this box that you put me
5 in.

6 MS. GILBRIDE: I -- I will try,
7 Justice Sotomayor.

8 So the first question is under state
9 law, particularly if, as here, a waiver defense
10 has been interposed by one of the parties.
11 That's a generally applicable contract defense.
12 It should be analyzed under state law.

13 If the party who wants to belatedly
14 arbitrate, even though they've acted
15 inconsistently in the past, they filed a motion
16 under Section 3, that has two inquiries. The
17 first is, is the agreement or is the issue
18 referable to arbitration under an agreement in
19 writing? That, again, I think, contains a state
20 law inquiry. How would you know if it's
21 referable to arbitration under an agreement in
22 writing, other than looking to state contract
23 principles, including waiver, if applicable?

24 But then the second question under
25 Section 3 is the one I was speaking with Justice

1 Kagan about, and that, I think, is a separate,
2 independent obligation that Congress placed on
3 the court reviewing a Section 3 stay
4 application. It doesn't matter if anyone's pled
5 waiver at all.

6 Is the applicant for the stay in
7 default in proceeding with the arbitration? And
8 if that is a statutory inquiry, if the type of
9 default Congress was talking about was taking
10 too long, being dilatory in proceeding with
11 arbitration, as inconsistent with the FAA's
12 intent of moving parties, as -- as this Court
13 said in *Concepcion*, to facilitate streamlined
14 procedures to getting into the arbitration
15 proceeding quickly --

16 JUSTICE SOTOMAYOR: Excuse me for --

17 JUSTICE KAGAN: Then why should we --

18 MS. GILBRIDE: -- and that should be
19 analyzed --

20 JUSTICE SOTOMAYOR: -- interrupting
21 you.

22 MS. GILBRIDE: -- under federal law.

23 JUSTICE SOTOMAYOR: I'm sorry for
24 interrupting you, but I still don't understand.
25 Are you suggesting there's a default under

1 Section 2 -- that there's a waiver under
2 Section 2 that we look at first? If there's a
3 waiver, we enforce that? You're shaking your
4 head yes.

5 But, even if there's no state waiver,
6 we then look to Section 3 and make up a federal
7 waiver as well?

8 MS. GILBRIDE: That is exactly
9 correct, Justice Sotomayor, that if --

10 JUSTICE SOTOMAYOR: So, under
11 Section 3, the prejudice -- the prejudice that
12 the lower courts have developed as common law,
13 why doesn't that stand?

14 MS. GILBRIDE: Because nothing in the
15 text of Section 3 or in the purposes and
16 structure of the FAA connote a prejudice
17 requirement as part of any federal law standard.
18 If this Court wants to reach that question, all
19 this Court needs to do at the first step is say
20 this should have been decided under state law
21 because there was a waiver defense here.

22 Ms. Morgan argued waiver, but it was
23 analyzed incorrectly by the Eighth Circuit.

24 JUSTICE SOTOMAYOR: Now some of my --

25 MS. GILBRIDE: It was analyzed as

1 federal.

2 JUSTICE SOTOMAYOR: -- colleagues seem
3 troubled by the fact that states differ in how
4 they define waiver. I'm troubled by the fact
5 that the circuits define prejudice in different
6 ways.

7 MS. GILBRIDE: Mm-hmm.

8 JUSTICE SOTOMAYOR: So there's
9 variation no matter what we do.

10 MS. GILBRIDE: Mm-hmm.

11 JUSTICE SOTOMAYOR: Your brief has not
12 attacked the prejudice finding that the court
13 below did because you wanted cert on the legal
14 question. I understand that.

15 But can you tell us how -- if we
16 disagreed with you, how we could reach that
17 second question if we were so disposed?

18 MS. GILBRIDE: Well, I think --

19 JUSTICE SOTOMAYOR: Because there is
20 wide variety in defining prejudice.

21 MS. GILBRIDE: Yes, and that is
22 certainly a problem, one of many problems, in
23 addition to it, the fact that it's atextual,
24 with the prejudice requirement that many federal
25 courts and some state courts require, is that

1 it's -- it's not uniform. They're all over the
2 place.

3 And -- and even in the Eighth Circuit,
4 you know, several years before this case,
5 another case, Messina versus North Central
6 Distributing, involving an eight-month delay and
7 a motion to transfer, very similar facts here,
8 came out the other way, and the court did find
9 prejudice. So it -- it's not a symmetrical or
10 uniform standard currently.

11 And what I would suggest that the
12 Court do, you know, is, again, remand for the
13 Eighth Circuit to apply the correct standard.
14 But, if the Court wants to -- to put content
15 into what Section 3's default provision means,
16 it shouldn't be a prejudice requirement.
17 There's no basis for that.

18 But, if you look at the structure of
19 the Act, there are reasons to think that
20 Congress wanted parties to proceed quickly. And
21 so a presumption that a party should raise their
22 defense of arbitration by the time they file
23 their first responsive pleading, by the time of
24 their answer, or to -- before their answer if
25 they file a motion, that would be presumptively

1 enough to get someone not to be in default in
2 proceeding.

3 That wouldn't preclude someone who had
4 exceptional circumstances, some change in the
5 law, some new facts that arose, to argue that to
6 the court, but it would be their burden to prove
7 they were not in default.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Ms. Gilbride,
10 I just have one last question. It, I think,
11 gets to what you were talking about most
12 recently.

13 I -- I would say or suggest that the
14 one thing that your position will do is increase
15 the complexity and delay associated with
16 arbitration proceedings. We've -- you've added
17 a presumption to sort of help address that.

18 Certification was mentioned earlier,
19 which, in my experience, our experience, can
20 contribute to a great deal of -- a great deal of
21 delay.

22 And, of course, the whole point of the
23 Federal Arbitration Act or at least a
24 significant point was to expedite disputes. Yet
25 you're, it seems to me, creating a whole new

1 battleground before you even get to arbitration
2 about whether or not there's been -- been waiver
3 under state law.

4 And I wonder if the cost of that -- I
5 mean, if that's what the law requires, it
6 requires, but I -- but I think we should take
7 into account that that seems quite contrary to
8 the policy behind the FAA.

9 MS. GILBRIDE: I appreciate the
10 concern, but I would respectfully submit that
11 the status quo in which courts are requiring
12 prejudice actually increases delay and increases
13 the sort of skirmishing in court that, you know,
14 before anyone resorts to the arbitral forum,
15 that the FAA was designed to eliminate.

16 So, for example, the Fourth Circuit's
17 decision in MicroStrategy, Inc. versus Lauricia,
18 in that case, the employer had sued the
19 plaintiff or the employee two different times,
20 once in federal court, once in state court.
21 Discovery had been taken. The employer even
22 took the employee's deposition in -- in the
23 previous litigation.

24 And then, when the employee filed a
25 federal lawsuit asserting retaliation for her

1 activities at the EEOC, then the employer
2 invoked the arbitration agreement for the first
3 time, after having taken all this discovery,
4 filing over 50 motions in three previous
5 lawsuits. And the Fourth Circuit said, because
6 she couldn't prove that she was prejudiced, you
7 know, all of that litigation activity was not
8 enough to constitute waiver.

9 So -- so I don't think that the -- the
10 current state of affairs is -- is bringing the
11 quick resolution in arbitration that we -- we
12 agree is the FAA's intent.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer?

15 JUSTICE BREYER: I've just gotten
16 worried now because of the questions the Chief
17 Justice and -- and really Justice Alito asked.

18 And -- you have a very logical
19 framework. I -- I have no doubt as to its logic
20 and there's lots to support it.

21 But what's worrying me is this is not
22 an esoteric situation, I don't think. I mean,
23 you had an arbitration agreement. So what you
24 decided to do is bring a lawsuit. And nobody
25 said anything further for quite a while.

1 And then finally the other side said:
2 Let's go to arbitration. And were they too
3 late? Now that kind of situation I bet arises
4 fairly frequently.

5 Okay. Now we're starting to create a
6 matrix of rules through your logic that is so
7 complicated that -- that -- that it's at least
8 hard for a layperson like me in this area to
9 understand, and -- and what's worrying me is
10 that my instinctive answer, which you'll tell me
11 is wrong if it's wrong, is it depends.

12 The first thing if I were a judge, I'd
13 sit there and I'd want to know how clear were
14 they if they got up and said I never want to go
15 to arbitration. Hey, I'm not going to be too
16 worried about prejudice. Look what they say.

17 On the other hand, if it's sort of a
18 vague thing, I might begin to think: Hey,
19 nobody's hurt. Make them go to arbitration.
20 Nobody's hurt by the contrary.

21 Or I might think: Hmm, they had good
22 reason for delaying. They thought you weren't
23 here in -- rightly in the first place. There
24 was another suit you should have been in, not
25 this one. So it's hardly surprising they did

1 this first.

2 In other words, what I'm doing is
3 showing you, as you well know, that there are a
4 lot of different situations, a lot of different
5 reasons, and so, at this point, having thought
6 of that out of these questions and not wanting
7 to muck everything up, what do I do?

8 MS. GILBRIDE: What you should do,
9 Justice Breyer, is remand for this to be decided
10 under state law, because courts deal with these
11 questions. They're complicated, I agree with
12 you. It's fact-intensive, I agree with you.
13 But courts deal with fact-intensive, complicated
14 questions all the time.

15 I mean, in some of the very things
16 like this Court said in First Options --

17 JUSTICE BREYER: Yeah, we'll send it
18 back to the Iowa state courts. Of course, the
19 person who knows about it is the judge in the
20 federal court because he's seen everything
21 that's gone on.

22 So now we send it to a new judge who
23 knows nothing about it. And -- and we use some
24 cases in Iowa that were done in other situations
25 but happen to use the word waiver. Well, that

1 is a possible answer. I'm not saying it isn't.
2 I'm making fun of it, but I'm not right to make
3 fun of it because it is a possible answer.

4 MS. GILBRIDE: Well, I -- I don't
5 think it's any more complicated than questions
6 about, you know, who's bound by the contract or
7 whether a particular dispute falls within the
8 terms of the contract.

9 And -- and state courts and federal
10 courts applying state law answer those questions
11 even with -- within the parameters of the FAA
12 all the time without, you know, anything seeming
13 to have ground to a halt or -- or caused undue
14 chaos in the -- in the lower courts.

15 JUSTICE BREYER: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Alito,
17 anything further?

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: Justice Breyer
20 referred to the trial court deciding this issue.
21 Did the trial court in this case find waiver?

22 MS. GILBRIDE: Yes.

23 JUSTICE SOTOMAYOR: It was the --

24 MS. GILBRIDE: The district court did
25 find --

1 JUSTICE SOTOMAYOR: -- it was the
2 circuit who reversed that finding?

3 MS. GILBRIDE: That's correct, Your
4 Honor.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: Ms. Gilbride, if Iowa
8 law requires a showing of prejudice before
9 finding waiver, you lose, is that correct?

10 MS. GILBRIDE: If Iowa finds prejudice
11 as a generally applicable matter --

12 JUSTICE KAGAN: Right.

13 MS. GILBRIDE: -- for all contracts,
14 yes.

15 JUSTICE KAGAN: Right.

16 MS. GILBRIDE: Then, under the equal
17 treatment principle, if arbitration is treated
18 the same as any other contract, including a
19 prejudice requirement, that would be consistent
20 with the FAA. We'd still have the Section 3
21 question that we discussed earlier.

22 JUSTICE KAGAN: And, similarly, if, as
23 a general matter, not arbitration-specific but
24 if, as a general matter, Iowa law allows a party
25 to cure their waiver, you also lose?

1 MS. GILBRIDE: If the circumstances
2 are -- are met for that here.

3 JUSTICE KAGAN: Yeah.

4 MS. GILBRIDE: I mean, there's been a
5 lot of discussion about executory contracts and
6 -- and retraction and we talked about mutual
7 rescission, you know, by -- by consent.

8 But, if the Iowa court, applying
9 generally applicable contract rules, finds that
10 -- that there was a -- a retraction or a cure
11 here, as long as it's -- it's not
12 arbitration-specific, that would be the end of
13 the inquiry and we would then move to Section 2
14 --

15 JUSTICE KAGAN: Well --

16 MS. GILBRIDE: -- Section 3.

17 JUSTICE KAGAN: -- do you have a view
18 as to what Iowa law says about those issues? Do
19 they -- do they have a general rule about waiver
20 or about curing waiver that would apply here?

21 MS. GILBRIDE: Well, you know, there's
22 been some cases about executory contracts where
23 it's periodic performance that -- that Sundance
24 cited in their brief, so periodic performance
25 when you have an installment contract, you have

1 to make deliveries every month or every year,
2 and, if you accepted late payments in the past,
3 you can still insist on timely payments in the
4 future.

5 Our position is that this is not that
6 sort of a periodic performance situation. We're
7 talking about a one time a dispute arose and how
8 did the parties respond once that dispute arose?

9 We think the more appropriate way to
10 frame that under existing Iowa law is the O'Dell
11 case about rescission of the contract and
12 creation of a new contract by mutual consent.

13 Ms. Morgan chose to go to court, and
14 Sundance acquiesced in her choice by filing
15 dispositive motions and otherwise engaging in
16 the litigation process in court.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?

19 JUSTICE GORSUCH: Ms. Gilbride, I -- I
20 understand your argument that all arbitration
21 contracts are subject to state law defenses that
22 are generally applicable under Section 3.

23 But I also take Justice Alito's point
24 that's been echoed here that all the courts of
25 appeals have seemed to treat it as -- as not a

1 question of state law but of federal law.

2 And, for my money, I -- I can see why,
3 because Section 6 says that motions to arbitrate
4 are to be treated like any other motion in
5 federal court and are subject to the rules of
6 federal -- federal jurisdiction, federal courts.

7 And, as I read the cases, I see the
8 courts of appeals trying to apply usual
9 principles of -- of waiver or forfeiture that
10 this Court has announced for use in federal
11 proceedings.

12 So, while you might have a state law
13 defense, don't you also have a federal law
14 argument that -- and -- and couldn't we simply
15 say that part of federal law, to the extent it
16 includes waiver, doesn't generally require
17 prejudice? Under this Court's teachings, it's
18 usually just an intentional relinquishment of a
19 known right.

20 And I guess I'm curious why you didn't
21 pursue that argument, or maybe you have and I've
22 misunderstood today's proceedings, which have
23 seemed to have focused on Section 3.

24 Can you help me out?

25 MS. GILBRIDE: Sure. I can try,

1 Justice Gorsuch.

2 So this Court could take default under
3 Section 3 to be analogous to waiver.

4 JUSTICE GORSUCH: No. No, no, no, no,
5 no. That's not what I'm suggesting.

6 MS. GILBRIDE: Okay.

7 JUSTICE GORSUCH: What I'm suggesting
8 is why don't we just put that Section 3 question
9 aside. Yes, you may have state contract
10 defenses, whatever they may be. Lord only knows
11 what Iowa state law defenses are with respect to
12 -- I don't -- I don't know. I'm not an expert.

13 But one thing I do know is federal
14 procedure law, which is governed -- and seems to
15 control under Section 6, and it seems to be what
16 the Eighth Circuit was relying on, federal
17 procedure law. It seems to be what all the
18 other federal courts of appeals are relying on
19 too.

20 And I can say, I think with some
21 degree of certainty, that waiver, whatever else
22 it requires in federal court, and our normal
23 procedure with respect to motions doesn't
24 require proof of prejudice. And to the extent
25 that that was the Eighth Circuit's

1 understanding, to the extent it was relying on
2 Section 6, not saying that's right, to the
3 extent it was talking about federal procedure,
4 which I think it was, we can say that that
5 doesn't exist with -- and reserving all of the
6 Section 3 questions and not having to address
7 them.

8 MS. GILBRIDE: I -- I understand your
9 question, and I understand your question is
10 about Section 6, but I do want to just quote
11 some language from Arthur Andersen that talks
12 about Section 3, and I think it is responsive.

13 Arthur Andersen said, in discussing
14 the interplay between Section 2 and Section 3,
15 Section 3 allows litigants already in federal
16 court to invoke agreements made enforceable by
17 Section 2. Neither Section 2 nor Section 3
18 purport to alter background principles of state
19 contract law. And then going on later in the
20 opinion, state law is applicable to determine
21 which contracts are binding under Section 2 --

22 JUSTICE GORSUCH: Okay.

23 MS. GILBRIDE: -- and enforceable
24 under Section 3. And Section 6 --

25 JUSTICE GORSUCH: Do you have anything

1 else you want to say about Section 6?

2 MS. GILBRIDE: Yeah. Section 6 is
3 just talking about the manner in which those
4 procedural provisions, motions under Section 3,
5 you can't -- you know, you don't bring a motion
6 under Section 2 unless you're arguing Section 2
7 in state court. You're -- you're using one of
8 those procedural provisions, what Rent-A-Center
9 called the procedural provisions for -- for
10 carrying out Section 2's substantive mandate.
11 And that's why the -- the substantive mandate is
12 applying state contract law.

13 Now I'm not saying there isn't a place
14 for looking at the federal rules. That could be
15 a gap filler. If you're trying to figure out
16 what default means under Section 3, looking at
17 rules like Rule 12(c) or 12(b)(3) for venue, for
18 example, could be a gap filler when we're trying
19 to figure out what default means.

20 But I do think you have to start with
21 state contract law --

22 JUSTICE GORSUCH: Very good. Thank --

23 MS. GILBRIDE: -- because that's the
24 substantive provision.

25 JUSTICE GORSUCH: -- thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Ms. Gilbride, your
4 concern is the prejudice requirement, correct?

5 MS. GILBRIDE: Yes. It's an atextual
6 requirement that is arbitration-specific, and
7 courts are applying it, you know, out of a
8 misguided sense of what the FAA requires.

9 JUSTICE KAVANAUGH: Okay. And then
10 focusing on the FAA, if I want to focus on
11 Section 3 rather than the state law approach,
12 the word "default," what is wrong with what the
13 D.C. Circuit did in the Zuckerman Spaeder
14 opinion? And what it said was, under Section 3,
15 that there should be a presumption of forfeiture
16 if you have not raised arbitration in the first
17 responsive pleading. And --

18 MS. GILBRIDE: I -- I think that is a
19 good model for this Court to look to. You know,
20 the D.C. Circuit did go on to talk about
21 prejudice later in that opinion, but the -- the
22 notion that there is a presumptive default if
23 the party does not include arbitration by the
24 time of its answer or in a pre-answer filing, I
25 think it's consistent with the rule we've

1 proposed here today.

2 JUSTICE KAVANAUGH: Right. And then,
3 on prejudice, what I understood the D.C. Circuit
4 to say in that case was that the reason that
5 they said there's a presumption is because,
6 usually, if you haven't raised it in the first
7 responsive pleading, there will be prejudice to
8 the other side in the form of expenditures on
9 litigation or the discovery process will -- will
10 prejudice the other side to some extent. And
11 that's why I -- as I read that opinion, they
12 said it has to be raised in the first responsive
13 pleading.

14 And just to the point of simplicity,
15 I'm just wondering why that isn't an approach
16 that is consistent with your objective of
17 limiting, if not eliminating, the prejudice
18 while keeping it very simple in terms of it's
19 all under Section 3 default?

20 MS. GILBRIDE: Two responses to that,
21 Justice Kavanaugh.

22 First of all, to the extent that the
23 D.C. Circuit is looking at prejudice or -- or
24 sort of in dicta saying that if not asserted by
25 that point, prejudice would likely result, that

1 troubles me less than what most federal courts
2 are doing, which is requiring the party alleging
3 waiver to prove prejudice. And that is not
4 something that should be, you know, that -- at a
5 minimum, I would want this Court to clarify that
6 no one should have to prove prejudice as part of
7 a waiver finding.

8 And my second response would just be
9 that while I agree that as a -- as a federal
10 standard, pegged to Section 3, that -- that
11 raising it by the time of the first responsive
12 pleading is appropriate, I don't think the D.C.
13 Circuit is correct to step over the Section 2
14 part of the analysis of looking at this as a
15 contract question.

16 I mean, what happens if someone
17 doesn't file a motion under Section 3, they only
18 file under Section 4, or the case is in state
19 court? Relying exclusively on Section 3 is very
20 under-inclusive to the circumstances in which
21 these waiver issues arise.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: Ms. Gilbride, I have

1 a question about the bucket that we put this in.
2 Everybody's talking about waiver, but waiver is
3 used to mean a lot of different things. And it
4 seems to me like this case would be more
5 properly considered an estoppel or laches, that
6 they sat on their right too long or didn't
7 assert the defense soon enough, and prejudice
8 would be part of it under state law if we looked
9 at those other kinds of defenses like estoppel
10 and laches, would it not?

11 MS. GILBRIDE: Well, there are some
12 states that have merged the doctrines of waiver
13 and estoppel. For example, we -- we cite one in
14 -- in Footnote 11 of our opening brief. New
15 Mexico does that. Sundance also cites a Vermont
16 Supreme Court case that does that.

17 So, if a state treats waiver and
18 estoppel as -- as merged for generally
19 applicable contract defenses not in -- not
20 involving arbitration, then that would be -- you
21 know, that -- that's what the state does, and --
22 and we would apply the same rules to an
23 arbitration agreement.

24 But the problem is that many states
25 have gone -- diverged, gone two separate ways.

1 They treat waiver and estoppel as distinct in
2 other contractual contexts not involving
3 arbitration, but, if it's an arbitration
4 agreement, they merge them together. And that's
5 what violates Section 2 of the FAA.

6 JUSTICE BARRETT: But you would lose
7 if it were estoppel, right, because doesn't Iowa
8 law require prejudice?

9 MS. GILBRIDE: Yes. Prejudice is
10 required under every state as far as I know for
11 estoppel. I think, you know, Ms. Morgan
12 certainly argued below that she was prejudiced
13 here. We haven't contested that in this --
14 before this Court, but, certainly, it was -- was
15 briefed below that she was prejudiced. But she
16 did not argue estoppel specifically. She argued
17 --

18 JUSTICE BARRETT: Waiver.

19 MS. GILBRIDE: -- waiver, and she
20 should have the opportunity to argue waiver
21 again under generally applicable Iowa law.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Ms. Gilbride.

25 Mr. Clement.

1

2

ORAL ARGUMENT OF PAUL D. CLEMENT

3

ON BEHALF OF THE RESPONDENT

4

MR. CLEMENT: Mr. Chief Justice, and

5

may it please the Court:

6

Nothing in the FAA or state law

7

supports Petitioner's proposed rule that a

8

motion to stay litigation in favor of

9

agreed-upon arbitration must be filed as

10

expeditiously as possible or lost forever.

11

To the contrary, Section 3 of the FAA

12

directs that courts shall grant such motions in

13

the -- unless the stay applicant is in default.

14

Similarly, under all relevant state law

15

doctrines, one has to show prejudice before a

16

contractual right is lost because you litigated

17

or waited too long to assert it.

18

The most straightforward way to affirm

19

the decision below is to apply Section 3 and its

20

stay absent default direction. My client,

21

Sundance, moved for a motion under Section 3,

22

and it is not in violation of any contractual

23

deadline, any court rule, or any other legal

24

obligation.

25

The parties here agreed to arbitrate

1 instead of going to court. That agreement did
2 not put a deadline on a party asserting a right
3 to arbitrate if the other side broke the
4 promise, and it incorporated rules that warn
5 against a finding of waiver because of
6 litigation conduct.

7 In this circumstance, simply not
8 filing a motion as expeditiously as possible,
9 without violating a court rule or imposing
10 prejudice on the other side, does not result in
11 a default. And, under those circumstances,
12 Section 3 directs courts shall grant the motion.

13 Under state law, the same result would
14 follow. All state law doctrines require
15 prejudice in these circumstances. Courts are
16 use -- loose in the way that they go about using
17 the term "waiver," but the kind of strict,
18 no-prejudice form of waiver on which
19 Petitioner's whole argument depends is limited
20 to true waiver, the intentional relinquishment
21 of a known right.

22 That's not what is at issue here. And
23 what is at issue is simply not asserting a right
24 soon enough. That is the office of estoppel and
25 laches, which require prejudice. And even in

1 the case of a true waiver, you can retract in
2 the absence of prejudice.

3 I welcome the Court's questions.

4 CHIEF JUSTICE ROBERTS: Well, I mean,
5 so you wait until, in a case that you lose, to
6 the denial of cert and say at that time no, wait
7 a minute, we're supposed to -- we have the right
8 to arbitrate and we want to go to arbitration.

9 Waiver plays no role in regard --
10 evaluating that situation at all?

11 MR. CLEMENT: Well, I -- I -- I think
12 that you -- there would be, in a sense, a waiver
13 under the court rules. I think the right way to
14 do it, if you're in federal court and applying
15 Section 3, is to say at that point you've
16 defaulted because it's clear you have to raise
17 arguments at the trial court. You can't wait
18 until appeal to raise arguments.

19 So you're in default of the legal
20 rules that require you to raise arguments in a
21 timely fashion.

22 But, as a general matter, in the
23 federal courts, if there's a motion that's not
24 subject to a specific deadline, how do courts
25 deal with that? If there's no specific

1 deadline, they generally -- if -- if the
2 opposition to the motion is, hey, you should
3 have filed that sooner, the courts will
4 generally look to considerations that include
5 whether there's prejudice to the other side.

6 And, in the absence of prejudice to
7 the other side and in the absence of a clear
8 deadline, they will allow you to make that
9 motion. That's certainly how motions to amend
10 Rule 15 work. It's how Rule 24 motions to
11 intervene work.

12 So there -- I -- I think the right way
13 to look at this is as a matter of federal law in
14 applying Section 3. And my friend wants to make
15 all of this an anterior inquiry into state law
16 under Section 2, and, with respect, I think
17 that's almost exactly backwards.

18 This is a case --

19 JUSTICE GORSUCH: Mr. Clement -- Mr.
20 Clement --

21 MR. CLEMENT: Yeah.

22 JUSTICE GORSUCH: -- before you get
23 into that, though, and I welcome that, but you
24 said something I just want to -- I want to make
25 sure I understand. I think you said that in the

1 absence of a specific deadline in the federal
2 rules, courts require some prejudice before
3 denying somebody an opportunity.

4 Is that right? I mean, can't there be
5 waiver? I intentionally relinquish something of
6 a known right, no deadline, no prejudice
7 required there. You lose. That's it. Case
8 moves on. You lose that right to make that
9 motion.

10 MR. CLEMENT: I think, in cases of
11 true intentional relinquishment of a right, I
12 think --

13 JUSTICE GORSUCH: Right.

14 MR. CLEMENT: -- that's generally true
15 in the federal courts. I -- I --

16 JUSTICE GORSUCH: Okay. Okay. If
17 that's true -- if that's true in the federal
18 courts, then didn't the Eighth Circuit err by --
19 you know, you're going to argue, and I -- I -- I
20 -- I grant you you've got a good argument that
21 there's no intentional relinquishment here, but,
22 to the extent that it was purporting to apply
23 doctrines of -- of -- of -- of -- of waiver, it
24 erred in its formulation of that rule, didn't
25 it?

1 MR. CLEMENT: I -- I don't think it
2 really erred. I think it did what every circuit
3 court in the country has done and this Court has
4 done on occasion, even since Kontrick against
5 Ryan and Justice Ginsburg tried to warn us about
6 being careful about forfeiture --

7 JUSTICE GORSUCH: Yep.

8 MR. CLEMENT: -- versus waiver. They
9 used the word "waiver" when they meant
10 forfeiture.

11 JUSTICE GORSUCH: Okay.

12 MR. CLEMENT: And --

13 JUSTICE GORSUCH: Fine. Fine.
14 Whatever they did, they didn't apply what we've
15 said waiver is. Waiver is an intentional
16 relinquishment of a known right, val none. No
17 more. Okay.

18 And why couldn't we just send it back
19 and say that? And you can make your argument
20 that there is no waiver here because there's no
21 intentional relinquishment. You can make your
22 argument that this should be analyzed as a
23 forfeiture. You can make all these Section 3
24 arguments about Iowa state law.

25 But why couldn't we just clarify, to

1 the extent that the Eighth Circuit was
2 purporting to interpret federal law, it was
3 wrong about what -- what -- what -- what's
4 required to show waiver, period?

5 MR. CLEMENT: Justice Gorsuch, if you
6 really got to that point, I would suggest you
7 probably should just dismiss the case as
8 improvidently granted because --

9 JUSTICE GORSUCH: Well, let's assume I
10 don't do that.

11 MR. CLEMENT: Okay. But -- but -- but
12 I really think you should, because the Eighth
13 Circuit wasn't saying this is absolutely waiver
14 and that's why we're applying this three-factor
15 test. They applied the three-factor test
16 presumably as -- if you go back in their case
17 law, as a -- as a gloss on the statutory phrase
18 "in default," and they said, as a general
19 matter, this is when it's too late to invoke
20 your right to arbitrate, and we have a
21 three-factor test, and the plaintiff in this
22 case fails under the third factor.

23 Importantly, they didn't even
24 definitively resolve the second factor, which is
25 the only thing that actually even goes to an

1 inconsistency that possibly could get to an
2 implied waiver.

3 And there's not a hint in the decision
4 that they thought they were talking about the
5 explicit waiver that your question alludes to.
6 So I really think --

7 JUSTICE BREYER: Well --

8 JUSTICE KAVANAUGH: Mr. Clement -- can
9 I?

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.

12 JUSTICE BREYER: While we're right on
13 this, I mean, I take it their -- I take it that
14 their point is this. Imagine a contract with 10
15 clauses, a state law contract. Clause 3 says I
16 will send you 10 shirts by October 1. Clause 10
17 is an arbitration clause.

18 Now a defendant wants to say or a
19 plaintiff they waived Clause 3. I don't have to
20 send them 10 shirts. They waived it. Okay?

21 And I think they're saying you could
22 say the same -- make the same argument about
23 Clause 10, the arbitration clause, too. It's no
24 longer in the contract. They waived it. That
25 would be a question of state law if it were

1 shirts. Why isn't it a question of state law
2 under Clause 10, which is the arbitration
3 clause? They want to make that argument first.

4 And that's what you were about to, I
5 think --

6 MR. CLEMENT: Yeah.

7 JUSTICE BREYER: Okay.

8 MR. CLEMENT: Exactly.

9 JUSTICE BREYER: So why can't they do
10 that?

11 MR. CLEMENT: Because it actually gets
12 it backwards. That argument doesn't come first
13 because the arguments that come first under
14 Section 2 are arguments that go to the validity
15 of the arbitration clause or arguably whether
16 this dispute is within the scope of the --

17 JUSTICE BREYER: That's what it is.

18 MR. CLEMENT: No, it's not.

19 JUSTICE BREYER: It's the validity --
20 it's the waiving of the arbitration clause.

21 MR. CLEMENT: That --

22 JUSTICE BREYER: Clause 10 was waived,
23 and, therefore, there is no contract with Clause
24 10.

25 MR. CLEMENT: That issue does not go

1 to the formation of the contract. That kind of
2 timing issue -- and -- and, with all respect,
3 Justice Breyer --

4 JUSTICE BREYER: No, no, no, I don't
5 know.

6 MR. CLEMENT: -- you should know this
7 better than anyone --

8 JUSTICE BREYER: Yeah.

9 MR. CLEMENT: -- because your opinion
10 in Howsam against Dean Witter --

11 JUSTICE BREYER: Yeah.

12 MR. CLEMENT: -- says that those kind
13 of questions about waiver and timing and
14 estoppel and laches are questions for the
15 arbitrator as long as the arbitration clause
16 itself is not being called into question as
17 invalid.

18 And, to be clear, that is this case.
19 If you look at Petition Appendix page 21, the --
20 the district court said that the parties "do not
21 dispute whether a valid arbitration agreement
22 exists and whether this particular dispute falls
23 within the terms of the agreement."

24 So, in those circumstances, Section 2
25 is not any longer an anterior inquiry. What you

1 do is you have a relatively streamlined inquiry
2 under Section 3 in federal court and you figure
3 out, did this party default? Did they waive in
4 the loose sense, which most circuits I think --

5 JUSTICE KAVANAUGH: I --

6 JUSTICE KAGAN: But why is that --

7 MR. CLEMENT: -- equate directly with
8 prejudice.

9 JUSTICE KAVANAUGH: I mean, I -- go
10 ahead.

11 JUSTICE KAGAN: But why is that a
12 federal question? I mean, even supposing we
13 stick to this question of are you in default,
14 why wouldn't we look to state law in that the
15 same way we look to state law with respect to
16 many other questions about the enforcement or
17 validity of particular contractual provisions?

18 MR. CLEMENT: Well, Justice Kagan,
19 there's two reasons I think it would be a
20 federal law question.

21 One, it's ultimately you're
22 interpreting the timeliness of a federal motion
23 under a federal statute in federal court. Seems
24 like a federal question to me.

25 The second reason, if I can just get

1 both out --

2 JUSTICE KAGAN: Well, but, I mean,
3 it's -- it's about whether a contract is valid
4 and enforceable, and that's a question that we
5 basically -- the FAA, you know, delegates to
6 state law.

7 MR. CLEMENT: With respect, I don't
8 think that's the right way to think about this
9 dispute. The arbitration agreement itself, as I
10 just read, was undisputed below. There's
11 nothing wrong with the arbitration agreement.

12 If Ms. Morgan brings a new suit
13 tomorrow based on something else that happened
14 during her brief employment, we can invoke the
15 arbitration agreement. The arbitration
16 agreement is valid. Nobody questions that.
17 That's the office, the principal office of
18 Section 3.

19 Then, in those circumstances, when you
20 don't have that kind of issue, and there is that
21 agreement, and one of the parties is saying I'd
22 like a stay of this litigation so we can go have
23 our agreed-upon arbitration, at that point, I
24 would think that you would want to have the
25 federal courts --

1 JUSTICE KAGAN: I mean, if you were --
2 if the question was instead whether you were in
3 default in the sense of whether you had violated
4 a particular contract provision, that would be a
5 question of state law, wouldn't it?

6 MR. CLEMENT: It would. And it would
7 be a question for the arbitrators. And the
8 reason that federal courts -- Judge Lynch has an
9 opinion that we cite in --

10 JUSTICE KAGAN: I mean, I guess I'm
11 wondering why it is that you would differentiate
12 between something where it's like are you in
13 default because you're in violation of a
14 contractual term or are you in default because
15 you've actually acted in a way that's completely
16 inconsistent with various contractual terms.

17 Like, those to me, I mean, they're
18 different, but they're not different that seems
19 as though it should matter with respect to what
20 the law is.

21 MR. CLEMENT: I -- I actually think
22 they're materially different in two dimensions.
23 One is an issue of federal law based on what
24 happened in federal court right before the
25 federal judges. The other is a state law

1 doctrine that you're importing from principles
2 of what would apply if, instead of a litigation
3 issue, this were an issue about widgets.

4 And I think Judge Lynch in the First
5 Circuit had a very thoughtful opinion. We cite
6 it when we go through all of the circuits that
7 have moored their decision to Section 3, and --
8 and -- and she and other federal courts had
9 wrestled with this issue in the wake of Howsam
10 because, before Howsam, all the federal courts
11 had been doing these little prejudice/waiver
12 inquiries under Section 3 themselves, and since
13 Howsam says questions of waiver and estoppel and
14 timeliness are for the arbitrators, all the
15 federal courts stopped and thought, should we
16 still be doing what we're doing?

17 And they all uniformly decided, yes,
18 we should still do what we're doing because this
19 is a very specific question about whether the
20 litigation conduct that just happened in front
21 of us in federal court is essentially so
22 substantial that we're going to really think
23 estop the party from not -- from invoking their
24 arbitration rights at -- at a later stage in the
25 case.

1 JUSTICE KAVANAUGH: Can I ask a --
2 keep going. Sorry.

3 MR. CLEMENT: No, no, and -- and --
4 and -- and -- but I think they recognize that
5 the only reason they get to make that decision
6 instead of the arbitrators is because it's a
7 federal question under Section 3 based on
8 litigation conduct that took place in front of
9 them.

10 JUSTICE KAVANAUGH: So suppose I agree
11 with you that Section 3 and default is the right
12 place to focus our analysis, but then why not --
13 what's your problem with the D.C. Circuit's
14 approach in the Zuckerman Spaeder case, which
15 said, well, there's a presumption of forfeiture
16 if you don't raise it by the first responsive
17 pleading and -- and I think makes the point that
18 delay alone is not prejudice, but delay is
19 rarely alone. Delay usually entails some cost
20 to the other side in terms of motions practice
21 or discovery.

22 What's -- what's wrong with that
23 approach?

24 MR. CLEMENT: Well, a couple of things
25 are wrong with that approach, Justice Kavanaugh.

1 First of all, it seems pretty unfair
2 to my client since that was -- I mean, you know,
3 there -- there are -- there's a federal rule
4 that says these are the things you have to raise
5 in your first responsive pleading, and this
6 isn't in it.

7 So I would say, if you want to write
8 an opinion in my client's favor and suggest to
9 the rules committee that they amend the rules to
10 give clear notice to parties, then I could live
11 with that.

12 JUSTICE KAVANAUGH: But -- but what
13 about the reasoning by analogy? And I think I
14 know what your answer is going to be to this,
15 but we're trying to interpret under your
16 construct what the term "default" means in a
17 federal statute.

18 And by analogy, like venue objections,
19 for example, need to be raised by the first
20 responsive pleading, and even, I guess -- and
21 even if you say prejudice is required, I think
22 the insight of the D.C. Circuit's approach was
23 there usually is prejudice if it's not raised in
24 the first responsive pleading because of the
25 cost of participating in motions practice or

1 discovery.

2 MR. CLEMENT: Well, the -- the --

3 JUSTICE KAVANAUGH: So there was a lot
4 there, but --

5 MR. CLEMENT: Yeah, there's a lot
6 there. Let me try to take it -- first of all,
7 the line most courts have drawn is not whether
8 it's in the responsive pleading, but the line
9 they've drawn is whether there's been
10 substantial discovery. That isn't the case
11 here.

12 I think that's a better line if you're
13 going to draw a presumptive line, and I think
14 that's true not just because it favors my client
15 but because that's the point at which you are
16 imposing costs on the other side that very well
17 might not have been incurred in arbitration,
18 where you -- one of the characteristics is you
19 don't have the same kind of extensive discovery.

20 JUSTICE KAVANAUGH: Wouldn't motions
21 practice also be expensive?

22 MR. CLEMENT: I -- I don't think it's
23 as expensive, and -- and at the point of motions
24 practice -- this is where the other side has to
25 share some of the responsibility here. And I

1 think it's particularly evident in this case,
2 where they didn't just file a lawsuit; they
3 filed a lawsuit asking for a nationwide
4 collective action.

5 Now, if they had filed a bilateral
6 claim under the FLSA, I mean, I don't have a
7 time machine and I wasn't involved in the
8 litigation, but I bet, if they had filed a
9 in-court complaint bilaterally under the FLSA,
10 my client would have invoked the arbitration
11 clause immediately.

12 But they asked for a nationwide
13 collective action when there was already another
14 putative nationwide collective action out there.
15 Even if that one was limited to Michigan, this
16 complaint purported to be a nationwide
17 collective action that covered everybody in
18 Michigan.

19 JUSTICE KAVANAUGH: Well, couldn't --

20 MR. CLEMENT: And so --

21 JUSTICE KAVANAUGH: -- all of that be
22 resolved on remand? In other words, we set
23 forth a standard of Section 3, and you can
24 figure out exactly what happened in this case on
25 remand. You don't --

1 MR. CLEMENT: It -- and that -- that
2 does seem kind of --

3 JUSTICE KAVANAUGH: -- and it's not
4 your preferred approach.

5 MR. CLEMENT: -- tough on my client
6 given the way I would read "in default" is that
7 you defaulted on some legal obligation based on
8 the rules as they exist.

9 JUSTICE BARRETT: But, Mr. Clement --

10 MR. CLEMENT: And the rules --

11 JUSTICE BARRETT: -- let me just
12 interrupt there for one second because Section 4
13 defines default as "failure, neglect, or refusal
14 of another to arbitrate." So you're talking
15 about default in response to Justice Kavanaugh
16 as a breach. But why wouldn't we look to that
17 language, which doesn't require prejudice?

18 MR. CLEMENT: Well, I -- I think it
19 does -- actually would require prejudice. I
20 think you could have the same inquiry under
21 that. I mean, I think that -- that you would
22 still have to -- you'd still have some concept
23 of material failure or neglect, seems to me, to
24 have kind of a prejudice inquiry built in. But
25 even if you go back and look at the definition

1 of those terms, which I did, like neglect is --
2 in a legal context, is neglect of a legal duty.

3 And -- and I just think the question
4 here is what's the legal duty --

5 JUSTICE KAGAN: But it just seems --

6 MR. CLEMENT: -- that my client --

7 JUSTICE KAGAN: -- it just --

8 MR. CLEMENT: -- violated or is in
9 breach of.

10 JUSTICE KAGAN: -- it seems a bit made
11 up, Mr. Clement. I mean --

12 MR. CLEMENT: I'm sorry?

13 JUSTICE KAGAN: It seems a bit made
14 up, this definition of default that you have. I
15 mean, you say that there are certain things that
16 count as default, missing an explicit deadline
17 and -- and -- but, you know, where are we
18 getting this from? We're not getting it from
19 Section 4. We're not getting it from any other
20 part of the FAA.

21 Where does this federal common law
22 rule come from as to what counts as default?

23 MR. CLEMENT: I mean, Justice Kagan,
24 look, I'll -- I'll take the characterization
25 that it's federal common law, but I think of

1 federal common law when you're just making it
2 up. I mean, I think this is just a --

3 JUSTICE KAGAN: But it seems a little
4 bit just making it up because you're drawing a
5 line and what -- you're putting some things on
6 one side of the line, and then you're saying,
7 well, you don't default if you act
8 inconsistently with your contractual rights.

9 Well, I don't know. Maybe -- I bet
10 there are a bunch of states that say you do
11 default when you act inconsistently with your
12 contractual rights, regardless whether you've
13 missed an explicit deadline.

14 I mean, it just seems as though
15 default is a kind of complicated concept and --
16 and you have one definition, and why should we
17 accept it? Where is it coming from?

18 MR. CLEMENT: It -- it's -- it's a
19 gloss on the statutory phrase "in default." And
20 I think everybody agrees "default" means you
21 violated a legal obligation, and --

22 JUSTICE BREYER: All right. Could --
23 could -- could you do this? I mean, suppose
24 this came to us out of the rules instead of FAA.

25 MR. CLEMENT: Yeah.

1 JUSTICE BREYER: I mean, I would be
2 tempted, perhaps wrongly, but tempted to say the
3 following: They waited a long time, okay? Now
4 that might be too late for them now to ask.
5 Whether it is is, one, a question of whether
6 they clearly and -- clearly stated we waive it
7 or we don't want it or the equivalent.

8 But, if they haven't said that, then
9 you try to look to see how much prejudice are
10 there or other relevant circumstances. This is
11 primarily a matter for the trial judge to
12 decide. That's the one who should decide it.
13 And if our standard which I just said is too
14 vague, the rules committee can fix it up.

15 But, if I tried that in this case,
16 there is no rules committee to fix it up. So
17 what do I do?

18 MR. CLEMENT: Well, I -- I think the
19 way -- I mean, I don't really have much of a
20 disagreement with what you just said, other than
21 I think it's a mistake to try to be too
22 deferential to the trial court in this context.

23 JUSTICE BREYER: Yeah. The other
24 mistake is we create all kinds of rigid rules
25 that -- that apply well in some cases and

1 terribly in another.

2 MR. CLEMENT: I don't think there's
3 been a problem. The vast majority of the
4 circuits have done something relatively similar
5 to what you're saying. They basically say,
6 look, have you done something -- did you know
7 about the arbitration agreement? Step one.
8 Step two, did you do something inconsistent with
9 it? Now that's where your consideration of, if
10 you said I don't ever want to arbitrate, I hate
11 that stuff, okay, that's really inconsistent.

12 If here, as in here, all you did is
13 you waited a while and you filed a couple of
14 motions, that's either not inconsistent -- the
15 Eighth Circuit didn't even resolve that case
16 here -- issue here. But that's either not
17 inconsistent or it's certainly not inconsistent
18 in the way that you were talking about.

19 And then the third factor is, is the
20 other side, you know, materially prejudiced?

21 And that all to me makes sense. It's
22 been workable. The reason I don't think you
23 want to be too deferential to the lower court is
24 the one benefit of making this a federal
25 question is that, through appellate review and

1 maybe some case down the road where there's a
2 circuit split as to the meaning of prejudice,
3 this Court could provide some guidance to make
4 sure that the system is working. And to me --

5 JUSTICE SOTOMAYOR: Mr. Clement, the
6 problem I have with your answer for Justice
7 Breyer is that the essence of the agreement here
8 is to not be in litigation.

9 Now you can argue the Petitioner, by
10 filing a claim in court, she herself has waived
11 it. So the fact that I waive it just evens out.
12 I understand that argument.

13 But the question becomes, did you know
14 that you had the right to arbitration? And,
15 here, you knew. Nevertheless, you didn't move
16 for arbitration in the answer as a defense. You
17 made a motion to transfer the case. When that
18 motion was denied, you indicated a willingness
19 to continue in litigation and went into
20 settlement talks, and, actually, there were
21 materials produced.

22 By its nature, there was a delay in
23 the speedy adjudication of the case because you
24 didn't move to begin with to go to arbitration,
25 so that's delay, something that was bought --

1 negotiated for.

2 And the cost is the cost that Justice
3 Kavanaugh said, an unnecessary motion, an
4 unnecessary type of settlement agreement.
5 Arbitration settlement agreements rarely require
6 the production of materials. They just require
7 talking.

8 So having said all of that to you, the
9 reason you waited was because you wanted to see
10 how the court -- by your own admission, you
11 wanted to wait to see if the court was going to
12 approve of class actions in arbitration. So you
13 were taking a calculated risk by staying in
14 litigation.

15 Why isn't that a waiver under
16 Section 6? Why isn't that a waiver under any
17 normal definition? It prejudiced the other
18 side. It hurt them at least financially. It
19 hurt them in delay. And you intentionally sat
20 on your rights waiting to see if you could
21 derive a benefit.

22 MR. CLEMENT: So there's a lot in
23 there.

24 JUSTICE SOTOMAYOR: So explain to --
25 unpackage it, but --

1 MR. CLEMENT: Yeah.

2 JUSTICE SOTOMAYOR: -- tell me why
3 isn't that not a waiver as an intentional right
4 of -- an intentional relinquishment of a known
5 right?

6 MR. CLEMENT: So, Justice Sotomayor,
7 first, I -- I don't think you get a lot out of
8 the idea that it was intentional, I mean,
9 because -- here's why: There are a lot of
10 situations, I mean, if, for example, my client
11 had thought that there was a personal
12 jurisdiction problem with this lawsuit, they
13 would have been obligated under the rules to
14 make that their first motion out of the box.

15 Now they would have intentionally been
16 doing that because they would have been saying
17 this isn't the right court for this litigation.

18 And, oh, by the way, Justice
19 Kavanaugh, all of the things in the federal
20 rules that say you have to put this in the first
21 responsive pleading are really going to the idea
22 that this is just not the right federal court
23 for this to be in.

24 And -- and so it's not just transfer
25 of -- of venue that's in there. It's improper

1 venue. So you've filed -- you've filed this
2 lawsuit in the wrong place. That's not this
3 case.

4 But getting back to the rest of the
5 answer, I think what the parties bargained for
6 here was not just arbitration but bilateral
7 arbitration. And when the other side decides
8 not just to violate the arbitration agreement
9 but to seek a nationwide collective action, I
10 think my client is perfectly within its rights,
11 and it's what I would advise my client to do
12 under the circumstances, is don't make a motion
13 to compel arbitration because you might get a
14 motion to compel nationwide collective
15 arbitration, and pretty much every defendant on
16 the planet agrees that's the worst of both
17 worlds.

18 So you wait. And then, once it's
19 clear that silence and ambiguity, which, by the
20 way, are about the same thing, can't cause you
21 to end up --

22 JUSTICE SOTOMAYOR: Mr. Clement, you
23 could have raised it -- you could have raised it
24 in your motion to compel arbitration, as did the
25 attorneys who came before us whose case you were

1 waiting on. They made a motion to compel
2 bilateral arbitration, and when the district
3 court ordered class-wide arbitration, they
4 brought it up to the Supreme Court.

5 You could have followed the same
6 protective measures.

7 MR. CLEMENT: I -- I -- I suppose we
8 could have, and with the benefit of that
9 additional advice, maybe that's what I'd tell my
10 clients to do.

11 But I'd still say, okay, at worst, we
12 failed to make a motion. At worst, we're in the
13 realm of forfeiture, and we still have the
14 ability to make this motion under Section 3.

15 And, generally speaking, in the
16 absence of absolute total waiver, which this
17 case doesn't involve, if you make a motion in
18 federal court that's not subject to a deadline,
19 then what the courts do is say: Well, was the
20 other side prejudiced? No. Okay. We're going
21 to hear this motion. And if I --

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 MR. CLEMENT: If -- if -- if I could
25 add sort of one piece to this in terms of kind

1 of explaining how all this fits together, I
2 think the design of Section 3 is to keep this
3 inquiry relatively simple, and in -- in a case
4 where it's a valid arbitration agreement and
5 it's an employment dispute within the bounds of
6 that agreement, if there is an arbitration
7 agreement, get it out of federal court quickly
8 and have a narrow inquiry based on what happened
9 in federal court. And then, if there isn't the
10 kind of prejudice that would cause those courts
11 to deny other motions as untimely, then, at that
12 point, send it to the arbitrators.

13 The other side can still raise these
14 contract theories that, if this were a contract
15 for widgets, you would have waived it or
16 estopped or you're too late. They could still
17 waive those arguments in front of the
18 arbitrator, which is where all of these
19 complicated issues of Iowa law ought to be if
20 they're not going to be in Iowa court. And, of
21 course, the parties agreed to arbitrate, so they
22 should be before the arbitrators.

23 One other point about your --

24 JUSTICE KAGAN: But, Mr. Clement, if I
25 could just -- get it out of federal court

1 quickly you said. But the way the system is now
2 working, and I want to abstract a little bit
3 from the facts of this case, I realize you have
4 this class bilateral issue going on, but put
5 that aside.

6 Irrespective of that, what's happening
7 here is that courts are saying you need to have
8 prejudice in order to waive, and then they're
9 saying there's no prejudice simply from motions
10 practice. You know, you have to get into
11 discovery to have prejudice.

12 And what that leads to is why wouldn't
13 anybody test the waters in federal court and see
14 if they can get the -- the case dismissed and
15 only if they can't say, okay, now I'm going to
16 rely on my arbitration agreement and let's go to
17 arbitration.

18 So it's like two bites at the apple.
19 There's no incentive for anybody to go to
20 arbitration fast, or there's no incentive for
21 the defendant. The defendant says, I have,
22 like, this free pass to litigate for a while and
23 then only then go to arbitration.

24 MR. CLEMENT: So, with respect,
25 Justice Kagan, I don't think it's a free pass

1 because courts -- I mean, the prejudice inquiry
2 is not so clear that you know you're going to
3 get a free pass. And, even if you do, there's
4 still the possibility the other side could say:
5 That's still a waiver under state law and an
6 issue for the arbitrator.

7 So, if you're advising clients, I
8 think what you would probably say is there's a
9 difference between motions practice that goes to
10 the merits and motions practice that doesn't.

11 But, even then, I really would draw
12 the line at discovery because sometimes you have
13 a situation where you've got to file a motion to
14 dismiss and you have some merits arguments, you
15 have some jurisdictional arguments, you're
16 allowed to put both in there.

17 And also keep in mind there's --
18 there's a wide range of cases that can be quite
19 complicated. I mean, this case is -- but for
20 the collective action piece is relatively
21 straightforward, but sometimes you have these
22 issues like under Arthur Andersen where you've
23 got to figure out whether there's a non -- you
24 know, there's a party to the litigation who's
25 not a party to the arbitration, and how does all

1 of that fit out, and how does that sort out in
2 terms of when you should make these various
3 motions.

4 And so I do think the line that the
5 lower courts have been dealing with this have
6 drawn is the line about discovery. And even
7 there, I think the real difference is whether
8 you're taking depositions because you probably
9 couldn't get those in arbitration.

10 But one last thing as to Justice
11 Kavanaugh's point, because part of the problem
12 to just all of a sudden make it kind of
13 retroactively this arbitration motion as part of
14 12(h)(1) and you've got to -- I mean, the way I
15 would look at that is those motions that you
16 have to raise in your first pleading, they all
17 go to the court's jurisdiction, so it's
18 sensible.

19 But to take something that doesn't go
20 to that court's jurisdiction and put it in
21 there, I would describe that loosely as
22 disfavoring arbitration, and I don't think
23 that's what you're supposed to do in
24 interpreting the -- the -- the FAA.

25 And I do think, in getting the

1 incentives right here, you can't ignore the
2 incentives of the party that first defaults,
3 that first violates the arbitration agreement.
4 I mean, if you -- if you err entirely on saying,
5 boy, that defendant, they have to raise that
6 thing in their very first pleading, that is
7 going to make more parties who are plaintiffs
8 say: Well, you know, the defendants are kind of
9 in a box because I've been thinking about this
10 litigation for six months. I've picked my
11 lawyer. I've refined my theory. I've not only
12 picked the district, I've picked, like, the
13 division within the district. I've done all of
14 that thinking for six months. And even though I
15 agreed to arbitrate, boom, I'm going to hit the
16 defendant with a lawsuit.

17 And then the defendant, who thought he
18 had an arbitration agreement and also thought,
19 as in this case, that there was a pre-filing
20 notification requirement in the agreement, is
21 getting hit with this lawsuit out of the blue.

22 They have to find a lawyer that they
23 didn't know they needed to get. Maybe get local
24 counsel as well. Figure out what's going on in
25 the case. Figure out whether there are other

1 additional parties to the case who aren't
2 parties to the arbitration agreement. They've
3 got to figure all that out.

4 I don't know why, if you're trying to
5 get the incentives right in a statute that's
6 pro-arbitration, that you would put that
7 defendant on what amounts to an invisible clock,
8 because it's not in 12(h)(1) now, and say: All
9 right, you've got to -- you've got to bring it
10 in that first pleading or you're out of luck.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Breyer, anything further?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 Justice Gorsuch, anything further?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: Just one thing.

20 You in your briefs rely on Rule 15 as the proper
21 analogy, and I just wanted to give you an
22 opportunity to explain how you think that works
23 and applies here.

24 In other words, an amended -- amended
25 responsive pleading, and Rule 15 allows that

1 under a very vague standard, but you say
2 prejudice is part of that standard. I just
3 wanted you to elaborate on that.

4 MR. CLEMENT: Sure, Justice Kavanaugh.
5 I appreciate the opportunity. I -- I think we
6 sort of rely on Rule 15 by analogy. I actually
7 don't think the law in the circuits is that in
8 order to file a motion under Section 3 you have
9 to have arbitration as a defense in the answer.

10 So I think, in most cases, they kind
11 of collapse that inquiry. But even if you
12 thought that was required, and this is why I
13 think the difference between arbitration, which
14 isn't a 12(h)(1) must raise defense, and other
15 defenses is important, is you could think about
16 this, okay, let's say we had to add it in the
17 answer as a preliminary step to filing this
18 motion.

19 We're past the point where we get to
20 amend as of right, but this is one of the many
21 things in the federal rules where you have,
22 like, an ability to make a motion, but there's
23 no strict deadline.

24 And so the way the courts would figure
25 out whether it's too late to amend your

1 complaint to add arbitration would be to
2 essentially say, well, the presumption is leave
3 is freely granted, but we withhold it in certain
4 circumstances and we look to prejudice.

5 In fact, cases like Forman, which we
6 cite in our brief, say that prejudice is more or
7 less the -- the most important factor.
8 Similarly, in sort of Kontrick against Ryan,
9 it's another case where this Court was dealing
10 with forfeiture issues and kind of talked about
11 the same principle.

12 Prejudice is an important part of that
13 inquiry. That's why it seems anomalous to say
14 that in this situation we would discharge the
15 prejudice inquiry altogether.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: One quick question.
19 So let's say that we agree with you. This is a
20 Section 3 question. It's a matter of federal
21 common law. Would you agree that it's not
22 really a question of waiver, so insofar as the
23 courts of appeals have classified it as waiver,
24 that really it ought to be considered a kind of
25 estoppel or laches, and so, as a matter of

1 federal common law, we should clarify that?

2 MR. CLEMENT: I -- I -- I think that
3 would actually be helpful. I would, you know,
4 because -- because really, if you look at these
5 cases, virtually all of them do not involve the
6 situation that Justice Gorsuch hypothesized of
7 somebody coming in and saying I never want to
8 litigate, I -- I mean I never want to arbitrate,
9 I just want to litigate, and then coming in the
10 next day and trying to retract it.

11 Almost all these cases involve the
12 argument that the other side waited or litigated
13 too long, and that really is thought of as an
14 issue of laches or estoppel.

15 I guess the only hesitation I would
16 say, though, is at the same time that you
17 clarified that, I would also say but it's not --
18 it's not an issue of state law, so you don't
19 have to -- like, if Iowa has a really funky law
20 of laches or estoppel, you don't have to go
21 apply that. You just have to apply federal law.
22 The federal common law would recognize that this
23 is really more like an issue of laches or
24 estoppel and, therefore, wouldn't have prejudice
25 as an important part of the inquiry.

1 JUSTICE BARRETT: But, if you did
2 something like filing a counterclaim, that might
3 be waiver, intentional relinquishment? You've
4 submitted your own dispute in an offensive way
5 to the district court?

6 MR. CLEMENT: I -- I would hesitate to
7 say that in this opinion because, like, for
8 example, what if I raised arbitration as a
9 defense, raised a mandatory counterclaim as
10 well, and then the next day asked for
11 arbitration? That doesn't seem like a waiver.

12 And I don't think -- you know, you can
13 think about this as -- like, it's not exactly
14 like an Eleventh Amendment case where the whole
15 point is that a state has a right not to be in
16 federal court against its will. So, if it files
17 a counterclaim or removes to federal court,
18 well, then boom, a trap door opens.

19 I don't think this is quite the same
20 thing. I think it needs to be a little more
21 flexible in that, precisely because of the
22 circumstance I hypothesized, where I have -- you
23 know, I -- I got to file -- I got to file an
24 answer, I've got a mandatory counterclaim, but I
25 also in the next breath am saying this should be

1 arbitrated.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Rebuttal, Ms. Gilbride.

6 REBUTTAL ARGUMENT OF KARLA A. GILBRIDE

7 ON BEHALF OF THE PETITIONER

8 MS. GILBRIDE: Just a few points in
9 rebuttal.

10 There's no place for a prejudice
11 requirement. Even if this Court does analyze
12 the question under Section 3, if you look at the
13 structure of the FAA, over and over again you
14 see indications that things should be done in a
15 summary manner. The word "summarily" appears
16 twice in Section 4, summarily to the trial, that
17 the judge shall summarily send the parties to
18 arbitration.

19 Section 16, the fact that you have an
20 interlocutory appeal if there's a refusal of a
21 request for a stay or a denial of a motion to
22 compel but not if it's granted or if the stay is
23 -- so -- so, basically, the idea, as this Court
24 said in Prima Paint, is that once the parties
25 select arbitration, it must be speedy and not

1 subject to delay and obstruction in the courts.

2 The current status quo that requires
3 prejudice and requires the party asserting
4 waiver to show prejudice results in delay and
5 obstruction in the courts over and over again.

6 And Sundance, my friend here, wants
7 the standard to be substantial participation in
8 discovery. The Second Circuit in *Rush v.*
9 *Oppenheimer* talks about participation in
10 discovery and says the -- the party asserting
11 waiver has to show that the particular
12 information the other party sought and obtained
13 could not have been obtained in arbitration. So
14 they have to go and -- go piece of information
15 by piece of information and say could the party
16 have gotten that same information in
17 arbitration. And that's all taking place in the
18 courts before anyone goes to arbitration in the
19 first place. Pre-arbitration skirmishing.

20 Motions practice was discussed.
21 Another case applying the prejudice standard is
22 the Third Circuit in *Wood v. Prudential*
23 *Insurance Company*, cited in the states' amicus
24 brief, talks about a motion to dismiss was
25 filed, the case was partially dismissed, and the

1 party asserted waiver. The district court said,
2 well, we don't know that the arbitrator wouldn't
3 have decided that motion to dismiss differently,
4 so you can't prove that you were prejudiced by
5 the court deciding it in the first instance.
6 So, therefore, license for -- for parties to
7 seek two bites at the apple, exactly the problem
8 that, Justice Kagan, you were describing.

9 So you asked, Justice Kagan, where
10 does this prejudice inquiry come from because
11 it's not anywhere in the text. Where the courts
12 got it from, if you look through the way this --
13 this doctrine developed, was this idea of the
14 liberal federal policy favoring arbitration,
15 because, if you look at the early cases, the
16 Radiator Specialties case in 1938 applying
17 Section 3, it just talks about the party being
18 dilatory and that Congress did not intend for a
19 Section 3 applicant to be dilatory. Unilateral,
20 no discussion of prejudice.

21 Where prejudice came in, starting with
22 the Carcich case in the Second Circuit and then
23 the Carolina Throwing case in the Fourth
24 Circuit, was this idea that because arbitration
25 is involved and there's a liberal federal policy

1 favoring arbitration, we need to raise the bar.
2 We need to make it harder to waive arbitration
3 than other contractual rights.

4 But this Court has repeatedly said in
5 Hall Street Associates versus Mattel and in
6 Granite Rock versus International Brotherhood of
7 Teamsters that the liberal federal policy
8 favoring arbitration is just another way of
9 codifying Section 2's equal treatment principle,
10 that because Congress was reacting to a -- to a
11 situation where courts were hostile to
12 arbitration, treating arbitration clauses like
13 any other contracts meant removing that
14 hostility, and that was the pro-arbitration
15 policy codified in the statute.

16 And so that brings us back to
17 Section 2, where we started, that, as this Court
18 has clarified, contract defenses need to be
19 generally applicable. This is not a generally
20 applicable contract defense that the courts are
21 -- are applying.

22 And that violates the centerpiece of
23 the FAA, which this Court has found in Section 2
24 dating back to Scherk versus Alberto Company in
25 1974 and reiterated in the GE Energy Power case

1 in 2020, that is codified in Section 2. And
2 it's not just about preemption. It's not just
3 about the saving clause. It is the centerpiece
4 of the FAA that contracts to arbitrate will be
5 treated like any other contract and, as this
6 Court said in *Prima Paint*, are -- that
7 Congress's intent in enacting the -- the FAA in
8 1925 was to make arbitration agreements as
9 enforceable as other contracts but not more so.

10 The Eighth Circuit applied an
11 arbitration-specific waiver doctrine at odds
12 with generally applicable Iowa contract law, and
13 that necessitates remand for the proper inquiry,
14 which, whether it's under state law, federal
15 law, or both, should not involve a prejudice
16 requirement.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:25 a.m., the case
20 was submitted.)

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