ARBITRATION EXCEPTIONALISM

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In Morgan v. Sundance, Inc.*, the Supreme Court addressed a question that has arisen frequently in recent years: If a party initially pursues litigation instead of immediately invoking the right to arbitrate pursuant to a contractual agreement, at what point can it be deemed to have waived arbitration? In deference to the judicially created "federal policy favoring arbitration," the U.S. Court of Appeals for the Eighth Circuit had required a showing that plaintiff suffered prejudice as the result of defendant's foot-dragging. Unanimously reversing this prejudice requirement—which had been the rule in nearly every circuit—the Justices emphatically declared that arbitration agreements be treated no differently from other contractual terms. Writing for the Court, Justice Kagan explicitly cautioned courts against "invent[ing] special, arbitration-preferring procedural rules."*

Morgan *marks a reversal to what has become a hallmark of modern arbitration jurisprudence: arbitration exceptionalism. For decades, federal courts have developed a body of rules that elevate arbitration agreements above ordinary contract law, often in direct conflict with statutory and doctrinal norms. From doctrines allowing non-signatories to enforce arbitration clauses under the banner of "equitable estoppel," to permissive interpretations of browse-wrap and unilateral terms, to unique severability standards applied only in aid of arbitration, exceptional rules have reshaped contemporary doctrines governing arbitration. By signaling an end to arbitration exceptionalism,* Morgan *paves the way for a critical reexamination of these doctrines and a restoration of parity between arbitration and other contractual arrangements.*

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INTRODUCTION

The legal dispute resolved by the Supreme Court in *Morgan v. Sundance, Inc.* began simply enough: Morgan, an hourly employee at a Taco Bell franchise owned by Sundance, brought a nationwide collective action against her employer alleging overtime violations in contravention of the Fair Labor Standards Act ("FLSA").[1] While Morgan's job application mandated that all disputes between the parties were subject to arbitration, Sundance pursued litigation instead, filing an unsuccessful motion to dismiss, answering the complaint, and participating in mediation—all without invoking the parties' arbitration agreement.[2] Then, eight months after Morgan had filed her complaint—and on the eve

[1] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711 (2022) (citing the Fair Labor Standards Act, 29 U.S.C. § 207(a) (setting maximum-hours standards for covered employees)).
[2] Id.

of the pretrial conference—Sundance abruptly changed course and moved to compel arbitration.[3]

Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by actively litigating the FLSA claim in Iowa federal court, and that it was only after the judicial avenue had lost its luster that the defendant pivoted to arbitration.[4] The U.S. District Court for the Southern District of Iowa agreed, observing that Sundance had invoked "the litigation machinery" by waiting eight months to assert its contractual right to arbitrate.[5] Applying traditional waiver principles—where the focus is on a party's actions rather than on the prejudice to the opposing party—the district court held that Sundance's conduct was inconsistent with its contractual right to arbitrate.[6]

On its face, the district court's ruling seemed uncontroversial. After all, courts routinely find that parties have waived certain rights in analogous procedural contexts. For instance, it is well-settled that a defendant waives the benefit of a forum selection clause when, upon being sued in a non-designated forum, it tests the waters by engaging in litigation activities rather than moving straightaway to transfer venue.[7] Courts likewise do not hesitate to find that a party waives its right to challenge personal jurisdiction or venue when it litigates without objection in a distant forum.[8] Even the constitutionally protected right to a jury trial may

[3] Id.

[4] Morgan v. Sundance, Inc., No. 18-cv-00316, 2019 WL 5089205, at *7 (S.D. Iowa June 28, 2019) ("[T]he timing of Sundance's actions demonstrates that it 'wanted to play heads I win, tails you lose,' which 'is the worst possible reason' for failing to move for arbitration sooner than it did." (internal quotation marks omitted) (citations omitted)), *rev'd*, 992 F.3d 711 (8th Cir. 2021), *vacated*, 142 S. Ct. 1708 (2022).

[5] Id. at *6 (quoting Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007)).

[6] Id. at *7 ("Sundance failed to mention the arbitration agreement in its answer, which listed numerous (fourteen) other affirmative defenses." (citing Messina v. N. Cent. Distrib., Inc., 821 F.3d 1047, 1050 (8th Cir. 2016))); *Lewallen*, 487 F.3d at 1091 ("To safeguard its right to arbitration, a party must 'do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration.'" (citation omitted)).

[7] Courts generally find that removal to and "active" litigation in a forum different from the one designated in a contract between the parties waive the right to later assert a forum selection clause. See, e.g., San Miguel Produce, Inc. v. L.G. Herndon Jr. Farms, Inc., Nos. 16-cv-00035, 16-cv-00043, 2016 WL 6403964, at *3 (S.D. Ga. Oct. 27, 2016) ("[Defendant] acted inconsistently with the forum-selection clause when, on its own accord, it chose to pursue its claims in an improper forum.").

[8] See, e.g., Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (noting that because personal jurisdiction "'represents a restriction on judicial power . . . as a matter of individual

be waived by a party who fails to make a timely demand.[9] Across these contexts, waiver principles are straightforward: courts focus on whether the party asserting the right acted inconsistently with that right. Yet in the context of arbitration, a starkly different framework emerged—one rooted in arbitration exceptionalism.

For decades, courts justified special rules governing waiver of arbitration rights by invoking the oft-repeated "federal policy favoring arbitration." Under this policy, courts imposed a heightened burden on plaintiffs opposing arbitration, requiring them to prove that a defendant's delay or inconsistent litigation conduct caused them "prejudice."[10] This prejudice requirement—a rule applicable only in arbitration cases—had become entrenched in modern jurisprudence, effectively shielding arbitration agreements from the application of ordinary waiver

liberty[,]' . . . a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court's exercise of adjudicatory authority" (first alteration in original) (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982))); Fed. R. Civ. P. 12(h)(1) ("A party waives any defense listed in Rule 12(b)(2)–(5) by: . . . failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.").

[9] See, e.g., Fed. R. Civ. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed."); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986) (explaining that the Seventh Amendment guarantee, "as a personal right, . . . is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil . . . matters must be tried"); Rodenbur v. Kaufmann, 320 F.2d 679, 683–84 (D.C. Cir. 1963) ("[A] jury trial lawfully may be waived . . . by inaction . . . ."); Bank of N.Y. Mellon v. Riley, No. 19-cv-00279, 2021 WL 2688615, at *2 (E.D. Tex. Feb. 17, 2021) (finding waiver where a party waited fifteen months to oppose a jury demand).

[10] At the time *Morgan* was decided, nine circuits required plaintiffs to establish prejudice where a defendant sought to compel arbitration after a period of active litigation. See, e.g., In re Tyco Int'l Ltd. Sec. Litig., 422 F.3d 41, 44 (1st Cir. 2005); Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968); PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1069 (3d Cir. 1995); Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690, 702 (4th Cir. 2012); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986); O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 357 (6th Cir. 2003); Erdman Co. v. Phx. Land & Acquisition, LLC, 650 F.3d 1115, 1117 (8th Cir. 2011); ATSA of Cal., Inc. v. Cont'l Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983), *amended by*, 754 F.2d 1394 (9th Cir. 1985); Citibank, N.A. v. Stok & Assocs., P.A., 387 F. App'x 921, 924–25 (11th Cir. 2010) (per curiam), *cert. granted*, 562 U.S. 1215 (mem.), *and cert. dismissed*, 563 U.S. 1029 (2011) (mem.). Only the U.S. Courts of Appeals for the Seventh and D.C. Circuits treated waiver of the right to arbitrate like the waiver of any other contractual right by focusing solely on the defendant's actions, with no explicit requirement that the plaintiff show prejudice from those actions. See St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 590 (7th Cir. 1992); Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 777 (D.C. Cir. 1987).

principles.[11] The heavy burden imposed on plaintiffs, these courts postulated, ensured that "any doubts concerning the scope of arbitrable issues [would] be resolved in favor of arbitration."[12]

Applying this prejudice test, a divided U.S. Court of Appeals for the Eighth Circuit reversed the district court and granted Sundance's motion to compel arbitration, finding that plaintiff had failed to establish that she had suffered any real prejudice from the defendant's eight-month delay in invoking arbitration.[13] With a thumb squarely on the scale favoring arbitration, the majority concluded that Sundance had not forfeited its contractual right to arbitrate.[14]

Then, a surprising thing happened: the Supreme Court granted certiorari and unanimously reversed the circuit court decision.[15] Rejecting the prejudice requirement, the Court declared that an arbitration agreement must be treated the same as any other contractual provision. Writing for the Court, Justice Kagan explained that the much-cited "federal policy favoring arbitration" was never meant to grant arbitration agreements special procedural advantages.[16] Rather, it reflected only a commitment to ending the early twentieth-century hostility toward arbitration by making arbitration agreements just as enforceable as other contracts, "but not more so."[17] Courts, Justice Kagan warned, should not

[11] See, e.g., Brevard v. Credit Suisse, No. 23-cv-00428, 2024 WL 36991, at *8 (S.D.N.Y. Jan. 3, 2024) ("Unlike in ordinary cases . . . concerning the waiver of contractual rights, prejudice was the *sine qua non* for waiver of the right to arbitrate.").

[12] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

[13] Morgan v. Sundance, Inc., 992 F.3d 711, 715 (8th Cir. 2021). But see id. at 716 (Colloton, J., dissenting) (observing that outside the arbitration context, plaintiffs are not required to demonstrate either prejudice or detrimental reliance to establish waiver).

[14] Id. at 715 (majority opinion).

[15] The result in *Morgan* was unexpected given the Supreme Court's consistent pro-arbitration stance over the past twenty years. Moreover, the Court has found workers exempt from arbitration under Section 1 of the Federal Arbitration Act ("FAA") in only three cases. See New Prime Inc. v. Oliveira, 139 S. Ct. 532, 543–44 (2019); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1793 (2022); Bissonnette v. LePage Bakeries Park St., LLC, 144 S. Ct. 905, 913 (2024).

[16] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712–13 (2022) (remarking that the Court's use of the "phrase" referencing a federal pro-arbitration policy was "merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010))).

[17] Id. at 1713 (citation omitted); see also id. ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."). The *Morgan* Court explained that this arbitration-specific prejudice rule originated with the "decades-old" decision in *Carcich v. Rederi A/B Nordie*, where the Second Circuit recognized that "an overriding federal policy

be in the business of inventing "special, arbitration-preferring procedural rules" that "tilt the playing field" in favor of arbitration.[18] Accordingly, "[i]f an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it."[19]

Thus, where defendants "engage in months, or even years, of litigation—filing motions to dismiss, answering complaints, and discussing settlement—before deciding they would fare better in arbitration," courts should evaluate a "request to switch to arbitration" as they would any other litigation strategy.[20] Specifically, courts must determine whether the defendant's conduct demonstrates a clear and intentional relinquishment of a known right to arbitrate. On this view, the prejudice requirement applied by the Eighth Circuit exemplified the very kind of arbitration exceptionalism deemed unacceptable under the Court's jurisprudence and the terms of the Federal Arbitration Act ("FAA") itself.[21] Accordingly, the Court directed the Eighth Circuit, along with ten other courts of appeals, to "[s]trip[]" the arbitration-waiver test of its prejudice requirement and ask only whether the defendant "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right."[22] This approach, the Court declared, allows the waiver of arbitration rights to be determined in the same manner as the waiver of other contractual rights.[23]

At a doctrinal level, *Morgan* breathed new life into waiver as a basis for resisting arbitration requirements.[24] In its wake, lower courts are

favoring arbitration" demanded a heavy burden be placed on those alleging waiver. Id.; *Carcich*, 389 F.2d 692, 696 (2d Cir. 1968). The Supreme Court observed that *Carcich*'s "rule and . . . reasoning spread" over the years, until most federal circuit courts had adopted a prejudice requirement for establishing waiver, relying on a policy favoring arbitration over litigation. *Morgan*, 142 S. Ct. at 1713.

[18] *Morgan*, 142 S. Ct. at 1713–14; see also id. at 1714 (observing that "the FAA makes clear that courts are not to create arbitration-specific procedural rules" (citing 9 U.S.C. § 6 (providing that any application under the statute "shall be made and heard in the manner provided by law for the making and hearing of motions"))).

[19] Id. at 1713.

[20] Id. at 1711.

[21] Id. at 1713–14.

[22] Id. at 1714.

[23] Id. (characterizing its decision as "[a] directive to a federal court to treat arbitration applications 'in the manner provided by law' for all other motions," which "is simply a command to apply the usual federal procedural rules" (quoting 9 U.S.C. § 6)).

[24] See id. at 1713 (explaining that the focus of waiver is "on the actions of the person who held the right," not "the effects of those actions on the opposing party," so the question boils

confronting a host of knotty questions concerning the abdication of arbitration rights. For instance, at what point does a party's litigation-related activities evince a clear intent to waive the arbitration right?[25] And now that prejudice is off the table, what other factors may courts consider in determining whether a party waived its right to arbitrate?[26] Should state or federal law be applied to determine the waiver of arbitration rights governed by the FAA?[27] These and many other issues are now percolating through state and federal courts; as one judge aptly observed, "The law in this area is undergoing a course correction."[28] For now, it appears that consensus on these questions may be some ways off, and further Supreme Court engagement on arbitration-waiver questions would not be surprising.[29]

But the ramifications of *Morgan* extend far beyond the narrow question of waiver. By explicitly rejecting arbitration exceptionalism, the Court has opened the door to reevaluating a host of doctrines that have long privileged arbitration agreements. As the Ninth Circuit has declared,

down to whether a party has "intentional[ly] relinquish[ed] or abandon[ed] . . . a known right" (quoting United States v. Olano, 507 U.S. 725, 733 (1993))).

[25] See, e.g., Doyle v. UBS Fin. Servs., Inc., 144 F.4th 122, 128 n.5 (2d Cir. 2025) (collecting cases defining the point at which a party's conduct in court signals a clear intention to relinquish the arbitration right).

[26] See, e.g., Garcia v. Fuentes Rest. Mgmt. Servs. Inc., 141 F.4th 671, 677–80 (5th Cir. 2025) (outlining post-*Morgan* factors relevant to waiver, including participation in discovery and mediation, answering the complaint, and delaying a motion to compel arbitration).

[27] See *Morgan*, 142 S. Ct. at 1712 (acknowledging disagreement "about the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate"). A further complication is that, in some states, courts themselves disagree over whether prejudice is required to establish waiver of the right to arbitrate. Compare Wagner Constr. Co. v. Pac. Mech. Corp., 157 P.3d 1029, 1035 (Cal. 2007) (noting that prejudice is but one factor a court can consider in determining whether a party has waived their right to arbitration), with Lewis v. Fletcher Jones Motor Cars, Inc., 140 Cal. Rptr. 3d 206, 220 (Ct. App. 2012) (stating that prejudice is required).

[28] Lamonaco v. Experian Info. Sols., Inc., No. 23-cv-01326, 2024 WL 1703112, at *7 (M.D. Fla. Apr. 19, 2024), *rev'd*, 141 F.4th 1343 (11th Cir. 2025); see also Gaudreau v. My Pillow, Inc., No. 21-cv-01899, 2022 WL 3098950, at *6 (M.D. Fla. July 1, 2022) ("In light of *Morgan*, this Court must start anew in developing a rule for waiver of arbitration agreements."); Pumphrey v. Triad Life Scis. Inc., No. 23-cv-00299, 2024 WL 69914, at *3 (N.D. Miss. Jan. 5, 2024) ("It seems possible that *Morgan* will, in fact, cause the Fifth Circuit to take a fresh look at its arbitration waiver jurisprudence . . . ."), *rev'd*, No. 24-60028, 2024 WL 4100495 (5th Cir. Sep. 6, 2024).

[29] See, e.g., Petition for a Writ of Certiorari at 1, Oceltip Aviation 1 Pty Ltd. v. Gulfstream Aerospace Corp., 143 S. Ct. 577 (2023) (mem.) (No. 22-470) (asking the Court to decide whether *Morgan* dictates that federal or state contract law serve as the basis for construing choice-of-law provisions in arbitration agreements).

"*Morgan* teaches that there is no 'strong federal policy favoring enforcement of arbitration agreements'"—which suggests that *all* judge-made, arbitration-specific rules created in the service of a supposed policy favoring arbitration are now ripe for reexamination.[30] These range from rules allowing non-signatories to enforce arbitration agreements under equitable estoppel doctrines, to permissive standards for enforcing arbitration provisions in browse-wrap contracts, to narrow interpretations of severability that preserve fundamentally unfair arbitration clauses. In each instance, the "federal policy favoring arbitration" has led courts to develop arbitration-specific procedural rules unmoored from ordinary contract law. The demise of arbitration exceptionalism, as signaled by *Morgan*, has the potential to reshape this doctrinal landscape.

This Article is the first to undertake a systematic examination of these arbitration-specific rules and their evolving place within modern contract and procedural law. While scholars, myself included, have chronicled the expanding reach of arbitration and noted the distinctive status conferred upon arbitration clauses, there has yet to be a focused exploration of the unique rules that have emerged from this exceptional treatment.[31] Accordingly, Part I traces the rise of arbitration exceptionalism, examining how the Court's invocation of a federal policy favoring arbitration has altered foundational principles of contract and procedure. Part II explores how this exceptional treatment has shaped doctrines like equitable estoppel, enabling non-signatories to enforce arbitration clauses in ways that depart from customary common law principles. Part III addresses the judicial willingness to uphold arbitration clauses in browse-wrap and other unilateral contract formats, notwithstanding common law precedents that reject such terms on the grounds that a party cannot be found to have assented to contract terms merely by using a website. And

[30] Armstrong v. Michaels Stores, Inc., 59 F.4th 1011, 1014 (9th Cir. 2023) (citation omitted); see also Deng v. Frequency Elecs., Inc., 640 F. Supp. 3d 255, 263 (E.D.N.Y. 2022) ("[A]s *Morgan* makes clear, there can be no special arbitration tests that go beyond the requirements of the common law . . . ."); Town of Vinton v. Certain Underwriters at Lloyds Lond., 706 F. Supp. 3d 602, 608 (W.D. La. 2023) (asserting that *Morgan* "clipped the wings" of the "'strong federal policy favoring arbitration' created by the FAA" (citation omitted)), *aff'd sub nom.*, Town of Vinton v. Indian Harbor Ins. Co., 161 F.4th 282 (5th Cir. 2025).

[31] See, e.g., Myriam Gilles, The Day Doctrine Died: Private Arbitration and the End of Law, 2016 U. Ill. L. Rev. 371, 409; Kristen M. Blankley, The Future of Arbitration Law?, 2022 J. Disp. Resol., no. 2, at 51, 86 (concluding "that the FAA today meets the definition of a super-statute").

Part IV examines how arbitration exceptionalism has narrowed the doctrine of severability, often to the detriment of fairness in contracting.

In the three years since *Morgan* was decided, a number of litigants have sought to use its ruling to reverse legal precedents produced by over-deference to arbitration. Accordingly, Part V surveys the post-*Morgan* case law to assess the potency of these challenges, as well as the judicial response, in order to measure whether courts are truly abandoning arbitration exceptionalism or clinging to it under different guises. As this early decisional law demonstrates, dismantling arbitration exceptionalism will require a fundamental shift in judicial attitudes. Over time, judicial acceptance of *Morgan*'s mandate disclaiming arbitration favoritism may grow stronger. Or, alternatively, the judiciary's cool reception to *Morgan* may reveal that arbitration exceptionalism retains deep vestigial power not easily displaced. As I have argued in prior work, unraveling the "hegemonic arbitration edifice that has stood now for decades" is no easy task.[32] The first step of this project is identifying the multitude of "arbitration-specific variants of federal procedural rules" that "tilt the playing field in favor of (or against) arbitration."[33] The next step—the one that may take a legal generation to accomplish—is convincing courts to fully embrace the principle that arbitration agreements be placed on "the same footing as other contracts."[34]

I. THE RISE OF ARBITRATION EXCEPTIONALISM

Between 1980 and 2000, the Supreme Court decided nineteen cases interpreting the FAA, fundamentally reshaping our understanding of arbitration's role in contemporary law.[35] During this period, the Court

[32] Myriam Gilles, Arbitration's Unraveling, 172 U. Pa. L. Rev. 1063, 1066–67 (2024) (describing legislative, judicial, and market-based developments that signal preferences for arbitration are in flux).

[33] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712, 1714 (2022).

[34] Id. at 1713 (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).

[35] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4 (1983); Southland Corp. v. Keating, 465 U.S. 1, 3 (1984); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 214 (1985); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616 (1985); AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 644 (1986); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 222–23 (1987); Perry v. Thomas, 482 U.S. 483, 484 (1987); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 31 (1987); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 478 (1989); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23, 26 (1991); Allied-Bruce Terminix Cos. v.

gradually abandoned its earlier view that the FAA was intended to put arbitration agreements "upon the same footing as other contracts."[36] In its place, the Court constructed a jurisprudence built upon arbitration exceptionalism: a body of law that elevated arbitration agreements above ordinary contractual principles, imbuing them with unique procedural and substantive advantages.

The departure from the "equal footing" principle began in 1983 with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, where the Court declared that FAA Section 2 expressed "a liberal federal policy favoring arbitration agreements."[37] This newfound policy required lower courts to rigorously enforce arbitration clauses, even where state substantive or procedural laws pointed otherwise, and to resolve "any doubts . . . in favor of arbitration."[38] Recognizing the sweeping implications of this declaration, the *Moses H. Cone* majority called for the creation of "a body of federal substantive law of arbitrability."[39] Over the decades that followed, the Court embarked on the project of constructing this body of federal common law, transforming the FAA into a super-statute that preempted longstanding state contract doctrines.

Dobson, 513 U.S. 265, 268 (1995); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 53 (1995); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 940 (1995); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 530 (1995); Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996); Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 72 (1998); Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 195 (2000); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 82 (2000).

[36] Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974) (explaining that the intention of the FAA was to put arbitration agreements "upon the same footing as other contracts" (quoting H.R. Rep. No. 68-96, at 1 (1924))); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (noting the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so").

[37] 460 U.S. at 24; see also id. at 24–25 ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 545 (2018) (Ginsburg, J., dissenting) ("In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a 'liberal federal policy favoring arbitration.'" (quoting *Moses H. Cone*, 460 U.S. at 24)).

[38] *Moses H. Cone*, 460 U.S. at 24–25.

[39] Id. at 24 ("The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

A. The Expansion of Federal Arbitration Law

The Supreme Court's embrace of arbitration exceptionalism began with its expansive interpretation of the FAA's preemptive power. Overturning earlier precedents that limited the FAA to federal court proceedings, the Court declared in 1984 that the "national policy favoring arbitration" had endowed the statute with authority to override any state policies or contract principles that impeded its full enforcement.[40] This broad interpretation thus enabled arbitration clauses to overcome myriad challenges grounded in common law contract principles.[41] The Court's interpretation not only subjugated state contract law to federal arbitration policy but also expanded the FAA's reach to the fullest extent of Congress's Commerce Clause authority.[42] By coupling expansive preemption with the doctrine that Congress need not prove a specific impact on interstate commerce in individual cases, the Court rendered the FAA virtually boundless in scope.[43] Through these rulings, arbitration exceptionalism emerged as a force that not only ensured the enforceability of arbitration agreements but also privileged these provisions above all other contracts.

The Court then extended its commitment to arbitration by finding that even statutory claims with significant public regulatory effects could be subject to private arbitration. For instance, the Court held that claims

[40] *Southland*, 465 U.S. at 10, 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." (footnote omitted)); see also *Volt Info.*, 489 U.S. at 472 (observing that "the FAA . . . pre-empts application of state laws which render arbitration agreements unenforceable"); *Terminix*, 513 U.S. at 272 ("[The] Act . . . seeks broadly to overcome judicial hostility to arbitration agreements and . . . applies in both federal and state courts.").

[41] See, e.g., Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (finding a Montana statute conditioning the enforceability of arbitration agreements on compliance with a special notice requirement preempted by the FAA); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015) (finding that state court interpretation of the parties' contract did not "give 'due regard . . . to the federal policy favoring arbitration'" and was therefore preempted by the FAA (alteration in original) (citation omitted)).

[42] E.g., *Terminix*, 513 U.S. at 273–74 (interpreting Section 2 of the FAA to extend the Act's reach to the limits of Congress's Commerce Clause power).

[43] Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003) (per curiam) (finding that the Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce where "in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control'" (alteration in original) (quoting Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948))).

brought under the federal securities,[44] antitrust,[45] and Racketeer Influenced and Corrupt Organizations statutes[46] were fully arbitrable, even when such claims implicated broader societal interests. Simultaneously, the Court endorsed the enforcement of pre-dispute arbitration clauses in standard-form contracts, interpreting these agreements generously to favor arbitration,[47] despite long-held policy arguments to the contrary.[48] This indulgence toward arbitration extended to procedural issues, as the Court empowered arbitrators to decide threshold questions of arbitrability, further insulating arbitration from judicial scrutiny.[49] The result was a comprehensive framework of judicially created doctrines that consistently privileged arbitration over competing legal norms.

By the close of the twentieth century, the Supreme Court had constructed a legal edifice that treated arbitration not as a neutral alternative to litigation but as a preferred forum warranting special deference.[50] On the sandstone foundation of *Moses H. Cone*'s "policy

[44] See, e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (overruling precedents that "rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" and, as such, were "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes").

[45] See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) ("[W]e find no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims.").

[46] Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 242 (1987) (holding that claims under the Racketeer Influenced and Corrupt Organizations Act were fully arbitrable).

[47] See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 33 (1991) ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context," and courts should address such challenges "with a healthy regard for the federal policy favoring arbitration." (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983))).

[48] Id. at 42 (Stevens, J., dissenting) ("When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims [or] to form contracts between parties of unequal bargaining power . . . .").

[49] See, e.g., First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943–44 (1995) (holding that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clea[r] and unmistakabl[e]" evidence (alterations in original) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986))); see also David S. Schwartz, Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles, 38 U.S.F. L. Rev. 49, 80 (2003) (arguing that arbitration cases in the early 2000s "show a trend toward moving . . . enforceability questions into the arbitrator's purview, consistent with a sweeping pro-arbitration policy that will result in more cases . . . going to arbitration").

[50] E.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining

favoring arbitration," the Court built a super-structure of arbitration exceptionalism that overrode traditional state contract law and procedural norms, solidifying federal dominance over arbitration doctrine.

B. Reevaluating Arbitration Exceptionalism in Light of Morgan

The Supreme Court's unanimous decision in *Morgan v. Sundance, Inc.* marks a significant departure from this tradition of arbitration exceptionalism. At its core, *Morgan* rejects the idea that arbitration agreements warrant special procedural advantages. By dismantling the judge-made "prejudice" requirement for waiver of arbitration rights, the Court restored the principle that arbitration agreements are enforceable on equal footing with other contracts—but not more so. If we take *Morgan* at its word, its repudiation of arbitration exceptionalism could serve as a basis for challenging a host of doctrines generated amidst decades of deference to arbitration.

Take, for instance, the well-settled principle of *contra proferentem*, which allows courts to resolve ambiguities in contractual terms against the drafter.[51] This common law doctrine is grounded in the belief that construing "contracts against drafters [may] incentivize them to write contracts more carefully."[52] While *contra proferentem* is applicable in cases across nearly all areas of contract law, it is most often employed where there is unequal bargaining power between the contracting parties.[53] One would therefore expect this canon to apply to arbitration

congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."); see also Sampson v. LCF Grp., Inc. (In re Bridger Steel, Inc.), No. 23-bk-20019, 2024 WL 4377452, at *7 (Bankr. D. Mont. Sep. 30, 2024) ("Over the intervening 50 years, equal footing was superseded by favoritism and enforcing arbitration was the rule not the exception.").

[51] See, e.g., Penn Mut. Life Ins. Co. v. Oglesby, 695 A.2d 1146, 1149–50 (Del. 1997) (noting that where a contract "is ambiguous, the principle of *contra proferentem* dictates that the contract must be construed against the drafter"); see also Restatement (Second) of Conts. § 206 (A.L.I. 1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

[52] Catlin Specialty Ins. Co. v. QA3 Fin. Corp., 36 F. Supp. 3d 336, 342 (S.D.N.Y. 2014) ("The terms of an insurance policy are usually what the insurance company chooses to make them. That is the rationale of the general rule that any ambiguity is to be resolved liberally in favor of the insured." (internal quotation marks omitted) (quoting Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 951 (2d Cir. 1965))), *aff'd*, 629 F. App'x 127 (2d Cir. 2015).

[53] Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co., 160 A.3d 1263, 1270–71 (N.J. 2017) ("*Contra proferentem* is a consumer-protective doctrine 'only available

provisions in standard-form agreements, where the corporate drafter is nearly always the more powerful party and the consumer or employee lacks both information and choice. And, since arbitration agreements are strictly "a matter of consent, not coercion,"[54] and are subject to "ordinary state-law principles that govern the formation of contracts,"[55] *contra proferentem* would dictate that ambiguous clauses in an arbitration agreement be resolved against the corporate drafter. And yet, in *Lamps Plus, Inc. v. Varela*, the Court carved out a special exception for arbitration agreements, holding that ambiguities must be resolved "in favor of arbitration," irrespective of customary common law doctrines.[56] In fact, lower courts had already adopted this pro-arbitration presumption, tilting the contractual scales to find enforceable agreements to arbitrate in even the murkiest contracts.[57] This departure from traditional contract principles underscores how arbitration exceptionalism disrupts longstanding doctrines, affording these provisions unique interpretative advantages.

Similarly, *Moses H. Cone* itself exemplifies how arbitration exceptionalism has reshaped procedural norms. Historically, courts have disfavored splitting related claims across multiple forums, citing inefficiency and the potential for inconsistent rulings.[58] As far back as

in situations where the parties have unequal bargaining power. If both parties are equally "worldly-wise" and sophisticated, *contra proferentem* is inappropriate.'" (citation omitted)).

[54] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[55] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[56] 139 S. Ct. 1407, 1418–19 (2019); see also id. at 1419 ("[T]he FAA provides the default rule for resolving ambiguity here.").

[57] See, e.g., Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 710 (4th Cir. 2001) (invoking "a federal policy requiring that all ambiguities be resolved in favor of arbitration").

[58] Courts have created numerous doctrines to guard against fragmented claims. For example, the claims-splitting doctrine prohibits plaintiffs from "maintain[ing] two separate actions involving the same subject matter at the same time in the same court and against the same defendant." Walton v. Eaton Corp., 563 F.2d 66, 70 (3d Cir. 1977) (en banc). The doctrine is often justified on the grounds that, "[b]y spreading claims around in multiple lawsuits in other courts or before other judges, parties waste 'scarce judicial resources' and undermine 'the efficient and comprehensive disposition of cases.'" Vanover v. NCO Fin. Servs., Inc., 857 F.3d 833, 841 (11th Cir. 2017) (citation omitted) (quoting Katz v. Gerardi, 655 F.3d 1212, 1217 (10th Cir. 2011)). Similarly, the entire controversy doctrine under New Jersey law "embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court." Cogdell v. Hosp. Ctr., 560 A.2d 1169, 1172 (N.J. 1989). The "purposes of the doctrine include the needs of economy and the avoidance of waste." Id. at 1173.

1877, the Supreme Court declared that if a party was allowed "to split up his demand and prosecute it by piecemeal, . . . [t]here would be no end to litigation."[59] Yet in *Moses H. Cone*, this longstanding policy against piecemeal litigation yielded to the FAA's newfound mandate to enforce arbitration agreements at all costs.[60] There, the Court held that a party could be compelled to adjudicate related disputes in separate forums where "necessary to give effect to an arbitration agreement," notwithstanding the increased costs or potentially varied outcomes.[61] Resigning itself to a form of procedural fragmentation found in no other area of its jurisprudence, the Court's decision in *Moses H. Cone* represents a stark example of arbitration exceptionalism.

Morgan's repudiation of arbitration exceptionalism invites a critical reassessment of these cases. If arbitration agreements are to be treated like other contracts, then judicially created, arbitration-preferring rules—such as the rejection of *contra proferentem* in *Lamps Plus* and the embrace of piecemeal litigation in *Moses H. Cone*—are ripe for reconsideration.[62] This shift has the potential to realign arbitration jurisprudence under the FAA with broader principles of contractual and procedural fairness.

Yet, any realistic account of the current legal-political environment suggests that the Supreme Court is unlikely to revisit these precedents in the near term. Meanwhile, the judiciary's continued reliance on the notion of a "strong federal policy favoring arbitration" has enabled arbitration exceptionalism to seep ever deeper into the fabric of our legal culture.[63]

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[59] Stark v. Starr, 94 U.S. 477, 485 (1877).

[60] 460 U.S. 1, 20 (1983) ("Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.").

[61] Id. (noting that enforcing the arbitration clause at issue required the plaintiff "to resolve . . . related disputes in different forums," with one claim dispatched to arbitration while the other remained in state court); see also KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011) (per curiam) ("The [FAA] has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation.").

[62] Some courts have already started to rethink these principles. See Simpson v. Nissan of N. Am., Inc., No. 22-cv-00747, 2023 WL 5120240, at *3 (M.D. Tenn. Aug. 9, 2023) ("Some of the principles that district courts and circuit courts have read into the FAA—particularly the requirement that contractual ambiguity be resolved in favor of arbitration—could be fairly characterized as judge-created, arbitration-specific rules that go beyond the FAA's purpose of 'plac[ing] such agreements upon the same footing as other contracts.' " (alteration in original) (quoting Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022)).

[63] China Media Express Holdings, Inc. ex rel. Barth v. Nexus Exec. Risks, Ltd., 182 F. Supp. 3d 42, 48–49 (S.D.N.Y. 2016) (declaring that the federal policy favoring arbitration

Even as *Morgan* disclaims the idea of custom-made rules that "tilt the playing field,"[64] many lower courts continue to extol arbitration as a favored forum, adopting expansive interpretations of arbitration agreements that deviate sharply from traditional contract principles.[65] Lower courts routinely justify disparate outcomes by invoking arbitration exceptionalism, construing arbitration clauses as broadly as possible and minimizing scrutiny of their enforceability. Indeed, contemporary courts acknowledge that it is so "difficult to overstate the strong federal policy in favor of arbitration" that the safer course is "to construe arbitration clauses as broadly as possible."[66]

This extreme deference has bred scores of lower court opinions justifying disparate outcomes based on arbitration exceptionalism.[67] It is here, in lower court jurisprudence, that we might identify areas ripe for reconsideration in the wake of *Morgan*. By rejecting the idea that arbitration agreements warrant special procedural rules, the decision provides a framework for dismantling the doctrines that have privileged arbitration for decades. So even if the Supreme Court is unlikely to revisit its pro-arbitration rulings in the near term, the equal-treatment principle articulated in *Morgan* provides a foundation for challenging arbitration-specific rules at the lower federal court level. By stripping arbitration agreements of their exceptional status, these courts can begin to unwind decades of jurisprudence that has elevated arbitration at the expense of fairness and common law principles.

II. ARBITRATION-SPECIFIC ESTOPPEL

Arbitration is a creature of contract, meaning that no party can be compelled to arbitrate a dispute unless it has contractually agreed to do so.[68] By the same token, nonparties cannot be forced into arbitration, even when their dispute implicates a contract containing an arbitration clause.

is so powerful that courts should interpret arbitration clauses as broadly as possible); see also Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151, 1160 (9th Cir. 2013) (asserting that "the FAA's purpose is to give preference (instead of mere equality) to arbitration provisions").

[64] *Morgan*, 142 S. Ct. at 1714.

[65] See, e.g., Acab v. Chenrosa LLC, 725 F. Supp. 3d 1140, 1147 (S.D. Cal. 2024) (refusing to extend *Morgan* to challenges to statutory interpretations of the FAA).

[66] *China Media Express Holdings*, 182 F. Supp. 3d at 48–49 (citations omitted).

[67] See Richard Frankel, The Arbitration Clause as Super Contract, 91 Wash. U. L. Rev. 531, 533–34 (2014) (attributing judicial preference for arbitration to "lower-court misinterpretation of thirty-year-old dicta" derived from *Moses H. Cone*).

[68] See Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010).

For many years, the Supreme Court consistently affirmed these principles. For instance, in its 1995 decision in *First Options of Chicago, Inc. v. Kaplan*, the Justices unanimously declared that arbitration "is a way to resolve those disputes—but *only* those disputes—that the parties have agreed to submit to arbitration."[69] Nearly a decade later, the Court again unanimously declared that "[i]t goes without saying that a contract cannot bind a nonparty" to arbitration.[70]

Lower federal courts readily adhered to these precedents, which aligned with long-settled principles of state contract law.[71] Over time, however, as arbitration exceptionalism gained traction, these bedrock principles began to erode. In *Arthur Andersen LLP v. Carlisle*, the Supreme Court abruptly departed from the notion that non-signatories to a written arbitration contract were barred from enforcing it under the FAA.[72] The Court clarified that while the FAA requires arbitration agreements to be in writing, this requirement does not limit enforcement to only the contractual "parties."[73] Instead, "background principles of state contract law" may allow nonparties to enforce arbitration agreements.[74]

In *Carlisle*, a group of clients sued their investment management firm, along with the firm's independent accountants.[75] The accountants—who lacked any contractual relationship with plaintiffs—sought to glom onto the parties' arbitration clause.[76] Specifically, the third-party accountants argued that principles of equitable estoppel required plaintiffs to arbitrate all claims relating to alleged misconduct by their investment management firm, including those against non-signatories to their arbitration agreement.[77] The Sixth Circuit rejected this argument, concluding that

[69] 514 U.S. 938, 943 (1995) (emphasis added).

[70] EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

[71] See, e.g., DSMC Inc. v. Convera Corp., 349 F.3d 679, 683 (D.C. Cir. 2003) (denying a non-signatory's motion to compel arbitration as "an effort to expand [plaintiff's] obligation *beyond* the terms of that written agreement pursuant to principles of equitable estoppel").

[72] 556 U.S. 624, 631 (2009).

[73] Id.

[74] Id. at 630–31 (noting that arbitration clauses may "be enforced by or against nonparties . . . through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel'" (quoting 21 Richard A. Lord, Samuel Williston's A Treatise on the Law of Contracts § 57:19 (4th ed. 2001))).

[75] Id. at 626–27.

[76] Id. at 627.

[77] Id.

non-signatories could not invoke the FAA to compel arbitration.[78] The Supreme Court disagreed, describing the Sixth Circuit as having treated nonparties as "categorically ineligible for relief," and clarifying that non-signatories may compel arbitration where "relevant state contract law" allows it.[79]

Unsurprisingly, *Carlisle* unleashed a wave of litigation in which a broad array of nonparties sought to compel arbitration under the banner of equitable estoppel.[80] In many instances, courts interpreted estoppel principles expansively, allowing corporate affiliates—including parent and subsidiary companies[81] as well as assignees[82] and other contractual strangers—to enforce arbitration agreements. Rather than resting on rigorous analyses of state contract law, these decisions often deferred to the FAA's pro-arbitration policy.

After *Morgan v. Sundance, Inc.*, the estoppel jurisprudence that has developed around *Carlisle* is primed for reassessment. In *Morgan*, the Court reiterated that defenses such as estoppel—as well as waiver, forfeiture, and laches—remain available to parties resisting arbitration.[83] But importantly, the Court emphasized that these principles must be applied consistently across all contractual disputes and cautioned against "using custom-made rules, to tilt the playing field in favor of (or against) arbitration."[84] As explored below, much of the arbitration-by-estoppel jurisprudence developed in the wake of *Carlisle* rests on precisely the sort of arbitration exceptionalism that *Morgan* disavows.

[78] Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP, 521 F.3d 597, 599 (6th Cir. 2008) (holding that non-signatories could not compel arbitration under the FAA), *rev'd sub nom.*, Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009).

[79] *Carlisle*, 556 U.S. at 629, 632.

[80] See Richard M. Alderman, The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration, 24 Loy. Consumer L. Rev. 586, 596 (2012) (describing equitable estoppel as "the most common argument used by non-parties as the basis for enforcing an arbitration provision").

[81] See, e.g., CVS Pharmacy, Inc. v. Gable Fam. Pharmacy, No. 12-cv-01057, 2012 WL 13448148, at *7 (D. Ariz. Oct. 22, 2012) (finding "a sufficiently close relationship and 'identity of interest'" between a parent and subsidiaries to "justify the conclusion that Respondents should be estopped from denying an obligation to arbitrate").

[82] See, e.g., ISTA Pharms., Inc. v. Senju Pharm. Co., No. 10-cv-03219, 2010 WL 11601183, at *6 (C.D. Cal. Aug. 26, 2010) (finding equitable estoppel precludes an assignee from claiming the benefits of a licensing agreement while simultaneously attempting to avoid the arbitration clause in the agreement).

[83] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022).

[84] Id. at 1714.

*A. Pro-Arbitration "*Erie *Guesses"*

In the wake of *Carlisle*, non-signatories seeking to enforce arbitration clauses initially faced some hurdles, largely because the "relevant state law" often demanded more evidentiary support than these third parties could muster. For example, Texas law has long presumed that "[a]rbitration agreements apply to nonsignatories only in rare circumstances."[85] Two such circumstances recognized under that state's law are the third-party beneficiary doctrine and "direct benefits" estoppel.

Under the third-party beneficiary doctrine, the non-signatory "must demonstrate that the contracting parties 'intended to secure a benefit to [a] third party' and 'entered into the contract directly for the third party's benefit.'"[86] This intent "must be clearly and fully spelled out" in the agreement.[87] Direct-benefits estoppel, by contrast, applies when a litigant seeks to derive benefits from a contract while "simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes."[88]

Texas courts have interpreted these exceptions narrowly,[89] expressing a "reluctance to adopt novel formulations of estoppel to compel

[85] In re Rubiola, 334 S.W.3d 220, 224 (Tex. 2011) (alteration in original) (quoting Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 358 (5th Cir. 2003)). Moreover, Texas courts are clear that "[e]stoppel in the arbitration context is based on principles of contract and agency and does not create a requirement to arbitrate where none existed before." Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 636 (Tex. 2018).

[86] First Bank v. Brumitt, 519 S.W.3d 95, 102 (Tex. 2017) (quoting Stine v. Stewart, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam)); see also Corpus Christi Bank & Tr. v. Smith, 525 S.W.2d 501, 503–04 (Tex. 1975) (stating a presumption exists that parties contracted for themselves unless it "clearly appears" that they intended a third party to benefit from the contract).

[87] MCI Telecomms. Corp. v. Texas Utils. Elec. Co., 995 S.W.2d 647, 651 (Tex. 1999); see also *Brumitt*, 519 S.W.3d at 103 ("The contract must include 'a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party,' and any implied intent to create a third-party beneficiary is insufficient." (citation omitted)); First Union Nat'l Bank v. Richmont Cap. Partners I, L.P., 168 S.W.3d 917, 929 (Tex. App. 2005) ("The fact that a third party might receive an incidental benefit from a contract does not give that third party a right to enforce the contract.").

[88] Taylor Morrison of Tex., Inc. v. Ha ex rel. C.M.X., 660 S.W.3d 529, 533 (Tex. 2023) (per curiam) (quoting In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005)); see also In re Weekley Homes, L.P., 180 S.W.3d 127, 135 (Tex. 2005) (observing that a nonparty "cannot both have his contract and defeat it too").

[89] See, e.g., *Jody James Farms*, 547 S.W.3d at 636–38 (finding the relevant contract did not "express an intent to make the insurance agency a direct beneficiary," nor were plaintiff's claims against the agency grounded in contractual duties); Travelers Indem. Co. v. Gustine Indep. Sch. Dist., No. 11-21-00229-CV, 2023 WL 3633744, at *8 (Tex. App. May 25, 2023)

arbitration."[90] For instance, in *Jody James Farms, JV v. Altman Group, Inc.*, the Supreme Court of Texas held that estoppel cannot compel arbitration where the plaintiff's claims alleging tortious conduct are distinct from any contractual obligations.[91] In so ruling, the Texas high court relied upon decades of jurisprudence interpreting the state's contract law.[92]

Given *Carlisle*'s holding that a non-signatory can only enforce an arbitration agreement where "relevant state contract law allows," one might expect federal courts applying Texas law to follow the narrow path defined in *Jody James Farms* and similar cases.[93] However, fueled by arbitration exceptionalism, courts in the Fifth Circuit have largely disregarded state law, instead crafting bespoke estoppel doctrines that expand the range of entities that can compel arbitration.[94] These doctrines include the close relationship or "intertwined claims" test and the "concerted misconduct" test, which focus on factors like the relationship between signatories and non-signatories or allegations of interdependent wrongdoing.[95]

Neither of these tests align with the third-party beneficiary or direct-benefits estoppel doctrines recognized by Texas law. Indeed, the Texas Supreme Court has explicitly rejected the concerted misconduct test,[96]

(finding plaintiff's claim was not seeking "the direct benefit of the reinsurance certificate," nor was plaintiff "attempting to artfully plead a case that, in actuality, constitutes a suit 'on the contract' " (quoting *In re Weekley Homes*, 180 S.W.3d at 132)).

[90] *Jody James Farms*, 547 S.W.3d at 637; see also, e.g., In re Merrill Lynch Tr. Co. FSB, 235 S.W.3d 185, 191–95 (Tex. 2007) (declining to recognize "concerted-misconduct estoppel"); G.T. Leach Builders, LLC v. Sapphire V.P., LP, 458 S.W.3d 502, 529 (Tex. 2015) ("[T]he fact that the claims would not have arisen but for the existence of the general contract is not enough to establish equitable estoppel.").

[91] 547 S.W.3d at 638.

[92] Id. at 637–40.

[93] Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632 (2009).

[94] See Michael A. Rosenhouse, Annotation, Application of Equitable Estoppel to Compel Arbitration By or Against Nonsignatory—State Cases, 22 A.L.R.6th 387 (2007) (describing a "unique body" of case law that "federal courts have initiated" and "that is peculiarly applicable" in cases involving arbitration agreements).

[95] See Hiser v. NZone Guidance, L.L.C., 799 F. App'x 247, 248 (5th Cir. 2020) (per curiam); In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 195 S.W.3d 807, 814 (Tex. App. 2006) ("[A]pplication of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.").

[96] In re Merrill Lynch Tr. Co. FSB, 235 S.W.3d 185, 191, 194 (Tex. 2007) (explicitly rejecting alternative estoppel to allow two non-signatory subsidiaries to enforce an arbitration

and "has neither accepted nor rejected intertwined claims estoppel."[97] Texas is not alone in limiting the application of equitable estoppel; indeed, most states that have addressed this issue have refused to adopt alternative estoppel theories, finding them inconsistent with traditional contract law principles.[98] For example, the Supreme Court of Mississippi has emphasized that estoppel should be applied "cautiously and only when equity clearly requires it."[99] Accordingly, the state's high court rejected the intertwined claims theory of estoppel as incompatible with "traditional elements of equitable estoppel" as recognized under Mississippi law.[100] Similarly, the Supreme Court of Indiana[101] and an intermediate appellate court in Maryland[102] have expressly declined to adopt the intertwined claims approach. Yet, federal courts in both the Fifth and Fourth Circuits routinely compel arbitration on equitable

agreement their corporate parent had with the plaintiff); see also Al Rushaid v. Nat'l Oilwell Varco, Inc., 814 F.3d 300, 305 (5th Cir. 2016) (recognizing that "[t]he concerted misconduct estoppel theory is foreclosed" under Texas law).

[97] Sanchez v. Marathon Oil Co., No. 20-cv-01044, 2021 WL 1201677, at *5 (S.D. Tex. Jan. 21, 2021); see also *Jody James Farms*, 547 S.W.3d at 639 ("In *In re Merrill Lynch Trust Co*., we acknowledged the existence of [the intertwined claims] theory without deciding its validity in Texas. . . . We need not consider the viability of such a theory in this case . . . .").

[98] See, e.g., Doe v. Carmel Operator, LLC, 160 N.E.3d 518, 524 (Ind. 2021) (refusing to endorse alternative theories of equitable estoppel); Ervin v. Nokia, Inc., 812 N.E.2d 534, 542–43 (Ill. App. Ct. 2004) (refusing to apply alternative estoppel because "arbitration is first a matter of consent"); Schneider v. SRC Energy, Inc., 424 F. Supp. 3d 1094, 1101 (D. Colo. 2019) (observing that Colorado law disfavors estoppel and "the doctrine will be applied only when all of the elements constituting an estoppel are clearly shown" (quoting Santich v. VCG Holding Corp., 2019 CO 67, ¶ 7, 443 P.3d 62, 65 (en banc))).

[99] Harrison Enters., Inc. v. Trilogy Commc'ns, Inc., 2000-CA-01345-SCT (¶ 32), 818 So. 2d 1088, 1095 (Miss. 2002) (en banc) (quoting Bright v. Michel, 137 So. 2d 155, 159 (Miss. 1962)); see also PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 206 (Miss. 1984) ("The law does not regard estoppels with favor, nor extend them beyond the requirements of the transactions in which they originate." (quoting McLearn v. Hill, 177 N.E. 617, 619 (Mass. 1931))).

[100] B.C. Rogers Poultry, Inc. v. Wedgeworth, 2000-IA-00184-SCT (¶¶ 30, 33, 35), 911 So. 2d 483, 492–93 (Miss. 2005) (en banc) ("[A] non-signatory to a contract should not be able to enforce an arbitration agreement, under the intertwined claims test, where there is no . . . close legal relationship alleged, and where the 'intertwined claims' do not depend on the agreement . . . ."); see also Qualcomm Inc. v. Am. Wireless License Grp., LLC, 2005-IA-01827-SCT (¶ 18), 980 So. 2d 261, 269 (Miss. 2007) (refusing to permit non-signatories to enforce an arbitration agreement that failed to name them).

[101] See *Doe*, 160 N.E.3d at 525–26 (declining to endorse alternative equitable estoppel theories that "require no relationship—not even a cursory one—between the parties").

[102] See, e.g., Griggs v. Evans, 43 A.3d 1081, 1096 (Md. Ct. Spec. App. 2012) (holding that equitable estoppel was not applicable where "the [plaintiffs'] complaint [did] not allege any wrongdoing by . . . the signatory").

estoppel grounds, in clear disregard of underlying state law.[103] As the Sixth Circuit has observed, federal courts applying alternative estoppel theories to compel arbitration often "fail to identify any traditional common-law 'analog' that could justify" these deviations from state law.[104]

How, one might ask, did alternative estoppel theories—which are so thoroughly unmoored from relevant state contract law—become generally accepted in federal courts? The widespread adoption of these arbitration-specific doctrines is largely attributable to a handful of federal appellate courts overriding state contract law in the name of arbitration exceptionalism. A prime example is the Fifth Circuit's "*Erie* guess" that the Texas Supreme Court, consistent with both federal and state pro-arbitration policy, would embrace the doctrine of intertwined claims estoppel.[105] This guess is unsupported by any reasonable interpretation of Texas law, which only sparingly allows non-signatories to enforce arbitration agreements. Nevertheless, the Fifth Circuit has repeatedly adhered to this position, even as the Texas Supreme Court has declined to endorse it.[106] As binding circuit precedent, this interpretation has

[103] For instance, in *Begole v. North Mississippi Medical Center, Inc.*, the Fifth Circuit cited the Mississippi Supreme Court's opinion in *Wedgeworth* as supporting a standalone intertwined claims theory of estoppel. 761 F. App'x 248, 253 (5th Cir. 2019) (per curiam). In reality, the *Wedgeworth* court was clear that a "third party who is a non-signatory to a contract should *not* be able to enforce an arbitration agreement" unless traditional bases (such as agency, alter ego, etc.) are also in play. *Wedgeworth*, 911 So. 2d at 492 (emphasis added). But see Hudson v. Windows USA, LLC, No. 16-cv-00596, 2017 WL 1305251, at *4 (S.D. Miss. Apr. 5, 2017) (recognizing that the Mississippi Supreme Court "rejected" the concerted misconduct test for equitable estoppel). See also Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 374 (4th Cir. 2012) (holding that the plaintiff was equitably estopped from avoiding arbitration with both signatory and non-signatory defendants where "[t]he conduct of [all three defendants, signatory and non-signatory,] was coordinated by virtue of each defendant's alleged involvement"); Long v. Silver, 248 F.3d 309, 317–20 (4th Cir. 2001) (compelling arbitration of claims against a signatory corporation and non-signatory shareholders because the claims against both were "closely intertwined" and arose out of the agreement).

[104] AtriCure, Inc. v. Meng, 12 F.4th 516, 530–31 (6th Cir. 2021) (citation omitted).

[105] When a question of state law is unsettled, a federal court sitting in diversity may attempt an *Erie* guess as to how the state's highest court would resolve the issue, drawing on that court's or lower courts' decisions. See, e.g., West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237 (1940). In *Hays v. HCA Holdings, Inc.*, however, the Fifth Circuit went further—relying on a passing remark in *In re Merrill Lynch Trust Co.* that merely "intimated at the validity of intertwined claims estoppel"—to predict that the Texas Supreme Court would embrace that doctrine. 838 F.3d 605, 611–13 (5th Cir. 2016).

[106] See, e.g., Newman v. Plains All Am. Pipeline, L.P., 23 F.4th 393, 404 (5th Cir. 2022) (describing the federal court's "*Erie*-guess that intertwined-claims estoppel exists in Texas"—a guess the Texas Supreme Court repeatedly declined to affirm); Hiser v. NZone Guidance,

entrenched intertwined claims estoppel in federal courts within the Fifth Circuit, despite its lack of foundation in state law.[107]

Nor is the Fifth Circuit alone: several federal appellate courts have made similar *Erie* guesses, tailoring estoppel doctrines to favor arbitration, even when doing so conflicts with state law.[108] The Eighth,[109] Ninth,[110] and Tenth[111] Circuits have engaged in this loose guesswork, making conjectures about state law untethered from actual precedents. Some federal courts have gone further, simply bypassing state law altogether and relying exclusively on federal precedent to justify application of alternative estoppel doctrines in arbitration.[112]

L.L.C., 799 F. App'x 247, 248 (5th Cir. 2020) (per curiam) (observing that the Texas Supreme Court distinguished between "concerted misconduct" and "intertwined claims" estoppel and "disallow[ed] the former while noting the relevancy and value of the latter" (alteration in original) (quoting *Hays*, 838 F.3d at 611 n.5)).

[107] See, e.g., Moore v. Maverick Nat. Res., LLC, No. 20-cv-00591, 2020 WL 6431905, at *3 (S.D. Tex. Oct. 15, 2020) ("[T]he Fifth Circuit's *Erie* guess in *Hays v. HCA Holdings, Inc.*, adopting the [intertwined estoppel] theory, is binding on this court."); *Newman*, 23 F.4th at 404 ("[O]ur hands are tied. We already made our *Erie*-guess, and the Texas Supreme Court has not changed Texas law since. So, the rule of orderliness binds us to assume that intertwined-claims estoppel exists in Texas." (footnote omitted)).

[108] See, e.g., NCMIC Ins. Co. v. Allied Pros. Ins. Co., 694 F. Supp. 3d 1164, 1168–69 (D. Minn. 2023) ("The Minnesota Supreme Court has neither recognized nor rejected the doctrine of direct-benefits estoppel. . . . [But] this Court predicts that the Minnesota Supreme Court would adopt some form of the doctrine."), *aff'd*, 110 F.4th 1072 (8th Cir. 2024); Wells Enters., Inc. v. Olympic Ice Cream, 903 F. Supp. 2d 740, 746 (N.D. Iowa 2012) (predicting that the Iowa Supreme Court would recognize equitable estoppel "when 'the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided' " (quoting MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999))).

[109] See In re Wholesale Grocery Prods. Antitrust Litig., 707 F.3d 917, 927 (8th Cir. 2013) ("Because the Minnesota Supreme Court has not addressed how to apply equitable estoppel, this court must predict how the court would rule.").

[110] See Setty v. Shrinivas Sugandhalaya LLP, 3 F.4th 1166, 1169 (9th Cir. 2021) (applying federal common law and noting that where courts in other circuits had allowed a non-signatory defendant to compel arbitration against signatory plaintiffs, it was "essential . . . that the subject matter of the dispute [was] intertwined with the contract providing for arbitration" (first alteration in original) (quoting Rajagopalan v. NoteWorld, LLC, 718 F.3d 844, 847 (9th Cir. 2013) (per curiam))).

[111] See Belnap v. Iasis Healthcare, 844 F.3d 1272, 1295 (10th Cir. 2017) ("Whether Utah law would recognize such a theory [of non-signatory estoppel] is an unsettled question. Significantly, when an appeal presents an unsettled question of state law, we must ordinarily 'attempt to predict how [the] highest court would interpret [the issue].' " (second and third alterations in original) (citation omitted)).

[112] For example, in *Nueterra Healthcare Management, LLC v. Parry*, the court applied intertwined estoppel to allow a non-signatory parent to take advantage of an arbitration

Over time, two trendlines have emerged from this jurisprudence. First, despite *Carlisle*'s clear directive that ordinary state contract law governs whether non-signatories may enforce arbitration agreements,[113] federal courts frequently rely on arbitration-specific estoppel doctrines grounded in federal common law to justify expansive interpretations of enforceability.[114] Rather than applying state law, these courts assume that state high courts will reflexively invoke the purported "policy favoring arbitration."[115]

Second, the boundaries between these alternative estoppel tests have eroded over time. Courts increasingly treat *any* overlap in parties, claims, or contractual obligations as sufficient grounds to compel arbitration, effectively abandoning meaningful doctrinal distinctions. The result is a catch-all approach that sweeps non-signatories into arbitration agreements regardless of how attenuated their connection to the original dispute may be.

These developments directly undermine *Carlisle*'s assurance that the FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)."[116] By prioritizing federal arbitration policy over state contract law, federal courts have eroded the state-law foundation upon which *Carlisle* was premised, replacing it with arbitration-specific doctrines that lack any meaningful connection to the principles of equity or contract.

provision. 835 F. Supp. 2d 1156, 1163 (D. Utah 2011). In doing so, however, the *Nueterra* court did not rely on decisions of the Utah Supreme Court or any Utah appellate court. Rather, it placed its principal reliance on a solitary federal district court decision, *I-Link Inc. v. Red Cube Int'l AG*, No. 01-cv-00049, 2001 WL 741315 (D. Utah Feb. 5, 2001), which itself did not rely on Utah law. *Nueterra*, 835 F. Supp. 2d at 1162. Similarly, in *Ragone v. Atlantic Video at Manhattan Center*, the Second Circuit held that a sports network could compel arbitration under the intertwined estoppel test when sued by a makeup artist who "understood [the sports network] to be, to a considerable extent, her co-employer." 595 F.3d 115, 119, 127 (2d Cir. 2010). But the court cited only intra-circuit case law in support, without reference to what New York state law requires for purposes of estoppel. Id. at 126–27.

[113] Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 n.6 (2009) ("There is no doubt that, where state law permits it, a third-party claim is 'referable to arbitration under an agreement in writing.'" (citation omitted)).

[114] For a counterexample, see Gramercy Distressed Opportunity Fund II, L.P. v. Bakhmatyuk, 628 F. Supp. 3d 1125, 1146 (D. Wyo. 2022) (rejecting the suggestion that, in the absence of Wyoming law, the court "should make an *Erie* prediction by following the general weight and trend of the federal law" and observing that *Carlisle* "made plain that federal courts should not apply federal common law" to issues of non-signatory estoppel).

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

[116] *Carlisle*, 556 U.S. at 630.

B. Authority to Arbitrate

In 2022, approximately 1.3 million seniors resided in nursing homes in the United States, many of whom were admitted after family members determined they could no longer live independently.[117] Admission to a nursing home typically requires prospective residents to sign various contracts, which almost invariably include arbitration clauses.[118] When the elderly person is too ill or incapacitated to sign, family members often execute these agreements on their behalf.[119] This raises a critical question: When an elderly resident is injured or dies in a manner suggesting negligence—or worse—by the nursing home staff, can the family sue in court, or are they bound by the arbitration clause in the admissions documents?[120]

Here again, the Supreme Court's decision in *Carlisle* provides guidance: the enforceability of contracts involving nonparties is governed by "'traditional principles' of state law,"[121] and commentators have long recognized that these include "principles of agency and contract."[122] In the context of nursing home cases, courts applying these principles scrutinize whether the resident conferred "actual authority" on a family

[117] Nursing Home Care, Ctrs. for Disease Control & Prevention: Nat'l Ctr. for Health Stat., https://www.cdc.gov/nchs/fastats/nursing-home-care.htm [https://perma.cc/E27W-Q3E7] (last updated Feb. 6, 2026).

[118] See, e.g., Paula Span, Arbitration Has Come to Senior Living. You Don't Have to Sign Up., N.Y. Times (Sep. 24, 2022), https://www.nytimes.com/2022/09/24/health/assisted-living-arbitration.html (observing that arbitration clauses are now "widespread in long-term care facilities, in nursing homes, assisted living, [and] board and care homes"). Under current federal regulations, long-term care facilities participating in Medicaid or Medicare may not require residents to agree to binding arbitration as a condition of admission or continued care. See Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 84 Fed. Reg. 34718, 34718–19 (July 18, 2019) (codified at 42 C.F.R. pt. 483) (rescinding the 2016 ban on pre-dispute arbitration in nursing homes yet preserving the prohibition against making arbitration a condition of admission or continued care).

[119] Rebecca E. Hatch, Cause of Action for Enforcement of Arbitration Clause in Long-Term Care Agreement, 41 C.O.A.2d 1 § 13 (2025) ("Most often, when a long-term care facility admits a new resident, the resident is not the signatory on the admission contract. The signatory may often be a spouse, family member, or friend, who signs the admission contract on behalf of the soon-to-be resident.").

[120] See Span, supra note 118 ("When residents or their representatives sign these agreements, which are part of admission packets that can include dozens of pages, they may not realize they've waived their court rights or understand what arbitration entails.").

[121] *Carlisle*, 556 U.S. at 631 (citation omitted).

[122] See, e.g., 21 Lord, supra note 74.

member to execute admissions documents, including arbitration agreements, on their behalf.

While hornbook law recognizes that actual authority may be either express or implied,[123] many states have enacted statutes requiring or authorizing express written delegation (via a durable power of attorney or health care proxy)[124] in order for agents to make significant legal or health-related decisions on behalf of the principal.[125] Even in the absence of such statutes, state courts generally require written evidence of the agent's authority to agree to arbitration.[126] Thus, if an arbitration

[123] Restatement (Third) of Agency § 2.01 cmt. b (A.L.I. 2006) (stating that express authority "often means actual authority that a principal has stated in very specific or detailed language," while implied authority exists where "an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent"); see also id. § 2.02 cmt. c ("[I]mplied authority is actual authority proved circumstantially, which means it is proved on the basis of a principal's conduct other than written or spoken statements that explicitly authorize an action.").

[124] Cooper v. NexLearn, LLC, 222 P.3d 564, 2010 WL 198485, at *21 (Kan. Ct. App. 2010) (unpublished table decision) (per curiam) (defining a power of attorney as "an instrument in writing by which one person, as principal, appoints another as his or her agent and confers upon such agent the authority to act in the place of the principal for the avowed purposes set forth in the instrument"); Moffett v. Life Care Ctrs. of Am., 187 P.3d 1140, 1147 (Colo. App. 2008) (holding that "a person who holds a medical durable power of attorney, in selecting a long-term health care facility, has the power to execute applicable admissions forms, including arbitration agreements" and listing cases), *aff'd*, 219 P.3d 1068 (Colo. 2009).

[125] See, e.g., Miss. Code Ann. § 41-41-211 (2025); Ark. Code Ann. § 28-68-201 (2025); N.C. Gen. Stat. § 90-21.13 (2025); Colo. Rev. Stat. § 15-14-506 (2025) (authorizing, rather than strictly mandating, agent authority be established via a medical durable power of attorney); Fla. Stat. §§ 765.101(21), 765.202(1), 765.401 (2025) (authorizing an expressly designated health surrogate via a written, witnessed instrument); N.Y. Gen. Oblig. Law § 5-1502H(5) (McKinney 2025).

[126] See, e.g., Davis v. GGNSC Admin. Servs. LLC, 290 F. Supp. 3d 1332 (M.D. Ga. 2017) (finding that the daughter of a long-term care resident lacked authority to bind the resident to the terms of an arbitration agreement at the time the agreement was signed); Courtyard Gardens Health & Rehab., LLC v. Quarles, 2013 Ark. 228, 428 S.W.3d 437 (holding that a nursing home resident's adult son had neither actual authority nor statutory authority to enter into the arbitration agreement with the nursing home on the resident's behalf); Rogers v. Roseville SH, LLC, 290 Cal. Rptr. 3d 760 (Ct. App. 2022) (holding same); Genesis Healthcare, LLC v. Stevens, 544 S.W.3d 645 (Ky. Ct. App. 2017) (holding that a nursing home resident's power of attorney did not have authority to enter into an arbitration agreement); Traver v. Reliant Senior Care Holdings, Inc., 2020 PA Super 23, 228 A.3d 280 (holding that a nursing home resident's wife did not have authority to enter an arbitration agreement); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 813 S.E.2d 292 (S.C. Ct. App. 2018) (holding that a husband was not decedent's agent).

agreement is signed with a valid durable power of attorney encompassing legal matters, arbitration is likely to be compelled.[127]

But, here too, arbitration exceptionalism has led some federal courts to disregard state agency principles in an effort to maximize enforcement of arbitration provisions. *Gross v. GGNSC Southaven, LLC* exemplifies this practice. In *Gross*, the adult son of a nursing home resident filed a wrongful death suit against the facility, alleging that its negligence had caused his mother's premature death.[128] Although the son had signed the admissions forms, including the arbitration agreement, he lacked a durable power of attorney when he did so.[129] The nursing home argued that he nonetheless possessed the requisite "actual authority" to bind his mother to arbitration.[130]

The federal district court began by analyzing Mississippi agency law, concluding that the state unequivocally requires a formal legal instrument to establish actual authority to sign arbitration agreements.[131] The court held that "informal permission" from the principal, such as that allegedly granted by the mother to her son, was insufficient to bind her to

[127] See, e.g., Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007) (compelling arbitration where plaintiff had validly signed the arbitration agreement with a durable power of attorney); Hogan v. Country Villa Health Servs., 55 Cal. Rptr. 3d 450 (Ct. App. 2007) (holding that durable powers of attorney for health care decisions authorize agents to enter binding arbitration agreements with nursing homes); Brookdale Senior Living Inc. v. Stacy, 27 F. Supp. 3d 776 (E.D. Ky. 2014) (applying Kentucky law to hold that a nursing home resident's daughter with durable power of attorney is subject to arbitration).

[128] 83 F. Supp. 3d 691 (N.D. Miss. 2015), *vacated*, 817 F.3d 169 (5th Cir. 2016).

[129] Id. at 693 (noting plaintiffs' argument "that since no power of attorney or similar document had been executed, Gross lacked legal authority to sign the agreement on his mother's behalf").

[130] Id.

[131] Id. at 694 ("This court's review of Mississippi case law in this area very strongly suggests, if not definitively establishes, that a formal legal device transferring authority is required in order to confer actual authority to sign a nursing home arbitration agreement on behalf of another."); Adams Cmty. Care Ctr., LLC v. Reed, 2009-CA-00730-SCT (¶ 2), 37 So. 3d 1155, 1156 (Miss. 2010) (denying a motion to compel arbitration where there was "no evidence in the record that [decedent's sons] had power of attorney at the time each signed the admissions agreements"); GGNSC Batesville, LLC v. Johnson, 2011-CA-01337-SCT (¶ 7), 109 So. 3d 562, 565 (Miss. 2013) (denying a motion to compel arbitration where daughter "did not possess actual authority" to bind her mother to arbitration); Miss. Care Ctr. of Greenville, LLC v. Hinyub, 2005-CA-01239-SCT (¶ 18), 975 So. 2d 211, 218 (Miss. 2008) (unanimously concluding that a daughter lacked actual authority to sign a nursing home arbitration agreement on behalf of her mother).

arbitration.[132] Consequently, the motion to compel arbitration was denied[133]—a decision consistent with the longstanding principle that significant delegations of authority, such as signing legal contracts, demand written proof.[134]

On appeal, the Fifth Circuit vacated the lower court decision.[135] Ignoring most of the Mississippi precedents relied upon below, the appellate court asserted that "[n]o decision of the Mississippi Supreme Court precisely answers the question whether Mississippi law requires a formal legal document to confer actual agency authority to sign an arbitration agreement for another."[136] That left the court free to make an *Erie* guess: once again, it used this broad discretion to clear the path for arbitration, finding that requiring formal instruments, such as powers of attorney, disproportionately burdens arbitration agreements.[137]

The *Gross* decision is flawed on two counts. First, the Mississippi Supreme Court *had* directly addressed this question—and had repeatedly held that significant delegations of authority must be accompanied by formal, written legal devices.[138] Thus, there was no cause for the federal appellate court's *Erie* guess—a dubious practice in any context, but especially troubling in the face of clear expressions of state law. Second,

[132] *Gross*, 83 F. Supp. 3d at 695, 698 (denying the nursing home's motion to compel arbitration for failure to present sufficient "proof of express authority" conferred upon the resident's son).

[133] Id. at 693.

[134] See, e.g., Gentry v. Beverly Enters.-Ga., Inc., 714 F. Supp. 2d 1225, 1231 (S.D. Ga. 2009) ("[I]t has not been demonstrated that Plaintiff in this case 'knew about the arbitration agreement, authorized her husband to sign the document, or otherwise agreed to arbitrate claims arising out of her nursing home stay.'" (quoting Ashburn Health Care Ctr., Inc. v. Poole, 648 S.E.2d 430, 433 (Ga. Ct. App. 2007))); Noland Health Servs., Inc. v. Wright, 971 So. 2d 681, 686 (Ala. 2007) (finding that the daughter-in-law's signature on the contract as the "responsible party" could not bind the decedent to an arbitration agreement).

[135] Gross v. GGNSC Southaven, L.L.C., 817 F.3d 169, 184 (5th Cir. 2016).

[136] Id. at 176.

[137] Id. at 178 ("To require a 'formal legal device[] such as a power of attorney' specifically for arbitration agreements and other 'important contracts' is in tension . . . with . . . [the rule] which disapprove[s] of nominally neutral rules that, in practice, . . . 'have a disproportionate impact on arbitration agreements.' . . . Thus, our best *Erie* guess is that the Mississippi Supreme Court would not adopt the district court's formal-device requirement." (first alteration in original) (citation omitted)). Notably, the parties in *Gross* did not brief or argue the preemption issue on which the panel based its decision. Without this necessary briefing, the court was free to make erroneous assumptions concerning Mississippi law.

[138] See, e.g., Adams Cmty. Care Ctr., LLC v. Reed, 2009-CA-00730-SCT (¶ 2), 37 So. 3d 1155, 1156 (Miss. 2010) (denying a motion to compel arbitration where there was "no evidence in the record that [decedent's sons] had power of attorney at the time each signed the admissions agreements").

Mississippi's written delegation requirement reflects the state's broader legal framework, which consistently demands written authorization for agents to conduct significant transactions. This includes evidence of written instruments authorizing agents to handle financial transactions,[139] amend certificates of deposit or execute *inter vivos* gifts,[140] make health care decisions,[141] or execute trusts.[142] Because Mississippi law requires formal legal devices whenever an agent asserts the power to relinquish a principal's rights, imposing this requirement does not disproportionately impact arbitration—quite the contrary, it treats arbitration the same as other contractual provisions.[143] The Fifth Circuit's failure to account for this robust body of state law reveals the pull of arbitration exceptionalism: federal courts have stretched the pro-arbitration policy far beyond any logical bounds in an effort to adhere to a "liberal policy favoring arbitration"—adherence that is no longer warranted in the wake of *Morgan*.

Despite its doctrinal weaknesses, *Gross* has become influential within the Fifth Circuit.[144] Post-*Gross*, federal courts have granted unwarranted recognition to informal verbal authorizations as a basis for agency authority under Mississippi law, despite the state supreme court's skepticism toward such arrangements in the nursing home arbitration context.[145]

* * *

[139] Estate of Johnson v. Johnson, 2016-CA-00338-SCT (¶¶ 22–23), 237 So. 3d 698, 707 (Miss. 2017) (en banc) (noting that Mississippi law requires a written durable power of attorney to delegate authority to an agent, and holding that significant financial acts—such as altering beneficiaries on certificates of deposit—must be grounded in the express terms of the written instrument and consistent with the principal's intent); see, e.g., In re Estate of Hemphill, 2014-CA-00479-COA (¶ 58), 186 So. 3d 920, 936 (Miss. Ct. App. 2016) (en banc) (finding that alleged oral statements cannot alter the terms of a power of attorney agreement where the two conflict).

[140] See, e.g., *Estate of Johnson*, 237 So. 3d at 706–07.

[141] See, e.g., Monticello Cmty. Care Ctr., LLC v. Estate of Martin ex rel. Peyton, 2007-CA-02158-COA (¶ 16), 17 So. 3d 172, 177–78 (Miss. Ct. App. 2009).

[142] See, e.g., Miss. Code Ann. § 91-8-401(5)(A) (2025) (providing that "[a] trust may be created by . . . an agent or attorney-in-fact under a power of attorney that: [e]xpressly grants authority to create the trust"); id. § 87-3-105 (requiring powers of attorney to be in writing).

[143] See, e.g., Eaton v. Porter, 645 So. 2d 1323, 1326 (Miss. 1994).

[144] See, e.g., Crowe v. GGNSC Ripley, LLC, 318 F. Supp. 3d 970, 981–82 (N.D. Miss. 2018) (following *Gross*).

[145] Id. at 971–72 (observing that "the Mississippi Supreme Court regards nursing home arbitration with far more skepticism than the Fifth Circuit does").

The doctrines of estoppel and agency, as applied in arbitration cases, illustrate the profound impact of arbitration exceptionalism on the judicial interpretation of state contract law. In the estoppel context, federal courts have often stretched traditional principles beyond recognition, invoking equitable theories that depart from their common law roots to privilege arbitration agreements. Similarly, in the agency context, numerous courts have disregarded clear state-law requirements for formal instruments, such as written powers of attorney, in favor of informal and ad hoc delegations of authority to arbitrate. These trends underscore the judicial inclination to subordinate state contract and agency principles to a perceived federal mandate favoring arbitration.

The Supreme Court's decision in *Morgan v. Sundance, Inc.* fundamentally challenges these expansive approaches. By rejecting special procedural treatment for arbitration agreements, *Morgan* reaffirms that arbitration rests on consent and must be governed by the same rules that apply to other contracts. This holding compels reexamination of decisions like *Gross*, where the federal court bypassed state law to advance arbitration, and estoppel cases that prioritized efficiency over substantive state-law requirements.[146] *Morgan* thus provides a corrective framework for arbitration jurisprudence—one that confines enforcement of arbitration agreements to established contract doctrines while respecting state law's primacy in matters of consent and contractual obligation.

III. ARBITRATION FORMATION

Thirty years ago, the Supreme Court clarified that the validity of arbitration agreements should be assessed using "ordinary state-law principles that govern the formation of contracts."[147] These require a meeting of the minds and mutual assent for a contract to be enforceable.[148] Mutual assent, in turn, hinges on whether each party had actual or

[146] AtriCure, Inc. v. Meng, 12 F.4th 516, 529 (6th Cir. 2021) (observing that when federal courts "use the phrase 'equitable estoppel,' they rest more on the federal policy favoring arbitration and efficiency concerns than on a traditional view of that doctrine").

[147] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); see also Doe v. Roblox Corp., 602 F. Supp. 3d 1243, 1255 n.5 (N.D. Cal. 2022) ("[F]ederal courts apply ordinary state-law principles that govern the formation of contracts." (quoting Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175 (9th Cir. 2014))); Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 855 (9th Cir. 2022) ("To form a contract under . . . California law, the parties must manifest their mutual assent to the terms of the agreement.").

[148] Restatement (Second) of Conts. § 19(2) (A.L.I. 1981).

constructive notice of the contract terms—ensured when those terms are clearly presented to all contracting parties.[149]

Online marketplaces, however, present unique challenges for discerning notice and assent. Moreover, arbitration clauses are often embedded in hyperlinked terms and conditions, raising concerns over "uninformed consent by click."[150] Worse yet, some contemporary online contracts bypass even minimal forms of consent, treating a consumer's continued use of a website as a tacit agreement to arbitration.[151] Yet, the same principles governing contract formation in the physical world apply to agreements formed online[152]—namely, state law does not permit contract terms to bind a party without sufficient notice and assent. Accordingly, arguments for enforcing arbitration clauses embedded in "browse-wrap" agreements—where terms are hidden in hyperlinks the user need not even click[153]—should fail. That they do not underscores a troubling reality: "[i]nternet arbitration agreements are reviewed with considerably less stringent requirements" than ordinary contractual terms.[154] Judicial enthusiasm for enforcing arbitration provisions in online contexts reflects yet another distortion of state contract law principles in favor of a supposed federal policy that prioritizes arbitration at all costs. This preference for arbitration lowers the threshold for what constitutes "notice" of arbitration clauses as compared to other contract

[149] See, e.g., Chilutti v. Uber Techs., Inc., 2023 Pa. Super 126, ¶ 25, 300 A.3d 430, 442 (en banc) ("It is reasonable to assume that if the arbitration provision is buried deep in webpages in tiny print, the person was not aware of the provision and it is unenforceable."), *vacated and remanded*, 349 A.3d 826 (Pa. 2026).

[150] Wayne Lonstein, The Digital Oppression of Clickwrap and Browserwrap Arbitration Clauses, Forbes (July 24, 2023, at 09:15 ET), https://www.forbes.com/sites/forbestechcouncil/2023/07/24/the-digital-oppression-of-clickwrap-and-browserwrap-arbitration-clauses/. As more commerce takes place online, the magnitude and importance of these agreements rise. See, e.g., *Chilutti*, 300 A.3d at 443 ("These agreements run the gamut from a mortgage loan to a clothing sales transaction to registration for a transportation or ride-hailing service.").

[151] *Chilutti*, 300 A.3d at 443 ("With these Internet contracts, it is now easier than ever for corporations to bind inexperienced, unaware, and unsuspecting consumers to arbitration agreements with the simple click or swipe of their finger—all from the convenience of [a] 3-inch by 6-inch smartphone screen.").

[152] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.").

[153] Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 855–56 (9th Cir. 2022) ("These elemental principles of contract formation apply with equal force to contracts formed online.").

[154] *Chilutti*, 300 A.3d at 442.

terms, undermining the basic common law principle that an agreement requires a true meeting of the minds.[155]

The Supreme Court's endorsement of arbitration has exacerbated this divergence. Courts, steeped in the pro-arbitration directive, often find enforceable arbitration agreements where none truly exist, bypassing state law to do so. The result is an expansive federal common law favoring arbitration clauses in online contracts, one that disregards long-established state law designed to protect consumers from unfair and oppressive terms. In the wake of *Morgan*, this body of case law demands reconsideration, particularly where arbitration agreements are given special treatment that contravenes ordinary principles of contract formation.

A. Clickwrap and Browse-Wrap Agreements

State contract law has developed distinct frameworks to evaluate the enforceability of the two most common forms of online contracts: clickwrap and browse-wrap agreements.[156] At one end of the spectrum are clickwrap agreements, where users are presented with specific terms on a pop-up screen and must affirmatively click "I agree" to proceed.[157] Courts generally enforce these agreements, reasoning that users receive adequate notice of the terms and manifest their assent explicitly,

[155] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) ("[W]hen a court interprets such provisions in an agreement covered by the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities . . . [should be] resolved in favor of arbitration.'" (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989))).

[156] Online contracts can also take other forms, such as "scroll-wrap" (which requires users to physically scroll through an internet agreement and click on a separate "I agree" button in order to assent to the terms and conditions of the host website) and "sign-in wrap" (where assent to the terms of a website is part of the process of signing up for use of the site's services). See Sarchi v. Uber Techs., Inc., 2022 ME 8, ¶ 24, 268 A.3d 258, 268 ("[B]rowsewrap agreements occupy one end of the spectrum of enforceability, clickwrap (and scrollwrap) agreements occupy the other, and sign-in wrap agreements fall somewhere in the middle, with their precise location on the spectrum almost entirely dependent on the features of the interfaces on which they appear.").

[157] See, e.g., Feldman v. Google, Inc., 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007) (describing clickwrap as an agreement requiring a computer user to "consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with [a] . . . transaction"); Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012) (explaining that clickwrap agreements are formed when a user is presented "with a message on his or her computer screen" and is required to "manifest his or her assent to the terms" (quoting *Register.com*, 356 F.3d at 429)).

consistent with the Restatement's principle that assent may be inferred from conduct that clearly indicates agreement.[158]

At the other extreme are "browse-wrap" agreements, where terms are accessible only via hyperlink and users ostensibly manifest assent simply by continuing to use the website.[159] The defining characteristic of browse-wrap agreements is that users may never visit—or even know about—the webpage hosting the terms.[160] Unsurprisingly, courts are more reluctant to enforce these agreements, particularly when consumers assert they had no notice of specific contract terms. The enforceability of such agreements often hinges on whether a user was on "inquiry notice" of the terms before using the site.[161]

[158] Restatement (Second) of Conts. § 19(2) (A.L.I. 1981) (noting that assent may be established where a party "knows or has reason to know that the other party may infer from his conduct that he assents" to contract terms); see also Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010–11 (D.C. 2002) (holding that adequate notice of clickwrap agreement terms was provided where users had to click "Accept" to agree to the terms in order to subscribe); Smallwood v. NCsoft Corp., 730 F. Supp. 2d 1213, 1226 (D. Haw. 2010) (observing that clickwrap agreements are increasingly common and "have routinely been upheld"); Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc., 464 F. Supp. 3d 634, 640 (S.D.N.Y. 2020) ("The Second Circuit routinely enforces clickwrap agreements as valid and binding contracts, 'for the principal reason that the user has affirmatively assented to the terms of agreement by clicking "I agree."'" (citation omitted)); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 397 (E.D.N.Y. 2015) ("[A]lmost '[e]very [lower] court to consider the issue has found "clickwrap" licenses . . . enforceable.'" (second and third alterations in original) (citation omitted)).

[159] See, e.g., Kauders v. Uber Techs., Inc., 159 N.E.3d 1033, 1054 n.26 (Mass. 2021) (describing a browse-wrap agreement as one in which "website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen" (quoting Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009), *aff'd*, 380 F. App'x 22 (2d Cir. 2010))); *Hines*, 668 F. Supp. 2d at 366 ("Unlike a clickwrap agreement, a browsewrap agreement 'does not require the user to manifest assent to the terms and conditions expressly . . . . [A] party instead gives his assent simply by using the website.'" (first alteration in original) (quoting Sw. Airlines Co. v. BoardFirst, L.L.C., No. 06-cv-00891, 2007 WL 4823761, at *4 (N.D. Tex. Sep. 12, 2007))).

[160] Be In, Inc. v. Google Inc., No. 12-cv-03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013) (observing that a consumer can use the website without ever "visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists"); see also *Fteja*, 841 F. Supp. 2d at 837 ("[B]y visiting the website—something that the user has already done—the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink.").

[161] *Sw. Airlines Co.*, 2007 WL 4823761, at *5; see also Meyer v. Uber Techs., Inc., 868 F.3d 66, 76 (2d Cir. 2017) (finding that inquiry notice requires that the terms be sufficiently conspicuous that a reasonably prudent consumer would understand what they were getting themselves into); Berman v. Freedom Fin. Network, LLC, 30 F.4th 849, 857 (9th Cir. 2022) ("Because 'online providers have complete control over the design of their websites,' 'the

B. Finding Inquiry Notice of Arbitration

Inquiry notice depends on the clarity and conspicuousness of the terms, which courts evaluate based on the design and content of the website's interface.[162] To establish inquiry notice, courts typically require: (1) that the terms were conspicuously presented, and (2) that the user took some action manifesting assent, such as clicking a button or checking a box.[163]

This standard approaches a requirement of actual knowledge, and courts routinely demand such a showing in order to enforce the full range of online contract terms—such as disclaimers, warranties, data privacy policies, contract termination, and intellectual property clauses.[164] For instance, many courts refuse to enforce forum selection clauses contained within browse-wrap where evidence of inquiry notice is lacking. In doing so, courts will typically take the plaintiff at her word when she alleges that she did not read or see the forum selection clause. Thus, in *Hunt v. CheapCaribbean.com, Inc.*, the court refused to hold plaintiffs to "the onerous terms" of a browse-wrap agreement containing a forum selection clause.[165] According to the *Hunt* court, not only was inquiry notice

onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.' " (citations omitted)).

[162] *Meyer*, 868 F.3d at 75 (observing that, in the context of web-based contracts, the "clarity and conspicuousness" of the terms are often "a function of the design and content of the relevant interface"); see also *Berkson*, 97 F. Supp. 3d at 401 (collecting cases for the proposition that " 'terms of use' will be enforced when a user is encouraged by the design and content of the website and the agreement's webpage to examine the terms clearly available through hyperlinkage"); Soliman v. Subway Franchisee Advert. Fund Tr., Ltd., 999 F.3d 828, 834 (2d Cir. 2021) (finding that an offeree will "be bound by such terms if a 'reasonably prudent' person would be on *inquiry* notice of those terms and she unambiguously manifested assent to those terms" (quoting *Meyer*, 868 F.3d at 74–75)).

[163] See *Berman*, 30 F.4th at 856 ("[R]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." (quoting Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 35 (2d Cir. 2002))); see also *Sw. Airlines Co.*, 2007 WL 4823761, at *5 (explaining that whereas courts routinely enforce clickwrap agreements, "the validity of a browsewrap license turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site"); *Fteja*, 841 F. Supp. 2d at 834–35 (finding that the user was put on inquiry notice when the user clicked on the "Sign Up" button and right below the button was a sentence stating, "By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service").

[164] See, e.g., Patel v. Rupp, 195 B.R. 779, 783 n.3 (D. Utah 1996) (explaining that inquiry notice has been "characterized as a derivative of actual notice"); Peoples Nat'l Bank, N.A. v. Banterra Bank, 719 F.3d 608, 614–15 (7th Cir. 2013) (observing that, under Illinois law, a purchaser "must in fact have actual knowledge of some relevant piece or pieces of information" that would put him on notice of any waiver of rights).

[165] No. 09-cv-00622, 2009 WL 10704881, at *4 (N.D. Tex. June 23, 2009).

lacking, but so too would enforcement of the provision result in an unreasonable and unjust limitation on the plaintiffs' ability to litigate in a convenient forum.[166] Other federal and state courts are in accord.[167]

However, when it comes to arbitration clauses, courts often abandon these rigorous standards. Driven by arbitration exceptionalism, many judges presume that consumers were aware of arbitration provisions in online contracts, even where consumers dispute that assumption. Accordingly, courts regularly find that mere use of a website or retention of a product evinces assent to arbitration.[168]

For instance, in a series of recent class actions brought against Samsung alleging product defects in its smartphones and laptops, federal courts have consistently found that consumers had "agreed" to arbitration clauses despite the absence of inquiry notice. In *Lewis v. Samsung Electronics America, Inc.*, the court deemed a plaintiff's use and retention of the smartphone sufficient to establish assent to an arbitration clause that was neither clearly presented nor affirmatively accepted.[169] Similarly, in *McDougall v. Samsung Electronics America, Inc.*, the court held that the plaintiff class had inquiry notice of the arbitration clause merely by keeping and using their phones, despite claims that the clickwrap process failed to provide adequate notice.[170] And again in *Vasadi v. Samsung Electronics America, Inc.*, the court determined that the shrink-wrap agreement on the phone's packaging, along with a

[166] Id. ("[T]he forum selection clause, if given the effect Defendants seek, would limit Plaintiffs to the state courts in one Pennsylvania county to adjudicate a wrongful death claim brought under Texas state law for an incident in Mexico that occurred on a vacation purchased over the internet. Such a result would be contrary to the deference typically afforded a plaintiff's choice of forum . . . .").

[167] See, e.g., Byars v. Goodyear Tire & Rubber Co., 654 F. Supp. 3d 1020, 1026 (C.D. Cal. 2023) (finding that the plaintiff's assertion that "she did not see" the terms of use containing a forum selection clause meant she "was not on constructive notice" and the clause could not be enforced against her); Nelkin v. Kroto, Inc., No. 23-cv-08241, 2024 WL 3527842, at *3 (C.D. Cal. June 24, 2024) (same); Hoffman v. Supplements Togo Mgmt., LLC, 18 A.3d 210, 220 (N.J. Super. Ct. App. Div. 2011) (declining to enforce a forum selection clause in a browse-wrap agreement); Masry v. Lowe's Cos., No. 24-cv-00750, 2024 WL 3228086, at *7 (N.D. Cal. June 28, 2024) (same).

[168] See, e.g., Taylor v. Samsung Elecs. Am., No. 16-cv-50313, 2018 WL 3921145, at *3 (N.D. Ill. Aug. 16, 2018) ("[W]here there is no actual notice of the term, an offeree is still bound by the provision if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent." (alteration in original) (emphasis omitted) (quoting Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012))).

[169] No. 22-cv-10882, 2023 WL 7623670, at *6–7 (S.D.N.Y. Nov. 14, 2023).

[170] No. 23-cv-00168, 2023 WL 6445838, at *3–4 (S.D.N.Y. Oct. 3, 2023).

pamphlet in the packaging detailing the agreement, provided adequate notice of the arbitration clause.[171] Indeed, courts have compelled arbitration even where Samsung consumers have asserted that third parties set up their phones, so they themselves could not have had notice of or assented to arbitration.[172] Importantly, in each of these cases, inquiry notice was decided *as a matter of law* on motions to dismiss or for summary judgment—generating a muscular body of federal common law that enforces online arbitration clauses in direct conflict with state contract principles.[173]

C. Reevaluating Arbitration Exceptionalism in Online Contracts

This judicial predisposition to enforce arbitration clauses in online contracts has significantly distorted state-law contract principles. Courts' leniency in finding mutual assent to arbitrate, especially in cases involving browse-wrap and clickwrap, reflects an outsized (and now outdated) commitment to federal arbitration policy.[174] This favoritism has

[171] No. 21-cv-10238, 2021 WL 5578736, at *9–10 (D.N.J. Nov. 29, 2021); see also Westerkamp v. Samsung Elecs. Am., Inc., No. 21-cv-15639, 2023 WL 4172967, at *6–7 (D.N.J. June 26, 2023) (following *Vasadi* in finding the consumer had inquiry notice of an arbitration provision).

[172] See, e.g., Beture v. Samsung Elecs. Am., Inc., No. 17-cv-05757, 2018 WL 4621586, at *6 (D.N.J. July 18, 2018) (finding that "[e]ven when a carrier store representative performed the [phone] initialization," a smartphone user is still deemed to have notice of the arbitration clause); *Taylor*, 2018 WL 3921145, at *3 (finding that even where the plaintiff's employer purchased and set up the phone, the plaintiff could have accessed the relevant terms online but failed to do so); Payne v. Samsung Elecs. Am., Inc., No. N23C-03-193, 2024 WL 726907, at *8 (Del. Super. Ct. Feb. 21, 2024) ("[I]t is [plaintiff's] own inattention in failing to look at the box or the materials contained in it that made him unaware of the contractual relationship into which he was entering with Samsung.").

[173] See, e.g., Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28 (2d Cir. 2002) ("[T]he district court decided the issue of reasonable notice and objective manifestation of assent as a matter of law."). Here, too, the "equal footing" principle of *Morgan* is implicated because courts generally allow juries to resolve claims of inquiry notice of other contractual terms. See, e.g., Gateway Triangle Dev., LLC v. Jabbel Holdings, LLC, No. 1 CA-CV 15-0558, 2017 WL 1278941, at *2 (Ariz. Ct. App. Apr. 6, 2017) ("There is a genuine issue of material fact as to whether [property purchaser] was on inquiry notice of the waiver."); Briggs v. Kent (In re Pro. Inv. Props. of Am.), 955 F.2d 623, 626 (9th Cir. 1992) ("Whether a purchaser has inquiry notice is largely a factual determination.").

[174] See, e.g., Bekkerman v. Foris Dax, Inc., No. 25-cv-02017, 2025 WL 3754270, at *4 (D.N.J. Dec. 29, 2025) (enforcing arbitration agreement where checkout page placed hyperlink to terms and conditions next to the "Place Order" button and informed users that placing the order constituted assent to those terms); Valiente v. StockX, Inc., 645 F. Supp. 3d 1331, 1337–38 (S.D. Fla. 2022) (enforcing arbitration agreement contained in clickwrap terms

weakened the bedrock principle of contract law: that agreements must be the product of informed and voluntary assent.

But as *Morgan v. Sundance, Inc.* reminds us, the FAA does not justify procedural shortcuts or preferential treatment for arbitration agreements. As seen in cases like *Lewis* and *McDougall*, inquiry notice has been inconsistently applied, often to the detriment of consumers. A more rigorous approach, grounded in actual notice or clear evidence of consumer awareness, would ensure that arbitration clauses are enforced only when assent is unequivocally demonstrated.

This sort of reevaluation carries profound implications for consumer rights and the broader marketplace. If courts begin to scrutinize arbitration clauses with the same rigor they apply to other contractual terms, it could incentivize companies to design fairer agreements and more transparent user interfaces. By addressing the distortions wrought by decades of arbitration exceptionalism, courts can rebuild public trust in the contractual system while preserving the FAA's original intent. This recalibration is particularly urgent in the digital age, where arbitration clauses often lurk in the fine print of online contracts and where the stakes for consumers have never been higher.[175]

IV. SEVERABILITY IN ARBITRATION

Consider this typical scenario: a plaintiff seeking to bring her action in court challenges an arbitration agreement embedded in a standard-form contract, arguing that certain terms are unconscionable—such as provisions that limit statutory remedies, shorten statutes of limitations, or require the plaintiff to bear prohibitively high arbitration costs.[176] Seeking to extricate herself from arbitration and restore her right to go to court, the plaintiff asserts that these problematic provisions permeate the entire arbitration agreement, rendering it wholly unenforceable. In response, the

where user was required to affirmatively check a box agreeing to the website's terms before creating an account).

[175] See, e.g., Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 Md. L. Rev. 1, 2–3 (2015) (surveying 688 consumers and finding that sixty-one percent failed to understand the implications of arbitration provisions and concluding that this profound misunderstanding undermines the premise of informed consent in consumer arbitration agreements).

[176] See, e.g., Myriam Gilles, The Quiet Revival of the Effective Vindication of Rights Doctrine, 94 Fordham L. Rev. (forthcoming 2026) (manuscript at 27–39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5424036 [https://perma.cc/V6ST-RESM].

defendant invokes the contract's severability clause, urging the court to excise any offending terms while compelling arbitration under the remaining provisions.

Outside of arbitration, the defendant's argument would be met with skepticism, as traditional contract law is leery of severability.[177] Hesitant to rewrite the parties' agreements, courts prefer to give full effect to any contract that may be enforced, while invalidating contracts comprised of numerous illegal terms.[178] For this reason, the common law has long distinguished between "entire" contracts, which cannot be severed, and "separate" contracts, which may be disassembled.[179] Thus, if the scenario described above involved anything *other* than arbitration, the court would simply ask whether the problematic provisions interfered with the parties' central bargain; if they did, the court would invalidate the entire contract rather than simply lop off a few offensive parts.[180]

But spurred by arbitration exceptionalism, courts faced with unconscionable elements in an arbitration provision have adopted an approach that is far more favorable to enforcement, often treating even integral unconscionable provisions as minor and severable.[181] This Part explores the implications of arbitration exceptionalism in cases involving

[177] See, e.g., United Air Lines, Inc. v. HSBC Bank USA (In re United Air Lines, Inc.), 453 F.3d 463, 468 (7th Cir. 2006) (observing that state law "places a heavy burden on the party seeking to sever a contract").

[178] See, e.g., Nw. G.F. Mut. Ins. Co. v. Norgard, 518 N.W.2d 179, 183 (N.D. 1994); see also Sugar Cane Growers Coop. of Fla., Inc. v. Pinnock, 735 So. 2d 530, 535, 537–38 (Fla. Dist. Ct. App. 1999) (stating that contracts should be reviewed in their entirety and all contractual language should be enforced as read, unless the contract is generally unenforceable).

[179] See, e.g., Frankfurt Fin. Co. v. Treadaway, 159 S.W.2d 514, 516 (Tex. Civ. App. 1942) ("[I]f there is a single assent to a whole transaction involving several things or kinds of property, a contract is entire; but if there is a separate assent to each of the several things involved it is divisible.").

[180] See, e.g., Marathon Ent., Inc. v. Blasi, 174 P.3d 741, 755 (Cal. 2008) ("Courts are empowered under the severability doctrine to consider the central purposes of a contract" and if the problematic provisions "are inseparable from [the central purposes], they may void the entire contract."); Frankenmuth Mut. Ins. Co. v. Escambia County, 289 F.3d 723, 728 (11th Cir. 2002) ("[A] bilateral contract is severable where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other." (citation omitted)).

[181] See, e.g., Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70–73 (2010) (explaining that delegation clauses with arbitration agreements are essentially severable mini-agreements, and as such, finding a delegation clause unconscionable does not establish the unconscionability of the arbitration agreement as a whole).

the severability of noxious arbitration terms. As I show below, the analysis of whether unenforceable terms taint the arbitration agreement as a whole departs significantly from established contract doctrine, resulting in a deliberate preservation of arbitration provisions unmatched in other contractual settings.

A. Dismembering Arbitration Provisions

Outside of arbitration, courts traditionally refuse to enforce contracts where the central purpose of the agreement is tainted by illegality or unfairness. For instance, where a covenant not to compete in an employment contract contains unenforceable elements (such as overly broad geographical restrictions or unreasonably long time durations) courts routinely hold that—rather than reform the non-compete to render it enforceable—"the entire covenant must fall."[182] Similarly, where a party contracts for the sale of authentic goods but adds some counterfeit products to the mix, courts do not hesitate to find the entire contract null and void—"irrespective of whether [the] counterfeit goods accounted for 30 percent or 70 percent" of the shipment.[183] And where a contract contemplates the provision of services which can only be legally provided by licensed providers, the absence of such a license renders the entire agreement unenforceable.[184] This reluctance to salvage flawed

[182] Moore v. Curtis 1000, Inc., 640 F.2d 920, 922 (8th Cir. 1981) (quoting Uni-Worth Enters., Inc. v. Wilson, 261 S.E.2d 572, 575 (Ga. 1979)) (applying Georgia law); see also Unlimited Opportunity, Inc. v. Waadah, 861 N.W.2d 437, 441 (Neb. 2015) ("'[W]e must either enforce [a covenant] as written or not enforce it at all.' We have found that 'reformation is tantamount to the construction of a private agreement and that the construction of private agreements is not within the power of the courts.'" (second alteration in original) (footnote omitted) (quoting CAE Vanguard, Inc. v. Newman, 518 N.W.2d 652, 655–56 (Neb. 1994))); John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 87 (Tex. App. 1996) ("Since the primary purpose of the Agreement was the covenant not to compete, it cannot be severed without adversely affecting the issuance of stock given in consideration therefor.").

[183] Yoo v. Jho, 55 Cal. Rptr. 3d 243, 247 (Ct. App. 2007); see also id. (finding that no matter the percentage of counterfeit goods delivered, "the business was substantially involved in the sale of counterfeit goods, rendering the object of the business purchase agreement illegal").

[184] Some states have enacted statutes voiding contracts for services provided by unlicensed providers. See, e.g., Ga. Code Ann. § 43-41-17(b) (2025) (providing that "any contract . . . for the performance of work for which a residential contractor or commercial general contractor license is required . . . and which is between an owner and a contractor who does not have a valid and current license required for such work in accordance with this chapter shall be unenforceable in law or in equity"); see also San Miguel Produce, Inc. v. L.G. Herndon Jr. Farms, Inc., 843 S.E.2d 403, 408 (Ga. 2020) ("[W]here a statute provides that persons proposing to engage in a certain business shall procure a license before being authorized to do

agreements reflects a foundational principle: courts should not become partners in circumventing legal protections by editing contracts to achieve enforceability. Thus, across a range of doctrinal settings, courts decline to sever unlawful terms where doing so would rescue an otherwise illegal agreement from nullification.[185]

Such restraint is absent in the arbitration context, where courts confronting unconscionable provisions frequently adopt an expansive approach to severability, treating even integral and egregiously unfair terms as minor and removable. Courts have severed core features of arbitration agreements, such as provisions requiring claimants to bear excessive costs,[186] barring the recovery of attorneys' fees,[187] shortening statutes of limitations,[188] or granting the drafter unilateral control over

so, . . . contracts made in violation of such statute are void and unenforceable." (quoting Paulsen St. Invs. v. EBCO Gen. Agencies, 514 S.E.2d 904, 906 (Ga. Ct. App. 1999))); Saks Mgmt. & Assocs., LLC v. Sung Gen. Contracting, Inc., 849 S.E.2d 19, 25 (Ga. Ct. App. 2020) (finding that because defendants "did not have Georgia contractor's licenses . . . when the work was performed pursuant to the contract," the "construction contract is not enforceable" (quoting Baja Props., LLC v. Mattera, 812 S.E.2d 358, 361 (Ga. Ct. App. 2018))).

[185] See, e.g., Santa Clara Valley Mill & Lumber Co. v. Hayes, 18 P. 391, 393 (Cal. 1888) (invalidating an agreement whose illegality "permeate[d] the whole contract, so that none of it can be said to be good"); *Uni-Worth Enters.*, 261 S.E.2d at 575 ("[I]f any of the sub-paragraphs of the restrictive covenant are invalid, the entire covenant must fall."). See generally Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982) (declining to enforce a contract that violated federal labor law and emphasizing that courts will not "lend [their] assistance in any way towards carrying out the terms of an illegal contract" (quoting McMullen v. Hoffman, 174 U.S. 639, 654 (1899))).

[186] See, e.g., Ragone v. Atl. Video at Manhattan Ctr., 595 F.3d 115, 121, 124–25 (2d Cir. 2010) (severing a loser pays provision from an arbitration clause based on the "federal policy favoring arbitration as an alternative means of dispute resolution," under which courts "are charged with 'encouraging and supporting arbitration'" (first quoting Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001); and then quoting Lucent Techs. Inc. v. Tatung Co., 379 F.3d 24, 29 (2d Cir. 2004))).

[187] See, e.g., Distribuidora de Vehiculos S.A. v. John Deere Constr. & Forestry Co., No. 12-cv-20983, 2012 WL 13014702, at *6 (S.D. Fla. June 13, 2012) (finding that unconscionable provisions "governing damages, attorney's fees, and costs, do not go to 'the essence' of the parties' agreement to arbitrate"); Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019, 1024 (Fla. Dist. Ct. App. 2005) (finding that an attorneys' fees provision could be severed "without affecting the intent of the parties to arbitrate"); Hochbaum ex rel. Hochbaum v. Palm Garden of Winter Haven, LLC, 201 So. 3d 218, 223 (Fla. Dist. Ct. App. 2016) (finding that provisions governing available attorneys' fees in arbitration were not integral to arbitration and could therefore be severed).

[188] See, e.g., Bodine v. Cook's Pest Control, Inc., No. 15-cv-00413, 2015 WL 3796493, at *4 (N.D. Ala. June 18, 2015) (affirming the severability of a statute of limitations provision that ran afoul of plaintiff's statutory claim), *aff'd* 830 F.3d 1320 (11th Cir. 2016); Fears v. Auto Reflections, Inc., No. 17-cv-02632, 2018 WL 4846531, at *2 (N.D. Ga. Feb. 8, 2018) (holding that the unenforceable limitations period provision, attorneys' fees provision, and

arbitrator selection,[189] among others.[190] Once these problematic terms are removed, courts then readily compel arbitration, preserving the remainder of the agreement despite the pervasive unfairness of its original design.

Indeed, some courts are so gung ho about enforcing arbitration clauses that they sever offensive arbitration provisions in the absence of contractual provisions authorizing them to do so. For example, in *Hudson v. P.I.P. Inc.*, the district court found cost-splitting provisions in an arbitration agreement unconscionable.[191] Conceding as much, the defendant demanded that the offensive provisions be severed so that arbitration could nonetheless proceed under the agreement, citing the "federal policy favoring arbitration."[192] Finding no severability clause in the contract, the court determined it lacked authority to sever the objectionable language; accordingly, the court denied the defendant's motion to sever and compel.[193] The Eleventh Circuit reversed on this

confidentiality provision "do not render the entire arbitration agreement unenforceable," thereby severing those provisions and compelling arbitration).

[189] See, e.g., Schuiling v. Harris, 747 S.E.2d 833, 838 (Va. 2013) ("[National Arbitration Forum's] designation as arbitrator is not integral and is severable in order to give effect to the arbitration requirement . . . .").

[190] See, e.g., Etokie v. CarMax Auto Superstores, Inc., 133 F. Supp. 2d 390, 395 (D. Md. 2000) ("[T]he remedy limitations in [the contract] are not so interwoven with the other terms of the agreement as to make them not severable."); Campbell v. Pilot Catastrophe Servs., Inc., No. 10-cv-00095, 2010 WL 3306935, at *6 (S.D. Ala. Aug. 19, 2010) ("Even if the objected-to-language [prohibiting punitive damages] is invalid, it is severable, and arbitration would remain warranted under the remaining, valid provisions of the parties' agreement."); Yates v. Royal Consumer Prods., LLC, No. 22-cv-00075, 2022 WL 3365075, at *7 (W.D. Ky. Aug. 15, 2022) (finding venue and choice of law provisions were readily "distinct" from the arbitration provision such that severing these provisions "would not fundamentally alter the arbitration agreement").

[191] No. 18-cv-61877, 2019 WL 2253395 (S.D. Fla. Mar. 7, 2019), *aff'd in part*, *rev'd in part*, 793 F. App'x 935 (11th Cir. 2019) (per curiam). The court of appeals affirmed on this issue, based on circuit precedent requiring that remedies must be "fully consistent with the purposes underlying any statutory claims subject to arbitration." 739 F. App'x at 937 (quoting Paladino v. Avnet Comput. Techs., Inc., 134 F.3d 1054, 1059 (11th Cir. 1998)). Thus, a clause providing that "each party will pay its own fees and costs is unenforceable, as the FLSA allows fees and costs as part of a plaintiff's award." Id.; see also id. ("When an arbitration clause has provisions that defeat the remedial purpose of the statute, . . . the arbitration clause is not enforceable." (alteration in original) (quoting *Paladino*, 134 F.3d at 1062)).

[192] Hudson v. P.I.P., Inc., No. 18-cv-61877, 2020 WL 5647009, at *2 (S.D. Fla. Mar. 13, 2020) (quoting Epic Sys. Corp. v. Lewis, 584 U.S. 497, 505 (2018)), *report and recommendation adopted*, 2020 WL 5647051 (S.D. Fla. Apr. 2, 2020).

[193] Trevisan v. P.I.P., Inc., No. 18-cv-61877, 2019 WL 2254815, at *2 (S.D. Fla. Feb. 6, 2019) (explaining that severing provisions from an arbitration agreement is impermissible if it requires a court to rewrite the agreement and to add an entirely new set of procedural rules and burdens), *report and recommendation adopted*, *Hudson*, 2019 WL 2253395; see also

issue, explaining, "Our law does not support that an arbitration provision is unenforceable in its entirety if it contains an offending clause and lacks a severability provision. The district court did not go on to the next step to address whether the unenforceable clauses were severable . . . ."[194]

On remand, the district court dutifully severed the unconscionable cost-splitting provisions on its own authority.[195] This judicial willingness to manufacture severability authority where none exists demonstrates how arbitration exceptionalism has inverted traditional contract principles, transforming courts from neutral arbiters into active advocates for arbitration enforcement.

Motivated by a mistaken belief that their mission is to "preserve as much of the parties' agreement as possible," courts have rewritten arbitration provisions with a solicitude that no other contractual provision enjoys.[196] This approach effectively dismembers arbitration agreements, preserving their enforceability at nearly any cost.

Some district judges have questioned this disparity in approaches to severability. For example, in *Hale v. Brinker International, Inc.*, the defendant argued that a cost-splitting provision, even if unconscionable, could easily be severed from the remainder of the arbitration agreement.[197] Judge Vince Chhabria of the Northern District of California was not convinced, emphasizing that "[e]ven though the cost-splitting provision is the only substantively unconscionable provision of the agreement, it remains consequential" because "[c]ost- and fee-shifting provisions can create a chilling effect, discouraging employees from vindicating their rights for fear that failure will prove cripplingly expensive."[198] He offered that if courts were simply "to excise those

Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 459 (Fla. 2011) ("Further, if the provision were to be severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, 'there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other'—particularly, when those legal promises are viewed through the eyes of the contracting parties." (citation omitted)).

[194] *Hudson*, 793 F. App'x at 938 (citation omitted).

[195] *Hudson*, 2020 WL 5647009, at *4. The district court, however, denied the defendant's motion to compel arbitration on alternate grounds, finding that plaintiffs' affidavits denying their signatures on the arbitration agreements created a genuine dispute as to contract formation and requiring a jury trial under 9 U.S.C. § 4. Id. at *6–7.

[196] See Bodine v. Cook's Pest Control, Inc., No. 15-cv-00413, 2015 WL 3796493, at *4 (N.D. Ala. June 18, 2015).

[197] No. 21-cv-09978, 2022 WL 2187397, at *1 (N.D. Cal. June 17, 2022).

[198] Id.

provisions and enforce arbitration agreements anyway," companies would have no incentive to draft fair arbitration provisions.[199] Similarly, Judge Nina Morrison of the Eastern District of New York recently questioned the disparity in judicial approaches to severability in light of *Morgan*, observing that "[g]eneral contract law is far more flexible in the face of an unconscionable provision than what the Second Circuit [has] instructed" in the arbitration context.[200] Post-*Morgan*, this and other pro-arbitration approaches to severability are no longer tenable.

B. Policy Concerns Attending Severability in Arbitration

In addition to violating *Morgan*'s equality-of-contracts mandate, current approaches to severability in arbitration raise two critical policy concerns—one practical and the other theoretical. First, on a practical level, the current severability framework incentivizes corporate defendants to include unconscionable terms in arbitration clauses because it is nearly costless to do so. Even when challenged, defendants face little risk: courts typically sever the offending provisions while compelling arbitration under the remaining terms, imposing no penalties on the drafter for including illegal clauses. This "no harm, no foul" approach leaves consumers and employees vulnerable to exploitative contract terms, discourages counterparties from seeking relief in arbitration, and wastes judicial resources on repeated challenges to unconscionable provisions.[201] Worse yet, a court's finding that certain provisions in an arbitration agreement are unconscionable often yields no collateral estoppel effects for future claimants, who may still be required to relitigate illegality depending on the unique facts and circumstances of their cases.[202]

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[199] Id.

[200] Vidal v. Advanced Care Staffing, LLC, No. 22-cv-05535, 2023 WL 2783251, at *20 n.15 (E.D.N.Y. Apr. 4, 2023).

[201] See, e.g., Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 474 (Fla. 2011) (reasoning that the limitation-of-remedies provisions "directly undermine[d] specific statutory remedies created by the Legislature").

[202] Offensive, non-mutual collateral estoppel under *Parklane Hosiery Co. v. Shore* applies only where (1) the issue decided in the prior adjudication was identical to the issue presented in the present action, and (2) the defendant had a full and fair opportunity to litigate the claim and a strong incentive to do so. See 439 U.S. 322, 328, 331–33 (1979). In the arbitration context, numerous courts have held that a provision deemed unconscionable in one setting may be perfectly valid in another. See, e.g., Bridgecrest Acceptance Corp. v. Donaldson, 648 S.W.3d 745, 757–58 (Mo. 2022) (en banc).

A second and more theoretical concern is that current severability jurisprudence perpetuates the fiction that arbitration agreements in standard-form contracts reflect the mutual intent of the parties. In reality, weaker parties have no intent beyond accessing the product, service, or job offered by the drafter. The arbitration provisions they "agree" to are non-negotiable, drafted solely to shield the stronger party from litigation and liability. Yet courts persist in framing severability as a means of preserving the "intent" of both parties, reinforcing a false narrative that undermines the foundational principles of contract law.[203]

In severability jurisprudence, arbitration exceptionalism has again twisted contract doctrine, rendering it nearly unrecognizable. Courts once understood that severability was an available remedy only "when nonenforcement [of a contract would] lead to an undeserved benefit or detriment to one of the parties that would not further the interests of justice."[204] But when it comes to arbitration, severability is the rule and nonenforcement the exception. Indeed, one district judge recently declared that courts confronting arbitration clauses, especially when supplemented by severability clauses, should "presume severability whenever possible."[205] This sentiment veers far from the traditional view and can only be understood as yet another product of arbitration exceptionalism.

The Supreme Court's decision in *Morgan v. Sundance, Inc.* offers a vital corrective to these distortions. By rejecting the presumption that arbitration agreements merit special treatment, *Morgan* reaffirms that arbitration is a matter of consent, not coercion. Post-*Morgan*, courts must reevaluate their approach to severability, ensuring that arbitration agreements are subject to the same rigorous standards as other contracts.

[203] See, e.g., Yates v. Royal Consumer Prods., LLC, No. 22-cv-00075, 2022 WL 3365075, at *6 (W.D. Ky. Aug. 15, 2022) ("By including this severability clause in the contract, the parties have signaled their intent for provisions to be interpreted as severable whenever possible."); Great Earth Cos. v. Simons, 288 F.3d 878, 891 (6th Cir. 2002) (citing the severability provision of an agreement for the proposition that "the terms of the Agreement itself make it clear that the parties intended the agreement to arbitrate to survive, even if certain parts of [the arbitration provision] were found to be unenforceable").

[204] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 699 (Cal. 2000).

[205] *Yates*, 2022 WL 3365075, at *6.

V. SURVEYING THE POST-*MORGAN* LANDSCAPE

In *Morgan v. Sundance, Inc.*, the Supreme Court declared that courts "may not devise novel rules to favor arbitration over litigation."[206] This Article takes that pronouncement seriously, arguing for the elimination of judicially created doctrines that have long distorted arbitration jurisprudence. Efforts to achieve this recalibration are already underway, with lawyers contesting arbitration-preferring applications of general legal principles and seeking to restore a system in which "arbitration agreements [are] as enforceable as other contracts, but not more so."[207]

This Part examines these developments in the two-plus years since *Morgan* was decided, analyzing how courts have applied its equal-treatment principle in both waiver and non-waiver contexts. In the period between May 24, 2022, to January 1, 2025, 611 federal and state court decisions cited *Morgan*; this Part analyzes 561 decisions, excluding unpublished and duplicate cases.[208] Over one-third (214 cases) of these cases reference *Morgan* only for its general statement that arbitration agreements must be treated like any other contract, part of the standard catechism that courts offer in the lead-up to analyzing any arbitration issue.[209] The remaining 347 cases discuss the applicability of *Morgan* to specific procedural facts. These cases, I submit, provide a unique opportunity to observe law in the making—i.e., how the lower federal

[206] 142 S. Ct. 1708, 1713 (2022).

[207] Id. (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).

[208] A Westlaw search of cases citing Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022), conducted for the period May 24, 2022, to January 1, 2025, yielding 611 results. After excluding forty-seven unpublished/non-citable cases and three duplicates, 561 cases were analyzed. These cases fell into three main categories: waiver claims directly engaging with *Morgan*'s substantive treatment of the issue (322 cases); non-waiver challenges invoking *Morgan*'s equal-treatment language to challenge arbitration-related issues beyond waiver (25 cases); and background citations noting *Morgan* as part of general arbitration-related jurisprudence without focusing on its core holding (214 cases). As noted above, this study eliminated forty-seven cases that were "red-flagged"—i.e., labeled "unpublished/non-citable" or superseded—and another three cases that were duplicates—for instance, a Report and Recommendation by a Magistrate Judge that was ultimately the subject of a district court decision.

[209] See, e.g., Garza v. Ayvaz Pizza, LLC, No. 23-cv-01379, 2023 WL 6518092, at *3 (S.D. Tex. Oct. 5, 2023) ("*Morgan* involved (and rejected) the crafting of 'special, arbitration-preferring procedural rules.'" (quoting *Morgan*, 142 S. Ct. at 1713)); Plintron Techs. USA, LLC v. Phillips, No. 24-cv-00093, 2024 WL 1557661, at *2 (W.D. Wash. Apr. 10, 2024) (holding that *Morgan* stands for the proposition that "a court may not devise novel rules to favor arbitration over litigation" (quoting *Morgan*, 142 S. Ct. at 1713)).

courts are interpreting and applying *Morgan* in real time, as well as how litigants are deploying its equal-treatment mandate in both waiver and non-waiver cases.

A. Waiving Arbitration Post-Morgan

Of the 561 cases citing *Morgan*, a little over half (322) address its substantive ruling on waiver, which instructs courts to abandon the arbitration-specific prejudice requirement for determining whether a party waived its right to arbitrate. This is unsurprising, as *Morgan* expressly offers plaintiffs seeking to remain in court a more relaxed waiver analysis.[210] As a result, courts have confronted a host of waiver-related questions: At what point do litigation-related activities signal an intent to waive arbitration rights?[211] Now that prejudice is off the table, what factors should courts consider in determining waiver?[212] Does state or federal law apply to determine waiver of arbitration rights governed by the FAA?[213]

Of the 322 waiver cases, courts declined to find waiver in 197 instances and held that a waiver of the right to arbitrate had occurred in 125 cases.[214]

[210] 142 S. Ct. at 1714 (characterizing its decision as "[a] directive to a federal court to treat arbitration applications 'in the manner provided by law' for all other motions," which "is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness").

[211] See, e.g., White v. Samsung Elecs. Am., Inc., 61 F.4th 334, 337–38, 340 (3d Cir. 2023) (finding that over three years of litigation, the defendant "continuously sought and agreed to stays in discovery," made a motion to dismiss on the merits, moved for reconsideration, and sought interlocutory appeal—all actions evincing "a preference for litigation over arbitration").

[212] See, e.g., Herrera v. Manna 2nd Ave. LLC, No. 20-cv-11026, 2022 WL 2819072, at *8 (S.D.N.Y. July 18, 2022) ("[C]ourts may be forced to interpret whether *Morgan* instructs courts to adopt general waiver analysis, or instead instructs courts to strip any prejudice requirement from their existing analysis of waivers of the right to arbitration under the FAA.").

[213] In *Morgan*, the Justices observed that the "Courts of Appeals . . . have generally resolved cases like this one as a matter of federal law, using the terminology of waiver." 142 S. Ct. at 1712. That may well be, but because arbitration is a creature of contract, state law governs many aspects of FAA analysis, and in the aftermath of *Morgan*, courts appear unsure whether state or federal law applies to the waiver determination. Compare Shake Out, LLC v. Clearwater Constr., LLC, 535 P.3d 598, 604 (Idaho 2023) (observing that under Idaho law, waiver is a state-law equitable doctrine that requires the party asserting waiver to show detrimental reliance), with Amargos v. Verified Nutrition, LLC, 653 F. Supp. 3d 1269, 1274 (S.D. Fla. 2023) (explaining that binding precedent dictates that the question of waiver is one of federal law after *Morgan*).

[214] A majority of post-2022 waiver decisions emanated from the federal courts: of the 197 declinations, 87.8% were decisions out of the federal district or circuit courts, and 12.2%

These decisions illustrate varying judicial attitudes toward litigation-related conduct, and some may reveal lingering traces of arbitration exceptionalism.[215]

In cases finding waiver, courts have often chastised defendants for "substantially invok[ing] the litigation machinery before asserting [their] arbitration right,"[216] citing the waste of judicial resources[217] and the unfairness of allowing a defendant to "use the threat of arbitration as a powerful bargaining chip"[218] before finally invoking arbitration.[219] Some judges have expressed outright frustration with what they perceive as chicanery or gamesmanship, particularly where defendants litigated for years before asserting arbitration rights.[220]

originated in state courts. Of the cases finding waiver, 74.4% were federal and 25.6% were state cases. This makes some sense given that many states had never adopted the federal prejudice requirement and were therefore unaffected by the decision in *Morgan*. Data on file with Author.

[215] For example, some courts have found that filing a motion to dismiss on the merits and engaging in some discovery are both indicative of a defendant's intent to waive its right to arbitrate. See, e.g., In re Pawn Am. Consumer Data Breach Litig., 108 F.4th 610, 615 (8th Cir. 2024) ("In the three months following the pretrial conference, [defendants] participated in an hour-long motion-to-dismiss hearing, stipulated to a discovery plan, and scheduled a mediation, which 'are hardly the actions of [litigants] trying to move promptly for arbitration.'" (second alteration in original) (quoting Sitzer v. Nat'l Ass'n of Realtors, 12 F.4th 853, 857 (8th Cir. 2021))). Other courts have held that similar activity is insufficient to show an intent to waive. See, e.g., Nicosia v. Amazon.com, Inc., No. 21-cv-02624, 2023 WL 309545, at *4 n.2 (2d Cir. Jan. 19, 2023) (finding no waiver where defendant pursued arbitration thirty-two months after filing a motion to dismiss and engaging in limited discovery).

[216] Messina v. N. Cent. Distrib., Inc., 821 F.3d 1047, 1050 (8th Cir. 2016) (citation omitted).

[217] Desert Reg'l Med. Ctr., Inc. v. Miller, 303 Cal. Rptr. 3d 412, 433 (Ct. App. 2022) (berating the defendant for trying to take "unfair advantage of participating in a trial run of litigating the case" before moving to compel arbitration).

[218] *In re Pawn Am. Litig.*, 108 F.4th at 615 (observing that the defendant "participated in an hour-long motion-to-dismiss hearing, stipulated to a discovery plan, and scheduled a mediation, which 'are hardly the actions of [litigants] trying to move promptly for arbitration'" (alteration in original) (quoting *Sitzer*, 12 F.4th at 857)).

[219] See id. ("Only after they had a chance to preview the district court's thinking did [defendants] begin to push for arbitration, with mediation only a week away."); Stickles v. Atria Senior Living, Inc., No. 20-cv-09220, 2023 WL 2062949, at *2 (N.D. Cal. Feb. 16, 2023) ("Defendants may not wait to see how the judicial winds blow before reversing course towards arbitration.").

[220] See, e.g., Lamonaco v. Experian Info. Sols., Inc., No. 23-cv-01326, 2024 WL 1703112, at *8 (M.D. Fla. Apr. 19, 2024) ("A party intending to arbitrate would not *request a jury trial* and allege its affirmative defenses [without mentioning arbitration] *twice* to a court it believes will not hear them.").

Conversely, courts rejecting waiver claims frequently exhibit a more lenient stance, accepting defendants' assertions that they always intended to arbitrate despite engaging in some litigation activity.[221] These courts tended to credit vague reservations of the right to arbitrate as sufficient to negate waiver, even in the face of prolonged litigation activity.[222] Others cling to outdated arbitration-specific doctrines, describing the burden to establish waiver as "heavy" because "federal law favors arbitration."[223] In some instances, courts have articulated impossibly high standards for waiver, arguably contradicting *Morgan* itself.[224]

In sum, the post-*Morgan* waiver cases showcase a spectrum of judicial attitudes that may reflect the enduring influence of arbitration exceptionalism. Courts conditioned over decades to think of arbitration as a favored forum for resolving disputes more efficiently seem to find it

[221] See, e.g., Deng v. Frequency Elecs., Inc., 640 F. Supp. 3d 255, 264 (E.D.N.Y. 2022) ("[E]ven assuming that [defendant] led plaintiff down a primrose path towards mediation for a couple of months before pulling out, that does not constitute the level of activity that would amount to a voluntary waiver of a known right.").

[222] See, e.g., AJ's Shoes Outlet, LLC v. Indep. Specialty Ins. Co., No. 22-cv-01148, 2023 WL 358779, at *3 (E.D. La. Jan. 23, 2023) ("Defendants explicitly reserved their right to seek arbitration in their Notice of Removal . . . ."); Brady v. Verizon Wireless (VAW) LLC, No. 22-cv-00187, 2022 WL 3268283, at *1 (E.D. Wis. July 19, 2022) ("In its February 22 answer and March 15 amended answer, Verizon pleaded as its first affirmative defense that it was 'reserv[ing] the right to compel contractual arbitration.'" (alteration in original) (citations omitted)); Nguyen v. Raymond James & Assocs., No. 20-cv-00195, 2022 WL 17811068, at *5–6 (M.D. Fla. Dec. 19, 2022) (finding that the very existence of the defendant's contractual class action-banning arbitration clause was sufficient evidence of its ongoing reservation of its right to arbitration). Notably, there is a significant body of precedent rejecting this idea. See, e.g., Martin v. Yasuda, 829 F.3d 1118, 1125 (9th Cir. 2016) ("A statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver."); In re Mirant Corp., 613 F.3d 584, 591 (5th Cir. 2010) ("A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court."); Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc., 589 F.3d 917, 923 (8th Cir. 2009) ("A reservation of rights is not an assertion of rights.").

[223] Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1025 (11th Cir. 1982); see also In re Intuniv Antitrust Litig., No. 16-cv-12653, 2023 WL 2662173, at *9 (D. Mass. Mar. 15, 2023) ("Regardless of whether *Morgan* applies to *federal procedural* rules favoring arbitration other than waiver, it did not do away with 'the FAA's "policy favoring arbitration."'" (citations omitted)); Holloman v. Consumer Portfolio Servs., Inc., No. 23-cv-00134, 2023 WL 4027036, at *4 (D. Md. June 15, 2023) ("Agreements to arbitrate are construed according to the ordinary rules of contract interpretation, as augmented by a federal policy requiring that all ambiguities be resolved in favor of arbitration." (quoting Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 710 (4th Cir. 2001))).

[224] See, e.g., Lawrence v. NYC Med. Prac., P.C., No. 18-cv-08649, 2023 WL 4706126, at *14 (S.D.N.Y. July 21, 2023) (finding that plaintiffs failed to show defendant clearly and intentionally waived its right to arbitrate).

difficult to suddenly pivot to an equal-footing regime. Political motivations, as well as concerns for crowded dockets and overly litigious plaintiffs, may also contribute to widely divergent judicial perspectives on waiver.[225] But, ultimately, because the question of whether a party has waived its right to arbitration is largely a factual inquiry "determined on a case-by-case basis," it is difficult to make meaningful observations or predictions about this body of developing waiver law.[226] As a district judge in Michigan recently observed, "[C]ourts engaging in these totality-of-the-circumstances analyses continue to 'reach[] different results in somewhat similar circumstances.'"[227]

More fruitful inquiry lies in the small but growing pool of cases where parties have actively sought to deploy *Morgan*'s equal-treatment principle beyond the bounds of waiver. Thus far, courts have—with few exceptions—rejected these challenges, again reflecting a continued commitment to pro-arbitration policies despite *Morgan*'s equal-treatment directive.

B. Beyond Waiver

Of the 561 post-*Morgan* cases, only 25 feature efforts to challenge judicially created, arbitration-specific rules. While the pool of non-waiver cases is small at this early stage, it is possible to make some general observations about the form and substance of the parties' equal-footing arguments.

First, arguments that *Morgan* abrogates any and all policies that favor of arbitration are too extreme for most courts. Plaintiffs attempted this in *Acab v. Chenrosa LLC*, asserting that *Morgan* overruled *any* prior decision that even mentioned a "strong policy in favor of arbitration."[228]

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[225] See Aaron-Andrew P. Bruhl, The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. Rev. 1420, 1445 (2008) ("Individual judges likely act on a mixture of motives, and the judiciary as a whole, which is composed of many distinct individuals, certainly does.").

[226] Lopez v. GMT Auto Sales, Inc., 656 S.W.3d 315, 328 (Mo. Ct. App. 2022) (citation omitted); see also Eades v. Doe 1, No. 04-22-00472-CV, 2023 WL 9007839, at *2 (Tex. App. Dec. 29, 2023) ("We look at the 'totality of the circumstances' to determine waiver on a 'case-by-case basis.'" (citation omitted)); *AJ's Shoes Outlet*, 2023 WL 358779, at *2 ("Courts must determine what constitutes substantial invocation of the judicial process on a case-by-case basis.").

[227] Doe v. Coliseum, Inc., No. 20-cv-10845, 2024 WL 4369883, at *8 (E.D. Mich. Sep. 30, 2024) (second alteration in original) (citation omitted).

[228] 725 F. Supp. 3d. 1140, 1147 (S.D. Cal. 2024) (citation omitted).

Unsurprisingly, the court refused to read *Morgan* so broadly.[229] The plaintiff in *Hunter v. Global Abbeville, LLC* similarly asserted that post-*Morgan*, "there is no longer a strong federal policy favoring arbitration."[230] Again, the court balked at so broad a reading.[231] A district judge in Kansas succinctly captured this resistance to using *Morgan* to launch sweeping attacks on the federal policy favoring arbitration:

> [Plaintiff] argues that the Supreme Court's recent decision in *Morgan v. Sundance, Inc.* requires courts to "reconsider the existing precedents and interpretive frameworks." The Court disagrees. Nothing in *Sundance* requires this Court to ignore years of precedent and binding caselaw to make a policy statement about the role of arbitration in modern-day disputes.[232]

Relatedly, courts look dimly upon efforts to use *Morgan*'s equal-treatment principle to challenge every order compelling arbitration; as one court aptly stated, "Simply because the result of [the] analysis favored arbitration does not suggest that [the judge] improperly put his thumb on the scale in favor of arbitration."[233] Suffice to say that overstating *Morgan*'s import looks to be a failing strategy.[234]

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[229] Id.

[230] No. 23-cv-03521, 2024 WL 2743605, at *7 (N.D. Ga. Jan. 24, 2024).

[231] Id. ("In *Morgan*, the Supreme Court simply declined to rely on the policy favoring arbitration to adopt an arbitration-specific waiver rule demanding a showing of prejudice. In fact, the Supreme Court reiterated the existence of the policy but clarified that '[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration.'" (alteration in original) (quoting Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022))).

[232] Palomo v. GMRG ACQ1, LLC, 631 F. Supp. 3d 1003, 1007 n.3 (D. Kan. 2022) (citations omitted).

[233] Bear v. Credit Acceptance Corp., No. 21-cv-12353, 2023 WL 5201736, at *3 (E.D. Mich. Aug. 14, 2023); see also Snow v. Genesis Eldercare Rehab. Servs., LLC, No. 22-cv-01794, 2023 WL 371085, at *4 (D.S.C. Jan. 24, 2023) ("Plaintiff seems to confuse policy with legal standard. The *policy* behind the FAA is 'to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.' The appropriate *legal standard* in this case, by contrast, is to [determine whether arbitration should be compelled based on the parties' agreement]." (first alteration in original) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991))).

[234] See, e.g., In re Intuniv Antitrust Litig., No. 16-cv-12653, 2023 WL 2662173, at *7 (D. Mass. Mar. 15, 2023) (rejecting the plaintiff's argument that, "after *Morgan*, courts may not apply any 'novel rule[s] to favor arbitration over litigation based on a "pro-arbitration policy"'" (alteration in original) (citation omitted)); Dimidik v. Hallrich Inc., No. 21-cv-00306, 2022 WL 4273404, at *3 (S.D. Ohio Sep. 14, 2022) ("Plaintiff reads *Morgan* too broadly" in arguing that private settlements of FLSA claims allowed in arbitration but prohibited in litigation "create[] an improper procedural exception . . . based on misplaced excessive deference to arbitration contracts" (citation omitted)); Eades v. Doe 1, No. 04-22-

Sharper arguments that point to specific rules being applied more favorably in arbitration have fared better. For instance, in *Gaudreau v. My Pillow, Inc.*, the plaintiff requested the court to reconsider its rule that when a plaintiff amends her complaint to "unexpectedly change[]" its "scope or theory," this acts to "revive [the defendant's] right to compel arbitration."[235] Agreeing with the plaintiff that these precedents created an "arbitration-specific variant of a federal procedural rule regarding revival of a waived right," the court abrogated its precedent on *Morgan* equal-treatment grounds.[236] Likewise, in *Yost v. Everyrealm, Inc.*, the plaintiff argued that merely severing an unconscionable cost-splitting provision but otherwise enforcing the arbitration clause ran afoul of *Morgan*'s equal-treatment principle, for many of the reasons discussed in Part III.[237] On the facts of *Yost* itself, the court ultimately disagreed[238]—but nonetheless, the *Yost* plaintiff identified a specific procedural rule (severability) that appears to operate differently in arbitration. In sum: narrower, more astute arguments that identify and articulate the arbitration-preferring effects of a specific rule appear more likely to succeed than broad, diffuse claims of unequal treatment.

Second, thus far, courts appear wary of applying *Morgan*'s equal-treatment principle beyond the waiver context—and are especially cautious when a party seeks to abrogate an entire line of precedent on this basis. In *James v. Venture Home Solar, LLC*, for instance, plaintiffs resisted arbitration by a non-signatory on grounds discussed above in Part II—namely, that the "perceived federal policy favoring arbitration has been the central rationale for courts invoking equitable estoppel in the arbitration context."[239] Relying on *Morgan*, plaintiffs argued that this pro-

00472-CV, 2023 WL 9007839, at *4 n.2 (Tex. App. Dec. 29, 2023) ("[W]e believe the [Plaintiffs] read *Morgan* too broadly."); Spencer v. TICI LLC, No. 22-cv-02464, 2023 WL 2806856, at *2 (D. Colo. Apr. 6, 2023) (rejecting "Plaintiff's contention that there is no presumption in favor of arbitration" and finding that "Plaintiff has not shown that the [ruling] is premised on the application of any novel rules favoring arbitration over litigation"); Peacock v. First Order Pizza, LLC, No. 22-cv-02315, 2022 WL 17475791, at *2 (W.D. Tenn. Dec. 6, 2022) ("Throughout his brief, [Plaintiff] argues that the caselaw governing arbitration needs to be reconsidered because prior assumptions about arbitration are inaccurate. . . . [But t]o the extent [*Morgan*] requires reconsideration of past cases, it is limited to cases that created special, arbitration-preferring procedural rules.").

[235] No. 21-cv-01899, 2022 WL 3098950, at *8 (M.D. Fla. July 1, 2022) (quoting Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194, 1202 (11th Cir. 2011)).

[236] Id.

[237] No. 22-cv-06549, 2023 WL 2859160, at *10 n.12 (S.D.N.Y. Apr. 10, 2023).

[238] Id. at *7–11.

[239] 715 F. Supp. 3d 203, 213 (D. Conn. 2024) (citation omitted).

arbitration rationale "is no longer permissible," and they should not be "forced to arbitrate against someone who is 'not a party.'"[240] The court disagreed, finding that the equal-treatment principle did not undermine its long line of estoppel precedents.[241] Similarly, in *Waters of White Hall, LLC v. Wiegand*, a nursing home defendant appealed the denial of its motion to compel arbitration against a resident.[242] The lower court erred, according to the defendant, because it had applied an "arbitration-specific rule on mutuality of obligation" in contravention of *Morgan*'s equal-treatment mandate.[243] The appellate court rebuffed this effort, which "essentially ask[ed the] court to overrule" a long line of state supreme court precedents, which it was both "powerless" and unwilling to do.[244] The parties did not seek appellate review in either *James* or *Wiegand*, leaving open the possibility that these arguments might have fared better had they been directed to the Second Circuit or the Arkansas Supreme Court.

Third, litigants miss the mark when deploying *Morgan* to challenge arbitration rules that lack any functional equivalent in litigation. Take, for example, *Prospect Capital Management L.P. v. Stratera Holdings, LLC*, where the plaintiff tried to use *Morgan*'s equal-treatment principle to undermine application of the *functus officio* doctrine—"a [judge-made,] arbitration-specific procedural rule" providing that "an arbitrator's authority to consider an issue is stripped once the arbitrator finally decides that issue."[245] While acknowledging that the *functus officio* doctrine is, indeed, an arbitration-specific rule, the court made the following commonsensical observation:

[240] Id. (citation omitted); see also id. (arguing that *Morgan* has, "in effect, abrogated the Second Circuit's equitable estoppel arbitration jurisprudence" (citation omitted)).

[241] Id. at 214; see also In re Intuniv Antitrust Litig., No. 16-cv-12653, 2023 WL 2662173, at *10 n.6 (D. Mass. Mar. 15, 2023) (declining plaintiff's invitation to take "a much broader reading of *Morgan*, which . . . would sweep away [defendant's] right to enforce arbitration by equitable estoppel").

[242] No. CV-21-426, 2023 WL 2669668, at *1 (Ark. Ct. App. Mar. 29, 2023). The lower court had found the arbitration clause in the nursing home admissions contract was unenforceable for lack of mutuality, as it reserved for the facility the exclusive right to "take a resident into court for the more probable low-value claims against the resident but shielded the facility from going to court on the more likely high-value financial exposure it would have in a negligence case." Id. at *2.

[243] Id. at *3 (citation omitted).

[244] Id.

[245] No. 22-cv-00089, 2023 WL 3686660, at *6, *13 n.11 (D. Del. May 26, 2023) (alteration in original), *report and recommendation adopted*, 2024 WL 4678392 (D. Del. Nov. 5, 2024).

> [T]he Court does not read *Morgan* as saying that every legal rule that only applies in the arbitration context is verboten. There are plenty of legal issues that only come up in the arbitration context. And so it makes sense that there might be certain legitimate legal doctrines or rules that address that context specifically. Instead, *Morgan* seems to be saying that if there is a legal concept or rule of procedure (i.e., waiver) that applies to both arbitration and non-arbitration cases, that concept should be applied the same way to both sets of cases . . . .[246]

The primary takeaways from these early post-*Morgan* cases are threefold: First, successful challenges require precision—litigants must identify specific procedural rules that operate more favorably in arbitration than in ordinary litigation; second, broad attacks on arbitration are likely to fail, while targeted arguments about differential treatment of particular doctrines show more promise; and third, courts remain reluctant to dismantle established precedent absent compelling evidence that a rule systematically advantages arbitration over litigation.

C. Circumventing Morgan

In the post-*Morgan* era, with prejudice no longer a relevant factor in waiver determinations, one might expect defendants to be wary of testing the litigation waters lest they be deemed to have waived their right to arbitrate—particularly given that few courts have landed on a "concrete test to determine whether a party has engaged in acts inconsistent with its right to arbitrate."[247] But there is some early evidence that corporate defendants—rather than avoiding litigation activity altogether—are searching for ways to circumvent *Morgan* and retain the right to engage in advantageous litigation activities before compelling arbitration. These efforts are apparent in two discrete scenarios.

In the first scenario, when faced with a putative class action filed by arbitration-free plaintiffs who purport to represent a range of class members—including some who may be bound by arbitration agreements—defendants have asserted their right to continue in court

[246] Id. at *13 n.11; see also Simpson v. Nissan of N. Am., Inc., No. 22-cv-00747, 2023 WL 5120240, at *3 (M.D. Tenn. Aug. 9, 2023) ("Arbitration-specific rules come into play not as exceptions to ordinary, substantive contract law, but because, when a motion to compel arbitration has been filed, there is a need to determine which issues are appropriate for the court to consider prior to any referral and which should be referred.").

[247] Hill v. Xerox Bus. Servs., LLC, 59 F.4th 457, 471 (9th Cir. 2023) (quoting Newirth ex rel. Newirth v. Aegis Senior Cmtys., LLC, 931 F.3d 935, 941 (9th Cir. 2019)).

until class certification is decided. Before that point, defendants argue they lack any right to compel arbitration against absent class members who are not yet technically in the case.[248] Relying on a contested line of decisions holding that "courts cannot compel individuals to arbitrate when they are yet to be identified and have not joined the suit," these class action defendants assert that the waiver clock does not start ticking until *after* a class is certified.[249] On this theory, defendants may engage in substantial litigation activity—including merits-based determinations on key issues—without fear of having waived their right to switch to arbitration.[250]

Thus far, most courts to have reached the class certification-waiver issue have rejected this end-run around *Morgan*. The leading case is *Hill v. Xerox Business Services, LLC*, where a divided Ninth Circuit panel rebuffed the defendant's unripe waiver claim, finding that "waiver is a unilateral concept" that "looks only to the acts of [the defendant], binds only [the defendant], [and] does not reach out to affect the rights of as then-unnamed class members."[251] The majority wryly observed that Xerox's strategy was twofold: "pursue 'binding individual arbitration,' where possible, while keeping claims subject to possible group arbitration in federal court," where it could take full advantage of appellate and other procedural rights not available in arbitration.[252] Refusing to bless this "attempt to play a game of 'heads I win, tails you lose,'" the court held

[248] Id. at 468–69.

[249] In re JPMorgan Chase & Co., 916 F.3d 494, 503 n.19 (5th Cir. 2019). Compare Gutierrez v. Wells Fargo Bank, NA, 889 F.3d 1230, 1238 (11th Cir. 2018) ("Class certification is the action that concretely identifies the plaintiffs; before that point, any plaintiffs beyond those named in the complaint are speculative and beyond the reach of the Court's power." (citing In re Checking Acct. Overdraft Litig., 780 F.3d 1031, 1037 (11th Cir. 2015))), with In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig., 790 F.3d 1112, 1119 (10th Cir. 2015) (declining to adopt a rule that would deem the "right to arbitrate against . . . class members" as known only after "the class was certified").

[250] See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011) (observing that class certification may require resolving "the factual and legal issues comprising the plaintiff's cause of action" (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982))).

[251] 59 F.4th at 469. But see id. at 487 (VanDyke, J., dissenting) (noting that only a defendant who is actively litigating against arbitration-bound class members that are joined to the lawsuit via class certification "can be said to have acted consistent with an intent to waive its right to arbitrate").

[252] Id. at 473 (majority opinion) ("Our system generally does not permit a party to lie in the weeds without consequences.").

Xerox had waived its right to arbitrate.[253] Courts in the Ninth Circuit have largely adopted *Hill*'s logic,[254] and a handful of courts outside the Ninth Circuit have also followed *Hill*.[255]

Similarly, in the recent and sprawling antitrust litigation against the National Realtors Association and adjacent entities, defendant HomeServices (a subsidiary of Berkshire Hathaway) argued it had not "waived any right to arbitrate because it 'could not have moved to compel arbitration of claims by absent members until the class was certified.'"[256] The court rejected this argument, observing that HomeServices repeatedly sought "to defeat class certification in federal court (and thereby effectively end any litigation against it) without ever mentioning arbitration. Only after those efforts failed did HomeServices resort to its arbitration 'do over' card that it had kept hiding 'in its back pocket' throughout months and years of hard-fought litigation."[257]

But defendants are not done trying to convince courts that motions to compel arbitration only ripen upon class certification.[258] Indeed, a district court within the Ninth Circuit recently agreed with the defendant that waiver cannot be established based on litigation activities "prior to class

[253] Id. at 477 (citation omitted). The panel observed that "[i]t is difficult to understate the possible effect of this particular strategy," which seeks to use the judicial process to resolve threshold merits issues in attempt to extinguish class claims and deter individual (or mass) arbitration. Id. at 476.

[254] See, e.g., Caccuri v. Sony Interactive Ent. LLC, 735 F. Supp. 3d 1139, 1154–55 (N.D. Cal. 2024) (rejecting the defendant's argument that "no waiver occurred because prior to class certification, absent class members are not parties to the litigation"); In re Google Assistant Priv. Litig., No. 19-cv-04286, 2024 WL 251407, at *5–6 (N.D. Cal. Jan. 23, 2024) (same); Salas v. Toyota Motor Sales, U.S.A., Inc., No. 15-cv-08629, 2024 WL 606166, at *6–8 (C.D. Cal. Jan. 10, 2024) (same); Avery v. TEKsystems, Inc., No. 22-cv-02733, 2024 WL 3908103, at *8–9 (N.D. Cal. Aug. 21, 2024) (same), *aff'd*, 165 F.4th 1219 (9th Cir. 2026).

[255] See, e.g., Valli v. Avis Budget Rental Car Grp., LLC, No. 14-cv-06072, 2024 WL 4349747, at *8 (D.N.J. Sep. 30, 2024), *vacated and remanded*, 162 F.4th 396 (3d Cir. 2025). But some courts have taken a different tack than *Hill* on the class certification-waiver issue. See, e.g., Nguyen v. Raymond James & Assocs., Inc., No. 20-cv-00195, 2022 WL 17811068, at *2–3 (M.D. Fla. Dec. 19, 2022) (implicitly accepting the defendant's argument that it had not waived its right to compel arbitration "because the arbitration clause expressly prohibited it from exercising the right to compel arbitration until class certification was denied").

[256] Burnett v. Nat'l Ass'n of Realtors, 615 F. Supp. 3d 948, 957 (W.D. Mo. 2022) (citation omitted), *aff'd*, 75 F.4th 975 (8th Cir. 2023).

[257] Id. (citation omitted).

[258] See, e.g., Appellant AmeriCredit Financial Services, Inc.'s Reply Brief & Response Brief to Cross-Appeal at *68–69, AmeriCredit Fin. Servs., Inc. v. Bell, 707 S.W.3d 639 (Mo. Ct. App. 2024) (No. ED112095) (arguing that "GM Financial could not, and thus did not need to, compel arbitration before class certification").

certification."[259] This decision sets up a potential intra-circuit split over the underlying question of precisely when the right to arbitrate against class members vests.

In the second scenario, defendants charged with waiver have pointed to delegation clauses within their arbitration agreements, which explicitly entrust to an arbitrator the task of resolving issues relating to the "enforceability" of the agreement.[260] Arguing that waiver-by-litigation relates directly to the overall enforceability of an arbitration provision, defendants assert that waiver is a question for an arbitrator rather than a judge. These defendants find some support in the Supreme Court's unanimous decision in *Howsam v. Dean Witter Reynolds, Inc.*, which held that "'procedural' questions which grow out of" an arbitration—such as "waiver, delay, or a like defense to arbitrability"—"are presumptively *not* for the judge, but for an arbitrator, to decide."[261]

Courts are deeply divided on the question of who decides waiver. Some have held that a "clear and unmistakable" contractual delegation of authority to the arbitrator should be respected, even where the issue to be delegated is waiver of arbitral rights.[262] The Supreme Courts of Georgia and Alabama, for example, have determined that, where the relevant delegation clause unambiguously assigns the "validity" or "enforceability" of the arbitration agreement to an arbitrator, litigation-waiver issues must be referred to arbitration.[263]

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[259] Hall v. Marriott Int'l, Inc., 344 F.R.D. 247, 269 (S.D. Cal. 2023) (finding that the defendant did not waive a jurisdictional affirmative defense against absent class members by not moving to dismiss "putative class members who were not then before the court" (quoting Moser v. Benefytt, Inc., 8 F.4th 872, 878 (9th Cir. 2021))).

[260] See, e.g., GFS, II, LLC v. Carson, 684 S.W.3d 170, 176, 184 (Mo. Ct. App. 2023) (rejecting the defendant's argument that litigation waiver must be decided by an arbitrator where the parties' agreement contained only a general delegation clause); Gandhi-Kapoor v. Hone Cap. LLC, 307 A.3d 328, 334–35 (Del. Ch. 2023) (rejecting the defendant's argument that an arbitrator must decide waiver pursuant to a delegation clause: "Arbitrators address procedural waivers. Courts rule on judicial conduct waivers.").

[261] 537 U.S. 79, 84 (2002) (first quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964); and then quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[262] See, e.g., Milliken v. C. Merrill Constr., LLC, 902 S.E.2d 669, 672 (Ga. Ct. App. 2024) (finding that contract language specifically assigning threshold issues to the arbitrator "provides clear and unmistakable evidence that the arbitrator should decide the issue of conduct-based waiver" (citing Brown v. RAC Acceptance E., LLC, 809 S.E.2d 801, 804–06 (Ga. 2018))).

[263] Key v. Warren Averett, LLC, 372 So. 3d 1132, 1139–40 (Ala. 2022); *Brown*, 809 S.E.2d at 804–05 ("[G]enerally, courts decide issues of alleged 'conduct-based' waiver of arbitration rights. . . . [But] where there is '"clear and unmistakable" evidence that the parties wanted an

Other courts reject the notion that waiver is for an arbitrator to decide. For example, a number of courts have determined that waiver is not technically a challenge to the enforceability of an arbitration clause, but instead merely raises the question of whether a party intentionally relinquished its right to arbitrate.[264] Other courts have limited *Howsam* to its specific facts, opining that waiver via litigation conduct has always been an issue for the court to decide.[265] For instance, the First Circuit has explained that the Supreme Court in *Howsam* "did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court."[266]

Yet others have relied on public policy in holding that litigation waiver is paradigmatically a judge's call. For instance, in *Lopez v. GMT Auto Sales, Inc.*, the court declared that "the doctrine of waiver by inconsistent acts is a *judicially created doctrine* designed to protect the integrity and resources of the court."[267] Thus, even the "anti-waiver" provision in the arbitration clause did not "preclude a finding of waiver following a party's

arbitrator to resolve the dispute' about arbitrability, courts must give effect to the parties' agreement." (citations omitted)).

[264] See, e.g., Westlake Servs., LLC v. Chandler, 226 N.E.3d 478, 490 (Ohio Ct. App. 2023) ("The argument that a party has waived its right to arbitrate through its litigation conduct does not challenge the arbitrability of any particular claim or counterclaim, [or] the 'existence, scope or validity' of the arbitration agreement . . . ." (citation omitted)); Jetall Cos. v. Sonder USA Inc., No. 01-21-00378-CV, 2022 WL 17684340, at *10, *11 n.4 (Tex. App. Dec. 15, 2022) (ruling that even though "the language in the [arbitration] provision expressly incorporating the [American Arbitration Association's] . . . Rules clearly and unmistakably delegates gateway issues of arbitrability to the arbitrator," litigation waiver is for the court to decide because "neither the arbitration provision generally nor the delegation clause specifically mentions who is to decide the issue of waiver by litigation conduct"); Kettle Black of MA, LLC v. Commonwealth Pain Mgmt. Connection, LLC, 189 N.E.3d 1257, 1264–65 (Mass. App. Ct. 2022) (finding reference to American Arbitration Association rules in an arbitration agreement insufficient to delegate waiver-by-litigation issue).

[265] At issue in *Howsam* was a rule of the National Association of Securities Dealers ("NASD") that required arbitration within six years of the event giving rise to the dispute. 537 U.S. at 81. In that case, six years had elapsed by the time the petitioner sought arbitration, so the respondent sued in federal district court invoking the NASD rule. Id. at 82. The Court held an arbitrator, not the court, should determine whether the rule applied. Id. at 82–85; see also Pre-Paid Legal Servs., Inc. v. Cahill, 786 F.3d 1287, 1295 (10th Cir. 2015) ("*Howsam* is distinguishable. It dealt with an NASD rule about time limits, not default under § 3 of the FAA. The time limit was part of the arbitrator's own rules and not contained in a federal statute like § 3.").

[266] Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 13–14 (1st Cir. 2005) (concluding that the FAA "seem[s] to place a statutory command on courts" to decide questions about waiver "themselves").

[267] 656 S.W.3d 315, 327–28 (Mo. Ct. App. 2022).

substantial participation in litigation to a point inconsistent with an intent to arbitrate."[268] Similarly, in *GFS, II, LLC v. Carson*, the court explained that the judiciary has "'comparative expertise' to address litigation-waiver issues," particularly "[w]here the alleged waiver arises out of conduct within the very same litigation in which the party attempts to compel arbitration."[269] Indeed, in *Morgan* itself, the Supreme Court seemed to assume that litigation waiver was a matter for the judge to decide, as suggested in its framing that "the *court* faces a question: Has the defendant's request to switch to arbitration come too late?"[270]

In the longer term, corporations may try to end-run *Morgan* altogether by simply amending their delegation clauses to expressly and unambiguously assign arbitrators the authority to resolve litigation-waiver questions.[271] Indeed, some consumer-facing companies have already begun to do so.[272] If these next-generation delegation clauses are upheld, arbitrators will be tasked with determining waiver—presumably at any point in the proceedings, "conceivably during trial, or even on appeal."[273] A crafty defendant intent on exploiting discovery in federal court or depleting the other side's resources might even go so far as to "delay a request for arbitration until jury deliberations had

[268] Id. at 327 ("Indeed, if an anti-waiver provision constituted an unassailable shield under this judicially-created doctrine, contracting parties hypothetically could use anti-waiver provisions to delay a request for arbitration until jury deliberations had commenced following a trial on the merits of arbitrable claims. To allow such a result would offend established principles of fairness and utterly undermine the notions of judicial economy.").

[269] 684 S.W.3d 170, 182 (Mo. Ct. App. 2023) (quoting *Marie*, 402 F.3d at 13); see also HFA Specialty Acquisitions LLC v. NexGen Flight Sols., LLC, No. 24-cv-01891, 2024 WL 4828043, at *4 (D.D.C. Nov. 19, 2024) (referencing circuit law holding that courts are best positioned to determine whether a party has "acted inconsistently with the arbitration right" by "active[ly] participat[ing] in a lawsuit" (alterations in original) (citation omitted)).

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

[271] See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) ("Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683–84 (2010))).

[272] See, e.g., Lamonaco v. Experian Info. Sols., Inc., No. 23-cv-01326, 2024 WL 1703112, at *6 (M.D. Fla. Apr. 19, 2024) (refusing to credit the delegation clause in Experian's Terms of Use, which "expressly delegate[s] the issue of 'whether [either party], through litigation conduct or otherwise, waived the right to arbitrate' to the arbitrator" (citation omitted)).

[273] *Carson*, 684 S.W.3d at 184 (observing that the trial court had to vacate a five-day jury trial scheduled for ten months and stay proceedings because of the defendant's late-filed motion to compel, and reasoning that allowing parties to invoke a delegation clause to send waiver disputes to arbitration at that stage would reward dilatory tactics and cause needless delay and disruption).

commenced."[274] And, because arbitrators have a direct financial stake in finding no waiver—as waiver findings terminate their engagement and eliminate their fees—these future delegation clauses may effectively circumvent *Morgan* while creating perverse incentives that systematically favor arbitration over litigation.[275]

CONCLUSION

Following *Morgan v. Sundance, Inc.*, the time has come to dismantle the jurisprudential scaffolding that has long favored arbitration through specialized rules. This Article initiates this critical project, revealing how lower courts have entrenched arbitration-friendly doctrines through equitable estoppel, contract formation, and severability principles, and how the Supreme Court has abandoned traditional rules like *contra proferentem* and the prohibition on piecemeal litigation in the arbitration context. But these are just a fraction of the whole: courts, conditioned by decades of the "federal policy favoring arbitration," have engineered a host of doctrines that privilege arbitration in ways inconsistent with ordinary contract and procedural law.[276]

For instance, courts routinely uphold arbitration clauses where one party maintains the unilateral right to modify portions of the clause without notice to the other party.[277] Meanwhile, outside of arbitration,

[274] Lopez v. GMT Auto Sales, Inc., 656 S.W.3d 315, 327 (Mo. Ct. App. 2022).

[275] See, e.g., David Horton, Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making, 68 Duke L.J. 1323, 1374 (2019) (observing that "arbitrators charge hundreds of dollars per hour and thus 'have self-serving incentives to maximize the size, complexity and significance of the matters before them' " and ascribing to one arbitrator the view that the "financial conflict of interest when arbitrators are vested with the jurisdiction to determine their own jurisdiction is a serious problem" (first quoting Charles H. Brower II, Mind the Gap, 2016 BYU L. Rev. 1, 51–52; and then quoting Partial Final Clause Construction Award at 6 n.1, Schofield v. Delilah's Den of Phila., Inc., No. 03-15-0003-4601 (Am. Arb. Ass'n Com. & Class Arb. Tribunal 2016) (Matthews, Arb.))).

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

[277] See, e.g., Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1033 (9th Cir. 2016) (upholding an arbitration clause despite the company's unilateral right to modify terms, reasoning that such a provision did not render the agreement unconscionable and noting that the implied covenant of good faith and fair dealing limits its exercise); McKee v. Audible, Inc., No. 17-cv-01941, 2017 WL 4685039, at *11 n.7 (C.D. Cal. July 17, 2017) (finding that even though the plaintiff created an Amazon account and agreed to terms that did not contain an arbitration clause, and Amazon later amended terms to add an arbitration clause but never specifically notified the plaintiff, the plaintiff still had to arbitrate because he later assented to the amended terms); Seawright v. Am. Gen. Fin. Servs., Inc., 507 F.3d 967, 974–75 (6th Cir. 2007) (enforcing an arbitration agreement where mutual promises to arbitrate constituted

one-way change-in-terms provisions imposed without notice render contracts illusory and unenforceable.[278] Likewise, courts regularly uphold arbitration provisions containing internally inconsistent and confusing terms,[279] while non-arbitration contracts with comparable defects are commonly struck down.[280] These anomalies, emblematic of modern arbitration jurisprudence, should face increasing scrutiny as litigants refine challenges grounded in *Morgan*'s equal-treatment principle.

The broader question, however, is whether the Supreme Court will truly commit to dismantling arbitration exceptionalism once the full implications come into focus. How far are the Justices—many of whom were architects of arbitration's ascendancy—willing to go in repudiating the very framework they helped construct?

A case from last term may offer a clue: in *Coinbase, Inc. v. Suski*, users of the cryptocurrency exchange platform alleged it had violated consumer protection laws in a sweepstakes promotion.[281] In opening their accounts, plaintiffs had agreed to the Coinbase User Agreement, which included an arbitration clause and a "delegation" clause requiring disputes about arbitrability to be decided by the arbitrator.[282] But when plaintiffs entered the sweepstakes, they agreed to the Official Rules of the sweepstakes, which did not impose arbitration but instead required all disputes be heard in state or federal courts in California.[283] The question before the Supreme Court in *Suski* was simply this: Who decides whether the sweepstakes

consideration and the employer's limited right to terminate after ninety days did not render the promise illusory).

[278] See, e.g., Montgomery County v. Deters, No. C-140266, 2015 WL 1843667, at *2 (Ohio Ct. App. Apr. 22, 2015) ("[A] contract is illusory only when by its terms the promisor retains an unlimited right to determine the nature or extent of his performance; the unlimited right, in effect, destroys his promise and thus makes it merely illusory." (alteration in original) (quoting Century 21 Am. Landmark, Inc. v. McIntyre, 427 N.E.2d 534, 536–37 (Ohio Ct. App. 1980) (per curiam))).

[279] See, e.g., Theodore v. Am. Express Nat'l Bank, No. 23-cv-03710, 2024 WL 1485842, at *2–3 (N.D. Cal. Apr. 4, 2024) (compelling arbitration where the relevant agreement contained two conflicting claims dispute provisions, including one which allowed some cardholders to decline arbitration), *amended by*, No. 23-cv-03710, 2024 WL 4134060 (N.D. Cal. Sep. 10, 2024).

[280] See, e.g., Utah Farm Bureau Ins. Co. v. Crook, 1999 UT 47, ¶ 6, 980 P.2d 685, 686–87 (noting, in the insurance context, that "[a] contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and understanding").

[281] 144 S. Ct. 1186, 1192 (2024).

[282] Id. at 1191.

[283] Id.

Official Rules supersede the Coinbase User Agreement—a judge or an arbitrator?[284]

In the heyday of arbitration exceptionalism, the Court might have tilted toward preserving the enforceability of arbitration agreements, emphasizing the delegation clause to defer the issue to the arbitrator. Yet in *Suski*, a unanimous Court reaffirmed that the FAA "places arbitration agreements on an equal footing with other contracts."[285] And, as with any contract, a *court* must first decide whether there is a valid agreement to arbitrate before enforcing it.[286] In this case, that meant that it was up to the judge, not an arbitrator, to decide whether the Official Rules of the sweepstakes (and their requirement that disputes be resolved in state court) overrode Coinbase's User Agreement.[287] The *Suski* Court thus affirmed the lower courts, finding the plaintiffs were not subject to Coinbase's arbitration clause—and in doing so, reiterated the equal-treatment principle, namely that "arbitration agreements are just contracts, subject to regular old contract law."[288]

Whether the *Morgan-Suski* equal-treatment principle will fundamentally reshape the Court's arbitration jurisprudence remains to be seen. But this much is clear: by explicitly disavowing special thumb-on-the-scale rules favoring arbitration, the Court has exposed a fundamental incoherence in its FAA jurisprudence. For decades, the Court has advanced arbitration as a preferred mechanism for resolving disputes, often at the expense of traditional principles of fairness and accessibility. This shift to an equal-treatment principle, if genuine, has profound

[284] Id. at 1192. The district court sided with the plaintiffs, finding that the question of which contract governed was a question for the court and that in this instance, under California contract law, the Official Rules superseded the User Agreement. Suski v. Marden-Kane, Inc., No. 21-cv-04539, 2022 WL 103541, at *5–6 (N.D. Cal. Jan. 11, 2022). The Ninth Circuit affirmed. Suski v. Coinbase, Inc., 55 F.4th 1227, 1228 (9th Cir. 2022), *aff'd*, 144 S. Ct. 1186.

[285] 144 S. Ct. at 1192 (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010)).

[286] Id. at 1194 ("Arbitration and delegation agreements are simply contracts, and, normally, if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute. So too here.").

[287] Id. at 1192 ("An agreement to allow an arbitrator to decide whether a dispute is subject to arbitration . . . 'is simply an additional, antecedent agreement . . . , and the FAA operates on this additional arbitration agreement just as it does on any other.'" (second alteration in original) (quoting *Rent-A-Center*, 561 U.S. at 70)).

[288] Pub. Just., A Contract Is a Contract Is a Contract, and So Is a Delegation Clause, Medium (May 23, 2024), https://public-justice.medium.com/a-contract-is-a-contract-is-a-contract-and-so-is-a-delegation-clause-7dfcaa09aaf1 [https://perma.cc/VL37-2KEF] (observing that *Suski* is "another nail in the coffin for the idea [that] arbitration agreements are special super-contracts that are more enforceable than other types of contracts").

implications for access-to-justice advocates seeking to challenge the hegemonic dominance of forced arbitration and its claim-suppressing effects.[289]

If this doctrinal recalibration holds, it could herald a pivotal moment for sweeping challenges to arbitration-preferring rules—challenges that disrupt entrenched jurisprudence and reimagine the role of alternative dispute resolution within our civil legal system. By peeling back the veneer of neutrality that has long cloaked arbitration exceptionalism, the Court may have opened the door to a long-overdue reckoning with the injustice that forced arbitration imposes on parties with unequal bargaining power.

[289] See, e.g., Gilles, supra note 32, at 1083 (asserting that class action-banning arbitration clauses have consigned "huge swaths of claims to individual arbitration[,] . . . all but ensuring that the vast majority of claimants will never pursue their disputes in any forum").