2022 Update to

ARBITRATION

FOURTH EDITION

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As in the main book, spaced asterisks indicate deletions of text. Where we have kept footnotes, we have kept the footnote number of the original material.

Chapter 1. Overview of Arbitration

No changes.

Chapter 2. Some Frequent Uses of Arbitration

Page 64, add:

Semenya appealed this decision of the CAS, but the Swiss Supreme Court upheld it.

> [T] he Swiss Supreme Court said that CAS had "the right to uphold the conditions of participation issued for female athletes with the genetic variant 46 XY DSD in order to guarantee fair competition for certain running disciplines in female athletics."
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> The Swiss court also said that Semenya's "guarantee of human dignity" was not undermined in agreeing that an athlete's biological characteristics may supersede a person's gender identity to protect fair competition.
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> * * *
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> Semenya's supporters include the World Medical Association, which has requested that doctors not implement the World Athletics regulations, questioning the ethics and potential harm of requiring athletes to take hormone therapy not based on medical need.
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> The Office of the United Nations High Commissioner for Human Rights has also called for the regulations to be revoked. Human Rights Watch has called the regulations "stigmatizing, stereotyping and discriminatory," saying they amount to "policing of women's bodies on the basis of arbitrary definitions of femininity and racial stereotypes."
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> But World Athletics welcomed Tuesday's ruling. One of its expert witnesses in the Semenya case, Doriane Lambelet Coleman, a Duke law professor and an elite 800-meter runner in the 1980s, said the rulings by CAS and the Swiss Supreme Court were "the right result in law and in policy."
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> It has been expected that, after the Tokyo Games, the International Olympic Committee will adopt the same testosterone limits for transgender athletes that World Athletics has imposed on intersex athletes.[1]

[1] Jere Longman, Track's Caster Semenya Loses Appeal to Defend 800-Meter Title, THE NEW YORK TIMES (June 28, 2021), https://www.nytimes.com/2020/09/08/sports/olympics/caster-semenya-court-ruling.html.

Chapter 3. Arbitration and the Courts

Page 168, add before Section 4. Most Claims are "Arbitrable":

In 2021, the U.S. House of Representatives has passed a bill to overrule *Epic Systems*, but the bill has not, as of this writing, passed the Senate.[2]

Page 168, add after last full paragraph (ending in "military personnel."):

An exception from the FAA's instruction to enforce arbitration agreements is the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, added to the FAA as a new Chapter 4 of Title 9 in 2022.[3] Enacted as a result of the #MeToo movement,[4] FAA Chapter 4 permits a person alleging a sexual harassment or sexual assault dispute to avoid enforcement of a pre-dispute arbitration agreement. FAA § 402(a) says:

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.[5]

Thus, § 402(a) apparently permits a party asserting such claims to effectively remove the entire case—not just the sexual harassment or sexual assault claims—from from the FAA's mandate to enforce predispute arbitration agreements. In contrast, if the party asserting such claims wants to enforce a predispute arbitration agreement, § 402(a) does not authorize the opposing party to prevent such enforcement.

Page 207, add:

Although not technically a class action, as the following case explains, California's Private Attorneys General Act ("PAGA") also permits many individual "low-value claims [to] be welded together into high-value suits." In *Viking River*, the Court held that the FAA preempts PAGA's "built-in mechanism of claim joinder" to the extent it would prevent enforcement of agreements to arbitrate claims individually rather than joined. "Requiring arbitration procedures to include a joinder rule of that kind compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether. Either way, the parties are coerced into giving up a right they enjoy under the FAA."

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[2] H.R. 842, 117th Cong. § 104(5) (2021) ("[I]t shall be an unfair labor practice under subsection (a)(1) for an employer to enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction.").

[3] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§401—2 .

[4] David Horton, The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 132 Yale L.J. Forum (2022) ("antiarbitration momentum accelerated in 2016 with the rise of #MeToo. A parade of disturbing allegations against powerful men led to a 'reckoning and an airing of truths about sexual harassment and assault at work.' These stories highlighted that arbitration's privacy and confidentiality permit 'offender[s] to potentially evade accountability and continue the harassment.' For example, Fox News anchor Gretchen Carlson became a vocal opponent of forced arbitration after her boss, Roger Ailes, invoked the process in her sexual harassment cases against him. As Carlson put it, 'Forced arbitration is a sexual harasser's best friend: It keeps proceedings secret, findings sealed, and victims silent.' * * * As public pressure mounted, a variety of white-shoe law firms and tech companies voluntarily exempted claims of sexual misconduct from their forced arbitration clauses.")

[5] 9 U.S.C. § 402(a).

VIKING RIVER CRUISES, INC. v. Angie MORIANA

Supreme Court of the United States, 2022

2022 WL 2135491, No. 20-1573

- Justice ALITO delivered the opinion of the Court.*

We granted certiorari in this case to decide whether the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004. Cal. Lab. Code Ann. § 2698 *et seq.* (West 2022).

I

A

The California Legislature enacted the Labor Code Private Attorneys General Act (PAGA) to address a perceived deficit in the enforcement of the State's Labor Code. California's Labor and Workforce Development Agency (LWDA) had the authority to bring enforcement actions to impose civil penalties on employers for violations of many of the code's provisions. But the legislature believed the LWDA did not have sufficient resources to reach the appropriate level of compliance, and budgetary constraints made it impossible to achieve an adequate level of financing. The legislature thus decided to enlist employees as private attorneys general to enforce California labor law, with the understanding that labor-law enforcement agencies were to retain primacy over private enforcement efforts.

By its terms, PAGA authorizes any "aggrieved employee" to initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by the State in an LWDA enforcement action. Cal. Lab. Code Ann. § 2699(a). As the text of the statute indicates, PAGA limits statutory standing to "aggrieved employees"—a term defined to include "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." § 2699(c). To bring suit, however, an employee must also exhaust administrative remedies. That entails providing notice to the employer and the LWDA of the violations alleged and the supporting facts and theories. § 2699.3(a)(1)(A). If the LWDA fails to respond or initiate an investigation within a specified timeframe, the employee may bring suit. § 2699.3(a)(2). In any successful PAGA action, the LWDA is entitled to 75 percent of the award. § 2699(i). The remaining 25 percent is distributed among the employees affected by the violations at issue. *Ibid.*

California law characterizes PAGA as creating a "type of *qui tam* action,"[1] *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 382, 327 P.3d 129, 148, 173 Cal.Rptr.3d 289 (2014). Although the statute's language suggests that an "aggrieved employee" sues "on behalf of himself or herself and other current or former employees," § 2699(a), California precedent holds that a PAGA suit is a " 'representative action' " in which the employee plaintiff sues as an " 'agent or proxy' " of the State. *Id.*, at 380, 173 Cal.Rptr.3d 289, 327 P.3d at 147 (quoting *Arias v. Superior Court*, 46 Cal.4th 969, 986, 95 Cal.Rptr.3d 588, 209 P.3d 923, 933 (2009)).

As the California courts conceive of it, the State "is always the real party in interest in the suit." *Iskanian*, 59 Cal.4th at 382, 173 Cal.Rptr.3d 289, 327 P.3d at 148.[2] The primary function of PAGA is to delegate a power

* THE CHIEF JUSTICE joins Parts I and III of this opinion.

[1] As we have explained, "*qui tam*" is the short form of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*"—meaning " 'who pursues this action on our Lord the King's behalf as well as his own.' " *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768, n. 1, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). *Qui tam* actions "appear to have originated around the end of the 13th century, when private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf" and became more of a rarity as "royal courts began to extend jurisdiction to suits involving wholly private wrongs." *Id.,* at 774–775, 120 S.Ct. 1858.

[2] The extent to which PAGA plaintiffs truly act as agents of the State rather than complete assignees is disputed. See *Magadia v. Wal-Mart Assocs., Inc.*, 999 F.3d 668, 677 (CA9 2021) (holding that PAGA "lacks the procedural controls necessary to ensure that California" retains "substantial authority over the case" (internal quotation marks omitted)). Agency requires control. See *Hollingsworth v. Perry*, 570 U.S. 693, 713, 133 S.Ct.

to employees to assert "the same legal right and interest as state law enforcement agencies," *Arias*, 46 Cal.4th at 986, 95 Cal.Rptr.3d 588, 209 P.3d at 933. In other words, the statute gives employees a right to assert the State's claims for civil penalties on a representative basis, but it does not create any private rights or private claims for relief. *Iskanian*, 59 Cal.4th at 381, 173 Cal.Rptr.3d 289, 327 P.3d at 148; see also *Amalgamated Transit*, 46 Cal.4th 993, 1002, 95 Cal.Rptr.3d 605, 209 P.3d 937, 943 (2009). The code provisions enforced through the statute establish public duties that are owed to the State, not private rights belonging to employees in their "individual capacities." *Iskanian*, 59 Cal.4th at 381, 173 Cal.Rptr.3d 289, 327 P.3d at 147. Other, distinct provisions of the code create individual rights, and claims arising from violations of those rights are actionable through separate private causes of action for compensatory or statutory damages. *Id.,* at 381–382, 173 Cal.Rptr.3d 289, 327 P.3d at 147–148; see also *Kim v. Reins Int'l California, Inc.*, 9 Cal.5th 73, 86, 259 Cal.Rptr.3d 769, 459 P.3d 1123, 1130 (2020) ("[C]ivil penalties recovered on the state's behalf are intended to remediate present violations and deter future ones, not to redress employees' injuries" (internal quotation marks omitted; emphasis deleted)). And because PAGA actions are understood to involve the assertion of the government's claims on a derivative basis, the judgment issued in a PAGA action is binding on anyone "who would be bound by a judgment in an action brought by the government." *Arias*, 46 Cal.4th at 986, 95 Cal.Rptr.3d 588, 209 P.3d at 933.

California precedent also interprets the statute to contain what is effectively a rule of claim joinder. Rules of claim joinder allow a party to unite multiple claims against an opposing party in a single action. See 6A C. Wright, H. Miller, & E. Cooper, Federal Practice and Procedure § 1582 (3d ed. 2016) (Wright & Miller). PAGA standing has the same function. An employee with statutory standing may "seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself." *ZB, N. A. v. Superior Court*, 8 Cal.5th 175, 185, 252 Cal.Rptr.3d 228, 448 P.3d 239, 243–244 (2019). An employee who alleges he or she suffered a single violation is entitled to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability. This mechanism radically expands the scope of PAGA actions. The default penalties set by PAGA are $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation. Cal. Lab. Code Ann. § 2699(f)(2). Individually, these penalties are modest; but given PAGA's additive dimension, low-value claims may easily be welded together into high-value suits.

B

Petitioner Viking River Cruises, Inc. (Viking), is a company that offers ocean and river cruises around the world. When respondent Angie Moriana was hired by Viking as a sales representative, she executed an agreement to arbitrate any dispute arising out of her employment. The agreement contained a "Class Action Waiver" providing that in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action. It also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court. But under that severability clause, if any "portion" of the waiver remained valid, it would be "enforced in arbitration."

After leaving her position with Viking, Moriana filed a PAGA action against Viking in California court. Her complaint contained a claim that Viking had failed to provide her with her final wages within 72 hours, as required by §§ 101–102 of the California Labor Code. But the complaint also asserted a wide array of other code violations allegedly sustained by other Viking employees, including violations of provisions concerning the minimum wage, overtime, meal periods, rest periods, timing of pay, and pay statements. Viking moved to compel arbitration of Moriana's "individual" PAGA claim—here meaning the claim that arose from the violation she suffered—and to dismiss her other PAGA claims. The trial court denied that motion, and the California

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2652, 186 L.Ed.2d 768 (2013). But apart from the exhaustion process, the statute does not feature any explicit control mechanisms, such as provisions authorizing the State to intervene or requiring its approval of settlements.

That said, California precedent strongly suggests that the State retains inherent authority to manage PAGA actions. There is no other obvious way to understand California precedent's description of the State as the "real party in interest." See generally 1A Cal. Jur. 3d Actions § 31 (real-party-in-interest status is based on ownership and control over the cause of action). And a theory of total assignment appears inconsistent with the fact that employees have no assignable interest in a PAGA claim. See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court of Los Angeles Cty.*, 46 Cal.4th 993, 1002, 95 Cal.Rptr.3d 605, 209 P.3d 937, 943 (2009) (Amalgamated Transit); see also *Turrieta v. Lyft, Inc.*, 69 Cal.App.5th 955, 972, 284 Cal.Rptr.3d 767, 780 (2021) (The employee's "ability to file PAGA claims on behalf of the state does not convert the state's interest into their own or render them real parties in interest"). For purposes of this opinion, we assume that PAGA plaintiffs are agents.

Court of Appeal affirmed, holding that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable "representative" claims.

This ruling was dictated by the California Supreme Court's decision in *Iskanian*. In that case, the court held that pre-dispute agreements to waive the right to bring "representative" PAGA claims are invalid as a matter of public policy. What, precisely, this holding means requires some explanation. PAGA's unique features have prompted the development of an entire vocabulary unique to the statute, but the details, it seems, are still being worked out. An unfortunate feature of this lexicon is that it tends to use the word "representative" in two distinct ways, and each of those uses of the term "representative" is connected with one of *Iskanian*'s rules governing contractual waiver of PAGA claims.

In the first sense, PAGA actions are "representative" in that they are brought by employees acting as representatives—that is, as agents or proxies—of the State. But PAGA claims are also called "representative" when they are predicated on code violations sustained by other employees. In the first sense, " '*every* PAGA action is ... representative' " and "[t]here is no individual component to a PAGA action," *Kim*, 9 Cal.5th at 87, 259 Cal.Rptr.3d 769, 259 Cal.Rptr.3d, 459 P.3d at 1131 (quoting *Iskanian*, 59 Cal.4th at 387, 173 Cal.Rptr.3d 289, 327 P.3d at 151), because every PAGA claim is asserted in a representative capacity. But when the word "representative" is used in the second way, it makes sense to distinguish "individual" PAGA claims, which are premised on Labor Code violations actually sustained by the plaintiff, from "representative" (or perhaps quasi-representative) PAGA claims arising out of events involving other employees. For purposes of this opinion, we will use "individual PAGA claim" to refer to claims based on code violations suffered by the plaintiff. And we will endeavor to be clear about how we are using the term "representative."

Iskanian's principal rule prohibits waivers of "representative" PAGA claims in the first sense. That is, it prevents parties from waiving *representative standing* to bring PAGA claims in a judicial or arbitral forum. But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate "individual PAGA claims for Labor Code violations that an employee suffered," on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA. 59 Cal.4th at 383, 173 Cal.Rptr.3d 289, 327 P.3d at 149; see also *Kim*, 9 Cal.5th at 88, 259 Cal.Rptr.3d 769, 259 Cal.Rptr.3d, 459 P.3d at 1132 (noting that based on *Iskanian*, California courts have uniformly "rejected efforts to split PAGA claims into individual and representative components").

In this case, *Iskanian*'s principal prohibition required the lower courts to treat the representative-action waiver in the agreement between Moriana and Viking as invalid insofar as it was construed as a wholesale waiver of PAGA standing. The agreement's severability clause, however, allowed enforcement of any "portion" of the waiver that remained valid, so the agreement still would have permitted arbitration of Moriana's individual PAGA claim even if wholesale enforcement was impossible. But because California law prohibits division of a PAGA action into constituent claims, the state courts refused to compel arbitration of that claim as well. We granted certiorari, 595 U.S. ——, 142 S.Ct. 734, 211 L.Ed.2d 421 (2021), and now reverse.

II

The FAA was enacted in response to judicial hostility to arbitration. Section 2 of the statute makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.[3] As we have interpreted it, this provision contains two clauses: An enforcement mandate, which renders agreements to arbitrate enforceable as a matter of federal law, and a saving clause, which permits invalidation of arbitration clauses on grounds applicable to "any contract." See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–340, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *Epic Systems Corp.* v. *Lewis*, 584 U.S. ——, —— – ——, 138 S.Ct. 1612, 1621–1622, 200 L.Ed.2d 889 (2018). These clauses jointly establish "an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only

[3] As we have noted, common-law hostility to arbitration "manifested itself in a great variety of devices and formulas." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (internal quotation marks omitted). Two important devices were the doctrines of ouster and revocability, which, respectively, invalidated arbitration clauses as impermissible attempts to "oust" courts of their jurisdiction and permitted parties to revoke consent to arbitrate until the moment the arbitrator entered an award. See, *e.g., Kill* v. *Hollister*, 1 Wils. K. B. 129, 95 Eng. Rep. 532 (K. B. 1746); *Vynior's Case*, 77 Co. Rep. 80a, 77 Eng. Rep. 597 (K. B. 1609). Another was the rule barring specific performance as a remedy for breach of an arbitration clause. See 21 R. Lord, Williston on Contracts § 57:2 (4th ed. 2017). Section 2 abrogated these doctrines by making arbitration agreements presumptively "valid," "irrevocable," and "enforceable."

to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.' " *Kindred Nursing Centers L. P.* v. *Clark*, 581 U.S. 246, 251, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) (quoting *Concepcion*, 563 U.S. at 339, 131 S.Ct. 1740). Under that principle, the FAA "preempts any state rule discriminating on its face against arbitration—for example, a law 'prohibit[ing] outright the arbitration of a particular type of claim.' " *Kindred Nursing*, 581 U.S., at 251, 137 S.Ct. 1421 (quoting *Concepcion*, 563 U.S. at 341, 131 S.Ct. 1740).

But under our decisions, even rules that are generally applicable as a formal matter are not immune to preemption by the FAA. See *Lamps Plus, Inc.* v. *Varela*, 587 U.S. ——, ——, 139 S.Ct. 1407, 1415, 203 L.Ed.2d 636 (2019); *Concepcion*, 563 U.S. at 343, 131 S.Ct. 1740. Section 2's mandate protects a right to enforce arbitration agreements. That right would not be a right to *arbitrate* in any meaningful sense if generally applicable principles of state law could be used to transform "traditiona[l] individualized ... arbitration" into the "litigation it was meant to displace" through the imposition of procedures at odds with arbitration's informal nature. *Epic Systems*, 584 U.S., at ——, 138 S.Ct., at 1623. See also *Concepcion*, 563 U.S. at 351, 131 S.Ct. 1740. And that right would not be a right to arbitrate based on an *agreement* if generally applicable law could be used to coercively impose arbitration in contravention of the "first principle" of our FAA jurisprudence: that "[a]rbitration is strictly 'a matter of consent.' " *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)); see also *Lamps Plus*, 587 U.S., at —— , 139 S.Ct., at 1416; *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010).

Based on these principles, we have held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.*, at 684, 130 S.Ct. 1758. See also *Lamps Plus*, 587 U.S., at ——, 139 S.Ct., at 1412; *Epic Systems*, 584 U.S., at —— – —— –, 138 S.Ct., at 1621–1623; *Concepcion*, 563 U.S. at 347–348, 131 S.Ct. 1740. The " 'shift from bilateral arbitration to class-action arbitration' " mandates procedural changes that are inconsistent with the individualized and informal mode of arbitration contemplated by the FAA. *Id.*, at 347, 131 S.Ct. 1740 (quoting *Stolt-Nielsen*, 559 U.S. at 686, 130 S.Ct. 1758). As a result, class procedures cannot be imposed by state law without presenting unwilling parties with an unacceptable choice between being compelled to arbitrate using procedures at odds with arbitration's traditional form and forgoing arbitration altogether. Putting parties to that choice is inconsistent with the FAA.

Viking contends that these decisions require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding. If this is correct, *Iskanian*'s prohibition on PAGA waivers presents parties with the same impermissible choice as the rules we have invalidated in our decisions concerning class- and collective-action waivers: Either arbitrate disputes using a form of class procedure, or do not arbitrate at all.

Moriana offers a very different characterization of the statute. As she sees it, any conflict between *Iskanian* and the FAA is illusory because PAGA creates nothing more than a substantive cause of action. The only thing that is distinctive about PAGA, she supposes, is that it allows employee plaintiffs to increase the available penalties that may be awarded in an action by proving additional predicate violations of the Labor Code. But that does not make a PAGA action a class action, because those violations are not distinct claims belonging to distinct individuals. Instead, they are predicates for expanded liability under a single cause of action. In Moriana's view, that means *Iskanian* invalidates waivers of substantive rights, and does not purport to invalidate anything that can meaningfully be described as an "arbitration agreement."[4]

We disagree with both characterizations of the statute. Moriana is correct that the FAA does not require

[4] Moriana declines to defend one of the *Iskanian* court's own bases for holding that the FAA does not mandate enforcement of PAGA waivers. The *Iskanian* court reasoned that a PAGA action lies outside the FAA's coverage entirely because § 2 is limited to controversies "*arising out of* " the contract between the parties, 9 U.S.C. § 2 (emphasis added), and a PAGA action "is not a dispute between an employer and an employee arising out of their contractual relationship," but "a dispute between an employer and the *state*." *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 387, 173 Cal.Rptr.3d 289, 327 P.3d 129, 151(2014). We reject this argument. Although the terms of § 2 limit the FAA's enforcement mandate to agreements to arbitrate controversies that "arise out of " the parties' contractual relationship, disputes resolved in PAGA actions satisfy this requirement. The contractual relationship between the parties is a but-for cause of any justiciable legal controversy between the parties under PAGA, and "arising out of " language normally refers to a causal relationship. See, *e.g., Ford Motor Co.* v. *Montana Eighth Judicial Dist. Court*, 592 U.S. ——, ——, 141 S.Ct. 1017, 1026, 209 L.Ed.2d 225 (2021). And regardless of whether a PAGA action is in some sense also a dispute between an employer and the State, nothing in the FAA categorically exempts claims belonging to sovereigns from the scope of § 2.

courts to enforce contractual waivers of substantive rights and remedies. The FAA's mandate is to enforce "*arbitration agreements*." *Concepcion*, 563 U.S. at 344, 131 S.Ct. 1740 (emphasis added). And as we have described it, an arbitration agreement is "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum.' " *Preston v. Ferrer*, 552 U.S. 346, 359, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628, 105 S.Ct. 3346).[5]

But Moriana's premise that PAGA creates a unitary private cause of action is irreconcilable with the structure of the statute and the ordinary legal meaning of the word "claim." California courts interpret PAGA to provide employees with delegated authority to assert the State's claims on a representative basis, not an individual cause of action. See, *e.g.*, *Amalgamated Transit*, 46 Cal.4th at 1003, 95 Cal.Rptr.3d 605, 209 P.3d at 943 (PAGA "is simply a procedural statute" that "does not create property rights or any other substantive rights"). And a PAGA action asserting multiple code violations affecting a range of different employees does not constitute "a single claim" in even the broadest possible sense, because the violations asserted need not even arise from a common "transaction" or "nucleus of operative facts." *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Group, Inc.*, 590 U.S. ——, ——, 140 S.Ct. 1589, 1595, 206 L.Ed.2d 893 (2020) (internal quotation marks omitted).[6]

Viking's position, on the other hand, elides important structural differences between PAGA actions and class actions that preclude any straightforward application of our precedents invalidating prohibitions on class-action waivers. Class-action procedure allows courts to use a representative plaintiff 's individual claims as a basis to "adjudicate claims of multiple parties at once, instead of in separate suits," *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010). This, of course, requires the certification of a class. And because class judgments bind absentees with respect to their individual claims for relief and are preclusive as to all claims the class could have brought, *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984), "class representatives must at all times adequately represent absent class members, and absent [class] members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Concepcion*, 563 U.S. at 349, 131 S.Ct. 1740. And to "ensur[e] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate," the adjudicator must decide questions of numerosity, commonality, typicality, and adequacy of representation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

PAGA actions also permit the adjudication of multiple claims in a single suit, but their structure is entirely different. A class-action plaintiff can raise a multitude of claims because he or she represents a multitude of absent individuals; a PAGA plaintiff, by contrast, represents a single principal, the LWDA, that has a multitude of claims. As a result of this structural difference, PAGA suits exhibit virtually none of the procedural characteristics of class actions. The plaintiff does not represent a class of injured individuals, so there is no need for certification. PAGA judgments are binding only with respect to the State's claims, and are not binding on nonparty employees as to any individually held claims. *Arias*, 46 Cal.4th at 986, 95 Cal.Rptr.3d 588, 209 P.3d at 933–934. This obviates the need to consider adequacy of representation, numerosity, commonality, or

[5] In briefing before this Court, Viking argued that the principle that the FAA does not mandate enforcement of provisions waiving substantive rights is limited to federal statutes. This argument is erroneous. The basis of this principle is not anything unique about federal statutes. It is that the FAA requires only the enforcement of "provision[s]" to settle a controversy "by arbitration," § 2, and not any provision that happens to appear in a contract that features an arbitration clause. That is why we mentioned this principle in *Preston*, which concerned claims arising under state law. See 552 U.S. at 360, 128 S.Ct. 978 (noting that under the agreement, a party "relinquishe[d] no substantive rights ... California law may accord him").

[6] California courts sometimes speak as though a PAGA action involves the assertion of "a single representative PAGA claim," *Williams v. Superior Court*, 237 Cal.App.4th 642, 649, 188 Cal.Rptr.3d 83, 87 (2015). But we are not required to take the labels affixed by state courts at face value in determining whether state law creates a scheme at odds with federal law. See, *e.g.*, *Carpenter v. Shaw*, 280 U.S. 363, 367–368, 50 S.Ct. 121, 74 L.Ed. 478 (1930). And in our view, this manner of speaking is another reflection of the still-embryonic character of the language that has grown up around PAGA.

typicality. And although the statute gives other affected employees a future interest in the penalties awarded in an action, that interest does not make those employees "parties" in any of the senses in which absent class members are, see *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), or give those employees anything more than an inchoate interest in litigation proceeds. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (The " 'right' " to a share of the proceeds of a *qui tam* action "does not even fully materialize until the litigation is completed and the relator prevails").

Because PAGA actions do not adjudicate the individual claims of multiple absent third parties, they do not present the problems of notice, due process, and adequacy of representation that render class arbitration inconsistent with arbitration's traditionally individualized form. See *Concepcion*, 563 U.S. at 347–348, 131 S.Ct. 1740. Of course, as a practical matter, PAGA actions *do* have something important in common with class actions. Because PAGA plaintiffs represent a principal with a potentially vast number of claims at its disposal, PAGA suits "greatly increas[e] risks to defendants." *Id.*, at 350, 131 S.Ct. 1740. But our precedents do not hold that the FAA allows parties to contract out of *anything* that might amplify defense risks. Instead, our cases hold that States cannot coerce individuals into forgoing arbitration by taking the individualized and informal *procedures* characteristic of traditional arbitration off the table. Litigation risks are relevant to that inquiry because one way in which state law may coerce parties into forgoing their right to arbitrate is by conditioning that right on the use of a procedural format that makes arbitration artificially unattractive. The question, then, is whether PAGA contains any procedural mechanism at odds with arbitration's basic form.

Viking suggests an answer. Our FAA precedents treat bilateral arbitration as the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA. See *Epic Systems*, 584 U.S., at ——— – ———, 138 S.Ct., at 1622–1624; see also *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 238, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013); *Concepcion*, 563 U.S. at 347–349, 131 S.Ct. 1740; *Stolt-Nielsen*, 559 U.S. at 685–686, 130 S.Ct. 1758. Viking posits that a proceeding is "bilateral" in the relevant sense if—but only if—it involves two and only two parties and the arbitration " 'is conducted by and on behalf of the individual named parties only.' " *Wal-Mart*, 564 U.S. at 348, 131 S.Ct. 2541 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). PAGA actions necessarily deviate from this ideal because they involve litigation or arbitration on behalf of an absent principal. Viking thus suggests that *Iskanian*'s prohibition on PAGA waivers is inconsistent with the FAA because PAGA creates an intrinsically representational form of action and *Iskanian* requires parties either to arbitrate in that format or forgo arbitration altogether.

We disagree. Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law. Familiar examples include shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons. Single-agent, single-principal suits of this kind necessarily deviate from the strict ideal of bilateral dispute resolution posited by Viking. But we have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract. Nor have we suggested that single-agent, single-principal representative suits are inconsistent the norm of bilateral arbitration as our precedents conceive of it. Instead, we have held that "the 'changes brought about by the shift from bilateral arbitration to *class-action arbitration*' " are too fundamental to be imposed on parties without their consent. *Concepcion*, 563 U.S. at 347–348, 131 S.Ct. 1740 (quoting *Stolt-Nielsen*, 559 U.S. at 686, 130 S.Ct. 1758; emphasis added). And we have held that § 2's saving clause does not preserve defenses that would allow a party to declare "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic Systems*, 584 U.S., at ———, 138 S.Ct., at 1623.

These principles do not mandate the enforcement of waivers of representative capacity as a categorical rule. Requiring parties to decide whether to arbitrate or litigate a single-agent, single-principal action does not produce a shift from a situation in which the arbitrator must "resolv[e] a single dispute between the parties to a single agreement" to one in which he or she must "resolv[e] many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 559 U.S. at 686, 130 S.Ct. 1758. And a proceeding in which two and only two parties arbitrate exclusively in their individual capacities is not the only thing one might mean by "bilateral arbitration." As we have said, "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin*,

536 U.S. at 10, 122 S.Ct. 2005. Our precedents use the phrase "bilateral arbitration" in opposition to "class or collective" arbitration, and the problems we have identified in mandatory class arbitration arise from procedures characteristic of multiparty representative actions. *Epic Systems*, 584 U.S., at ——, 138 S.Ct., at 1632; see also*Italian Colors*, 570 U.S., at 238, 133 S.Ct. 2304;*Concepcion*, 563 U.S. at 347–349, 131 S.Ct. 1740; *Stolt-Nielsen*, 559 U.S. at 685–686, 130 S.Ct. 1758. Unlike these kinds of actions, single-principal, single-agent representative actions are "bilateral" in two registers: They involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant. This degree of deviation from bilateral norms is not alien to traditional arbitral practice,[7] and our precedents have never suggested otherwise. See, e.g., *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012) (*per curiam*) (invalidating rule categorically barring arbitration of wrongful-death actions).

Nor does a rule prohibiting waiver of representative standing declare "that a contract is unenforceable *just because it requires bilateral arbitration*." *Epic Systems*, 584 U.S., at ——, 138 S.Ct., at 1623. Indeed, if the term "bilateral arbitration" is used to mean "arbitration in an individual capacity between precisely two parties," a rule prohibiting representative-capacity waivers *cannot* invalidate agreements to arbitrate on a "bilateral" basis. An agreement that explicitly provided for "arbitration on a strictly bilateral basis" would, under that definition of the term "bilateral," categorically exclude representative-capacity claims from its coverage. Such claims, after all, necessarily involve the representation of an absent principal, and thus cannot be arbitrated in a strictly bilateral proceeding. A rule prohibiting waivers of representative standing would not *invalidate* any agreements that contracted for "bilateral arbitration" in Viking's sense—it would simply require parties to choose whether to litigate those claims or arbitrate them in a proceeding that is not bilateral in every conceivable sense. And while this consequence only follows because it is *impossible* to decide representative claims in an arbitration that is "bilateral" in every dimension, nothing in our precedent suggests that in enacting the FAA, Congress intended to require States to reshape their agency law to ensure that parties will never have to arbitrate in a proceeding that deviates from "bilateral arbitration" in the strictest sense. If there is a conflict between California's prohibition on PAGA waivers and the FAA, it must derive from a different source.

III

We think that such a conflict between PAGA's procedural structure and the FAA does exist, and that it derives from the statute's built-in mechanism of claim joinder. As we noted at the outset, that mechanism permits "aggrieved employees" to use the Labor Code violations they personally suffered as a basis to join to the action any claims that could have been raised by the State in an enforcement proceeding. *Iskanian*'s secondary rule prohibits parties from contracting around this joinder device because it invalidates agreements to arbitrate only "individual PAGA claims for Labor Code violations that an employee suffered," 59 Cal.4th at 383, 173 Cal.Rptr.3d 289, 327 P.3d at 149.

This prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine "the issues subject to arbitration" and "the rules by which they will arbitrate," *Lamps Plus*, 587 U.S., at ——, 139 S.Ct., at 1416, and does so in a way that violates the fundamental principle that "arbitration is a matter of consent," *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758. The most basic corollary of the principle that arbitration is a matter of consent is that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration," *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). This means that parties cannot be coerced into arbitrating a claim, issue, or dispute "absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.' " *Lamps Plus*, 587 U.S., at ——, 139 S.Ct., at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758); see also *Concepcion*, 563 U.S. at 347–348, 131 S.Ct. 1740.

For that reason, state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate. Rules of claim joinder can function in precisely that way. Modern civil procedure dispenses with the formalities of the common-law approach to claim joinder in favor of almost-unqualified joinder. Wright & Miller § 1581. Federal Rule of Civil Procedure

[7] For example, close corporations have included arbitration clauses in negotiated shareholder agreements for many decades. See, *e.g., In re Carl*, 263 App.Div. 887, 32 N.Y.S.2d 410 (1942); *Lumsden v. Lumsden Bros. & Taylor Inc.*, 242 App.Div. 852, 275 N.Y.S. 221 (1934).

18(a), which permits a party to "join, as independent or alternative claims, as many claims as it has against an opposing party," is typical of the modern approach. But the FAA licenses contracting parties to depart from standard rules "in favor of individualized arbitration procedures of their own design," so parties to an arbitration agreement are not required to follow the same approach. *Epic Systems*, 584 U.S., at ——, 138 S.Ct., at 1626. And that is true even if bifurcated proceedings are an inevitable result. See, *e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration. Such a rule would permit parties to superadd new claims to the proceeding, regardless of whether the agreement between them committed those claims to arbitration. See *Lamps Plus*, 587 U.S., at —— – ——, 139 S.Ct., at 1415–1416; *Epic Systems*, 584 U.S., at —— – ——, 138 S.Ct., at 1621–1624; *Concepcion*, 563 U.S. at 347–351, 131 S.Ct. 1740; *Stolt-Nielsen*, 559 U.S. at 684–687, 130 S.Ct. 1758.

When made compulsory by way of *Iskanian*, the joinder rule internal to PAGA functions in exactly this way. Under that rule, parties cannot agree to restrict the scope of an arbitration to disputes arising out of a particular " ' "transaction" ' " or " 'common nucleus of facts.' " *Lucky Brand*, 590 U.S., at ——, 140 S.Ct., at 1595. If the parties agree to arbitrate "individual" PAGA claims based on personally sustained violations, *Iskanian* allows the aggrieved employee to abrogate that agreement after the fact and demand either judicial proceedings or an arbitral proceeding that exceeds the scope jointly intended by the parties. The only way for parties to agree to arbitrate *one* of an employee's PAGA claims is to also "agree" to arbitrate *all other* PAGA claims in the same arbitral proceeding.

The effect of *Iskanian*'s rule mandating this mechanism is to coerce parties into withholding PAGA claims from arbitration. Liberal rules of claim joinder presuppose a backdrop in which litigants assert their own claims and those of a limited class of other parties who are usually connected with the plaintiff by virtue of a distinctive legal relationship—such as that between shareholders and a corporation or between a parent and a minor child. PAGA departs from that norm by granting the power to enforce a subset of California public law to every employee in the State. This combination of standing to act on behalf of a sovereign and mandatory freeform joinder allows plaintiffs to unite a massive number of claims in a single-package suit. But as we have said, "[a]rbitration is poorly suited to the higher stakes" of massive-scale disputes of this kind. *Concepcion*, 563 U.S. at 350, 131 S.Ct. 1740. The absence of "multilayered review" in arbitral proceedings "makes it more likely that errors will go uncorrected." *Ibid.* And suits featuring a vast number of claims entail the same "risk of 'in terrorem' settlements that class actions entail." *Ibid.* As a result, *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than "forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution." *Stolt-Nielsen*, 559 U.S. at 685, 130 S.Ct. 1758; see also *Concepcion*, 563 U.S. at 350–351, 131 S.Ct. 1740. This result is incompatible with the FAA.

IV

We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. This holding compels reversal in this case. The agreement between Viking and Moriana purported to waive "representative" PAGA claims. Under *Iskanian*, this provision was invalid if construed as a wholesale waiver of PAGA claims. And under our holding, that aspect of *Iskanian* is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner. But the severability clause in the agreement provides that if the waiver provision is invalid in some respect, any "portion" of the waiver that remains valid must still be "enforced in arbitration." Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim. The lower courts refused to do so based on the rule that PAGA actions cannot be divided into individual and non-individual claims. Under our holding, that rule is preempted, so Viking is entitled to compel arbitration of Moriana's individual claim.

The remaining question is what the lower courts should have done with Moriana's non-individual claims. Under our holding in this case, those claims may not be dismissed simply because they are "representative." *Iskanian*'s rule remains valid to that extent. But as we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an

action only by virtue of also maintaining an individual claim in that action. See Cal. Lab. Code Ann. §§ 2699(a), (c). When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit. See *Kim*, 9 Cal.5th at 90, 259 Cal.Rptr.3d 769, 259 Cal.Rptr.3d, 459 P.3d at 1133 ("PAGA's standing requirement was meant to be a departure from the 'general public' ... standing originally allowed" under other California statutes). As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.

For these reasons, the judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

- Justice SOTOMAYOR, concurring.

I join the Court's opinion in full. The Court faithfully applies precedent to hold that California's anti-waiver rule for claims under the State's Labor Code Private Attorneys General Act of 2004 (PAGA) is pre-empted only "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Ante,* at ——. In its analysis of the parties' contentions, the Court also details several important limitations on the pre-emptive effect of the Federal Arbitration Act (FAA). See *ante,* at —— – ——. As a whole, the Court's opinion makes clear that California is not powerless to address its sovereign concern that it cannot adequately enforce its Labor Code without assistance from private attorneys general.

The Court concludes that the FAA poses no bar to the adjudication of respondent Angie Moriana's "non-individual" PAGA claims, but that PAGA itself "provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." *Ante,* at —— . Thus, the Court reasons, based on available guidance from California courts, that Moriana lacks "statutory standing" under PAGA to litigate her "non-individual" claims separately in state court. *Ibid.* Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits. With this understanding, I join the Court's opinion.

- Justice BARRETT, with whom Justice KAVANAUGH joins, and with whom THE CHIEF JUSTICE joins except as to the footnote, concurring in part and concurring in the judgment.

I join Part III of the Court's opinion. I agree that reversal is required under our precedent because PAGA's procedure is akin to other aggregation devices that cannot be imposed on a party to an arbitration agreement. See, *e.g., Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *Epic Systems Corp.* v. *Lewis*, 584 U.S. ——, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018); *Lamps Plus, Inc.* v. *Varela*, 587 U.S. ——, 139 S.Ct. 1407, 203 L.Ed.2d 636 (2019). I would say nothing more than that. The discussion in Parts II and IV of the Court's opinion is unnecessary to the result, and much of it addresses disputed state-law questions as well as arguments not pressed or passed upon in this case.*

- Justice THOMAS, dissenting.

I continue to adhere to the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, does not apply to proceedings in state courts. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–297, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (THOMAS, J., dissenting); see also *Kindred Nursing Centers L. P.* v. *Clark*, 581 U.S. 246, 257, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017) (THOMAS, J., dissenting) (collecting cases). Accordingly, the FAA does not require California's courts to enforce an arbitration agreement that forbids an employee to invoke the State's Private Attorneys General Act. On that basis, I would affirm the judgment of the California Court of Appeal.

Page 209, replace Vaden with:

Denise A. BADGEROW, v. Greg WALTERS, et al.

Supreme Court of the United States, 2022
142 S.Ct. 1310, No. 20-1143

- Justice KAGAN delivered the opinion of the Court.

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, authorizes a party to an arbitration agreement to seek several kinds of assistance from a federal court. Under Section 4, for example, a party may ask the court to compel an arbitration proceeding, as the agreement contemplates. And under Sections 9 and 10, a party may apply to the court to confirm, or alternatively to vacate, an arbitral award.

Yet the federal courts, as we have often held, may or may not have jurisdiction to decide such a request. The Act's authorization of a petition does not itself create jurisdiction. Rather, the federal court must have what we have called an "independent jurisdictional basis" to resolve the matter. *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

In *Vaden v. Discover Bank*, 556 U.S. 49, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009), we assessed whether there was a jurisdictional basis to decide a Section 4 petition to compel arbitration by means of examining the parties' underlying dispute. The text of Section 4, we reasoned, instructs a federal court to "look through" the petition to the "underlying substantive controversy" between the parties—even though that controversy is not before the court. *Id.*, at 62, 129 S.Ct. 1262. If the underlying dispute falls within the court's jurisdiction—for example, by presenting a federal question—then the court may rule on the petition to compel. That is so regardless whether the petition alone could establish the court's jurisdiction.

* The same is true of Part I.

The question presented here is whether that same "look-through" approach to jurisdiction applies to requests to confirm or vacate arbitral awards under the FAA's Sections 9 and 10. We hold it does not. Those sections lack Section 4's distinctive language directing a look-through, on which *Vaden* rested. Without that statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction.

I

This case grows out of the arbitration of an employment dispute. Petitioner Denise Badgerow worked as a financial advisor for REJ Properties, a firm run by respondents Greg Walters, Thomas Meyer, and Ray Trosclair. (For ease of reference, we refer from now on only to Walters.) Badgerow's contract required her to bring claims arising out of her employment to arbitration, rather than to court. So when she was (in her view, improperly) fired, she initiated an arbitration action against Walters, alleging unlawful termination under both federal and state law. The arbitrators sided with Walters, dismissing Badgerow's claims.

What happened afterward—when Badgerow refused to give up—created the jurisdictional issue we address today. Believing that fraud had tainted the arbitration proceeding, Badgerow sued Walters in Louisiana state court to vacate the arbitral decision. Walters responded by removing the case to Federal District Court—and, once there, applying to confirm the arbitral award. Finally, Badgerow moved to remand the case to state court, arguing that the federal court lacked jurisdiction over the parties' requests—under Sections 10 and 9, respectively—to vacate or confirm the award.

The District Court assessed its jurisdiction under the look through approach this Court adopted in *Vaden* v. *Discover Bank*. See 2019 WL 2611127, *1 (ED La., June 26, 2019). That approach, as just noted, allows a federal court to exercise jurisdiction over an FAA application when the parties' underlying substantive dispute would have fallen within the court's jurisdiction. See *supra*, at 1314. The District Court acknowledged that *Vaden* involved a different kind of arbitration dispute: It concerned a petition to compel arbitration under the FAA's Section 4, rather than an application to confirm or vacate an arbitral award under Section 9 or 10. And *Vaden*'s "reasoning was grounded on specific text" in Section 4 that Sections 9 and 10 "do[ ] not contain." 2019 WL 2611127, *2. But the court thought it should apply the look-through approach anyway, so that "consistent jurisdictional principles" would govern all kinds of FAA applications. *Ibid*. And under that approach, the court had jurisdiction because Badgerow's underlying employment action raised federal-law claims. The court thus went on to resolve the dispute over whether fraud had infected the arbitration proceeding. Finding it had not, the court granted Walters's application to confirm, and denied Badgerow's application to vacate, the arbitral award.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court's finding of jurisdiction, relying on a just-issued Circuit precedent. See 975 F.3d 469, 472–474 (2020) (citing *Quezada v. Bechtel OG&C Constr. Servs., Inc.*, 946 F.3d 837, 843 (2020)). In that decision, the Fifth Circuit had echoed the reasoning of the District Court here. Yes, the language of Section 4 directing use of the look-through approach "is in fact absent in" the FAA's other sections. 946 F.3d, at 842. But, the court continued, a "principle of uniformity" applying to the FAA "dictates using the same approach for determining jurisdiction under each section of the statute." *Ibid.*; but see *id.*, at 845–846 (Ho, J., dissenting) (rejecting that asserted principle in favor of "[f]idelity to text"). As applied to this case, that analysis meant that the district court had jurisdiction over Walters's Section 9 and Badgerow's Section 10 applications.

Courts have divided over whether the look-through approach used in *Vaden* can establish jurisdiction in a case like this one—when the application before the court seeks not to compel arbitration under Section 4 but to confirm, vacate, or modify an arbitral award under other sections of the FAA.[1] We granted certiorari to resolve the conflict, 593 U. S. ——, 141 S.Ct. 1532 (2021), and now reverse the judgment below.

II

The district courts of the United States are courts of limited jurisdiction, defined (within constitutional bounds) by federal statute. See, *e.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673,

[1] Compare *Quezada v. Bechtel OG&C Constr. Servs., Inc.*, 946 F.3d 837, 843 (CA5 2020) (holding that the look-through approach applies to applications to confirm, vacate, or modify an arbitral award); *Ortiz-Espinosa v. BBVA Securities of P. R., Inc.*, 852 F.3d 36, 47 (CA1 2017) (same); *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372, 381–388 (CA2 2016) (same); *McCormick v. America Online, Inc.*, 909 F.3d 677, 680–684 (CA4 2018) (same), with *Goldman v. Citigroup Global Markets Inc.*, 834 F.3d 242, 252–255 (CA3 2016) (holding that the look-through approach does not apply to those applications); *Magruder v. Fidelity Brokerage Servs.*, 818 F.3d 285, 287–289 (CA7 2016) (same).

128 L.Ed.2d 391 (1994). Congress has granted those courts jurisdiction over two main kinds of cases. District courts have power to decide diversity cases—suits between citizens of different States as to any matter valued at more than $75,000. See 28 U.S.C. § 1332(a). And they have power to decide federal-question cases—suits "arising under" federal law. § 1331. Typically, an action arises under federal law if that law "creates the cause of action asserted." *Gunn v. Minton*, 568 U.S. 251, 257, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). So when federal law authorizes the action, the party bringing it—once again, typically—gets to go to federal court.

But that is not necessarily true of FAA-created arbitration actions. As noted above, the FAA authorizes parties to arbitration agreements to file specified actions in federal court—most prominently, petitions to compel arbitration (under Section 4) and applications to confirm, vacate, or modify arbitral awards (under Sections 9 through 11). See *supra*, at 1314. But those provisions, this Court has held, do not themselves support federal jurisdiction. See *Hall Street*, 552 U.S., at 581–582, 128 S.Ct. 1396; *Vaden*, 556 U.S., at 59, 129 S.Ct. 1262. (Were it otherwise, every arbitration in the country, however distant from federal concerns, could wind up in federal district court.) A federal court may entertain an action brought under the FAA only if the action has an "independent jurisdictional basis." *Hall Street*, 552 U.S., at 582, 128 S.Ct. 1396. That means an applicant seeking, for example, to vacate an arbitral award under Section 10 must identify a grant of jurisdiction, apart from Section 10 itself, conferring "access to a federal forum." *Vaden*, 556 U.S., at 59, 129 S.Ct. 1262. If she cannot, the action belongs in state court. The FAA requires those courts, too, to honor arbitration agreements; and we have long recognized their "prominent role" in arbitral enforcement. *Ibid.*; see *id.,* at 71, 129 S.Ct. 1262; *Southland Corp. v. Keating*, 465 U.S. 1, 12–16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).[2]

The issue here is about where a federal court should look to determine whether an action brought under Section 9 or 10 has an independent jurisdictional basis. An obvious place is the face of the application itself. If it shows that the contending parties are citizens of different States (with over $75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction. Or if it alleges that federal law (beyond Section 9 or 10 itself) entitles the applicant to relief, then § 1331 gives the court federal-question jurisdiction. But those possibilities do Walters no good. He and Badgerow are from the same State. And their applications raise no federal issue. Recall that the two are now contesting not the legality of Badgerow's firing but the enforceability of an arbitral award. That award is no more than a contractual resolution of the parties' dispute—a way of settling legal claims. See *Vaden*, 556 U.S., at 63, 129 S.Ct. 1262. And quarrels about legal settlements—even settlements of federal claims—typically involve only state law, like disagreements about other contracts. See *Kokkonen*, 511 U.S., at 378–382, 114 S.Ct. 1673. So the District Court here, as Walters recognizes, had to go beyond the face of the Section 9 and 10 applications to find a basis for jurisdiction. It had to proceed downward to Badgerow's employment action, where a federal-law claim satisfying § 1331 indeed exists. In other words, the court had to look through the Section 9 and 10 applications to the underlying substantive dispute, although that dispute was not before it. Could the court do so?

In *Vaden,* this Court approved the look-through approach for a Section 4 petition, relying on that section's express language. Under Section 4, a party to an arbitration agreement may petition for an order to compel arbitration in a "United States district court which, save for [the arbitration] agreement, would have jurisdiction" over "the controversy between the parties."[3] That text, we stated, "drives our conclusion that a federal court should determine its jurisdiction by 'looking through' a § 4 petition to the underlying substantive controversy"—to see, for example, if that dispute " 'arises under' federal law."

To show why that is so, we proceeded methodically through Section 4's wording. "The phrase 'save for [the

[2] This Court has held that the FAA's core substantive requirement—Section 2's command to enforce arbitration agreements like other contracts—applies in state courts, just as it does in federal courts. See *Southland Corp.*, 465 U.S., at 12–16, 104 S.Ct. 852. We have never decided whether the FAA's more procedural provisions, including Sections 4 and 9 through 11, also apply in state courts. See *Vaden,* 556 U.S., at 71, n. 20, 129 S.Ct. 1262; see also *post,* at 1325 – 1326 (BREYER, J., dissenting) (expressing concern that they do not). But we have made clear that Section 2 "carries with it" a duty for States to provide certain enforcement mechanisms equivalent to the FAA's. See *Vaden*, 556 U.S., at 71, 129 S.Ct. 1262 (referring specifically to Sections 3 and 4). And most, if not all, States in fact provide procedural vehicles, similar to those in the FAA, to enforce arbitration agreements—including, as here, to resolve post-arbitration disputes by means of confirming, modifying, or vacating arbitral awards. See, *e.g.,* Revised Uniform Arbitration Act of 2000 §§ 22–24, 7 U. L. A. 26 (2009) (adopted in 21 States and the District of Columbia); Cal. Civ. Proc. Code Ann. §§ 1285–1287.6 (West 2022); N. Y. Civ. Prac. Law Ann. §§ 7510–7511 (West 2022).

[3] In full, the relevant sentence of Section 4 reads: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement."

arbitration] agreement,' " we began, "indicates that the district court should assume the absence of the arbitration agreement and determine whether [the court] 'would have jurisdiction ...' without it." But "[j]urisdiction over what?" "The text of Section 4," we continued, "refers us to 'the controversy between the parties.' " And that "controversy," we explained, could not mean the dispute before the court about "the existence or applicability of an arbitration agreement"; after all, the preceding save-for clause had just "direct[ed] courts" to assume that agreement away. The "controversy between the parties" instead had to mean their "underlying substantive controversy." "Attending to the language" of Section 4 thus required "approv[ing] the 'look through' approach" as a means of assessing jurisdiction over petitions to compel arbitration. *Ibid.* The opposite view was not merely faulty; it was "textual[ly] implausib[le]." *Id.*, at 65, 129 S.Ct. 1262.

But Sections 9 and 10, in addressing applications to confirm or vacate an arbitral award, contain none of the statutory language on which *Vaden* relied. Most notably, those provisions do not have Section 4's "save for" clause. They do not instruct a court to imagine a world without an arbitration agreement, and to ask whether it would then have jurisdiction over the parties' dispute. Indeed, Sections 9 and 10 do not mention the court's subject-matter jurisdiction at all.[4] So under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply. "[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act," we generally take the choice to be deliberate. We have no warrant to redline the FAA, importing Section 4's consequential language into provisions containing nothing like it. Congress could have replicated Section 4's look-through instruction in Sections 9 and 10. Or for that matter, it could have drafted a global look-through provision, applying the approach throughout the FAA. But Congress did neither. And its decision governs.

Nothing in that conclusion changes because a jurisdictional question is before us. The federal "district courts may not exercise jurisdiction absent a statutory basis." And the jurisdiction Congress confers may not "be expanded by judicial decree." Those bedrock principles prevent us from pulling look-through jurisdiction out of thin air—from somehow finding, without textual support, that federal courts may use the method to resolve various state-law-based, non-diverse Section 9 and 10 applications. The look-through rule is a highly unusual one: It locates jurisdiction not in the action actually before the court, but in another controversy neither there nor ever meant to be. We recognized that rule in *Vaden* because careful analysis of Section 4's text showed that Congress wanted it applied to petitions brought under that provision. But Congress has not so directed in Sections 9 and 10. Congress has not authorized a federal court to adjudicate a Section 9 or 10 application just because the contractual dispute it presents grew out of arbitrating different claims, turning on different law, that (save for the parties' agreement) could have been brought in federal court. And because a statutory basis for look-through jurisdiction is lacking here, we cannot reach the same result as in *Vaden*: That would indeed be jurisdictional "expan[sion] by judicial decree."

Walters contests that view of the statute. * * *

Walters's more thought-provoking arguments sound not in text but in policy. Here, Walters—now joined by the dissent—preaches the virtues of adopting look-through as a "single, easy-to-apply jurisdictional test" that will produce "sensible" results. First, Walters says, a uniform jurisdictional rule, applying to all FAA applications alike, will necessarily promote "administrative simplicity" because a court will not have to figure out which rule to apply. Second, he claims, the look-through rule is "easier to apply" than a test that would ground jurisdiction on the face of the FAA application itself. In particular, he says, the latter approach confronts courts with "hard questions" about how to determine diversity jurisdiction (including its amount-in-controversy component) across a range of settings—for the Section 9 and 10 applications at issue here, as well as for Section 5 and 7 petitions (obviously not at issue) to appoint arbitrators or compel the presence of witnesses. Finally, Walters contends that only the look-through rule will provide federal courts with comprehensive control over the arbitration process, including the period after the award. The opposite position, he says, will "close the federal

[4] Section 9 provides, in relevant part, that if an arbitration agreement states "that a judgment of the court shall be entered upon the [arbitral] award," then a "party to the arbitration may apply" within a year to the federal court located where the award was made (or any other court specified) "for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected" as the Act otherwise prescribes.
Section 10 provides, in relevant part, that a United States court "may make an order vacating the award upon the application of any party to the arbitration" if the award is tainted in any of four specified ways.

courthouse doors to many" post-arbitration motions, even when they grow out of disputes raising "*exclusively* federal claims."

Walters himself quotes back to us the topline answer to those theories, reflecting its obviousness: "Even the most formidable policy arguments cannot overcome a clear statutory directive." Walters's (and the dissent's) what-makes-best-sense assertions rest on the view that "the FAA contains no" such clear "directive" limiting look-through jurisdiction to Section 4. Having rejected that view, we cannot find much relevance in his ideas, even if plausible, about the optimal jurisdictional rule for the FAA. "It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction." However the pros and cons shake out, Congress has made its call. We will not impose uniformity on the statute's non-uniform jurisdictional rules.

And anyway, we think Walters oversells the superiority of his proposal. First, uniformity in and of itself provides no real advantage in this sphere. A court can tell in an instant whether an application arises under Section 4 or, as here, under Section 9 or 10; so it can also tell in an instant whether to apply the look-through method or the usual jurisdictional rules. Second, the use of those ordinary rules—most notably, relating to diversity jurisdiction—is hardly beyond judicial capacity. Federal courts have faced, and federal courts have resolved, diversity questions for over two centuries, in diverse and ever-changing legal contexts. Throughout, they have developed workable rules; and we see no reason to think they will do differently here. * * *

Finally, we can see why Congress chose to place fewer arbitration disputes in federal court than Walters wishes. The statutory plan, as suggested above, makes Section 9 and 10 applications conform to the normal—and sensible—judicial division of labor: The applications go to state, rather than federal, courts when they raise claims between non-diverse parties involving state law. As Walters notes, those claims may have originated in the arbitration of a federal-law dispute. But the underlying dispute is not now at issue. Rather, the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law. And adjudication of such state-law contractual rights—as this Court has held in addressing a non-arbitration settlement of federal claims—typically belongs in state courts. See *Kokkonen*, 511 U.S., at 381–382, 114 S.Ct. 1673; *supra*, at 1316 – 1317. To be sure, Congress created an exception to those ordinary jurisdictional principles for Section 4 petitions to compel. But it is one thing to make an exception, quite another to extend that exception everywhere. As this Court has often said, the "preeminent" purpose of the FAA was to overcome some judges' reluctance to enforce arbitration agreements when a party tried to sue in court instead. *E.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). We have never detected a similar congressional worry about judges' willingness to enforce arbitration awards already made. So Congress might well have thought an expansion of federal jurisdiction appropriate for petitions to compel alone. Applications about arbitral decisions could and should follow the normal rules.

The result, as Walters laments, is to give state courts a significant role in implementing the FAA. But we have long recognized that feature of the statute. "[E]nforcement of the Act," we have understood, "is left in large part to the state courts." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); see *Vaden*, 556 U.S., at 59, 129 S.Ct. 1262; *Hall Street*, 552 U.S., at 582, 128 S.Ct. 1396. As relevant here, Congress chose to respect the capacity of state courts to properly enforce arbitral awards. In our turn, we must respect that evident congressional choice.

* * *

For the reasons stated, we reverse the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

- Justice BREYER, dissenting.

When interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion. That, I fear, is what the majority's interpretation here will do. I consequently dissent.

I

The question presented arises in the context of the Federal Arbitration Act (FAA). 9 U.S.C. § 1 *et seq.* The question is technical and jurisdictional: How does a federal court determine whether it has jurisdiction to consider a motion to confirm or vacate an arbitration award? The FAA contains several sections that seem to empower a federal court to take certain specified actions related to arbitration proceedings. These include Section 4, which gives "any United States district court" the power to "order" parties to a written arbitration agreement to "proceed" to arbitration; Section 5, which gives "the court" the power to "designate and appoint an arbitrator"; Section 7, which gives "the United States district court for the district" in which an arbitrator is sitting the power to "compel the attendance" of witnesses whom the arbitrator has "summoned"; Section 9, which gives "the United States court in and for the district within which" an arbitration award "was made" the power to enter an "order confirming the award"; Section 10, which gives "the United States court in and for the district wherein the [arbitration] award was made" the power to "make an order vacating the award"; and Section 11, which gives "the United States court in and for the district wherein the [arbitration] award was made" the power to "modif[y] or correc[t] the award." This case directly concerns jurisdiction under Sections 9 and 10, but the Court's reasoning applies to all the sections just mentioned.

At first blush, one might wonder why there is *any* question about whether a federal court has jurisdiction to consider requests that it act pursuant to these sections. The sections' language seems explicitly to give federal courts the power to take such actions. Why does that language itself not also grant jurisdiction to act? The answer, as the Court notes, is that we have held that the FAA's "authorization of a petition does not itself create jurisdiction." "Rather, the federal court must have what we have called an 'independent jurisdictional basis' to resolve the matter."

We made clear how this works in *Vaden*, a case involving Section 4. As just noted, Section 4 gives a district court the power to order parties (who have entered into a written arbitration agreement) to submit to arbitration. We held "that a federal court should determine its jurisdiction by 'looking through' a § 4 petition to the parties' underlying substantive controversy." The court asks whether it would have jurisdiction over *that* controversy, namely, whether that underlying substantive controversy involves a federal question or diversity (a dispute between parties from different States with a value of more than $75,000). If so, then the federal court has jurisdiction over a Section 4 petition asking the court to order the parties to resolve that controversy in arbitration.

The *Vaden* Court gave two reasons for adopting this "look-through" approach. The first, as the majority today emphasizes, was textual. Section 4 says that a party seeking arbitration may petition for an order compelling arbitration from

> "any United States district court which, *save for [the arbitration] agreement*, would have jurisdiction ... in a civil action ... of the subject matter of a suit arising out of the controversy between the parties." (Emphasis added.)

The words "save for [the arbitration] agreement," we reasoned, tell a court not to find jurisdiction by looking to the petition to enforce the agreement itself, but instead to the underlying controversy between the parties.

The second reason, which the majority today neglects, was practical. To find jurisdiction only where the petition to enforce an arbitration agreement itself established federal jurisdiction, we explained, would result in "curious practical consequences," including unduly limiting the scope of Section 4 and hinging jurisdiction upon distinctions that were " 'totally artificial.' " *Ibid.* (quoting 1 I. MacNeil, R. Speidel, & T. Stipanowich, Federal Arbitration Law § 9.2.3.3, p. 9:21 (1995) (hereinafter MacNeil)).

Today, the majority holds that this look-through approach does not apply to Section 9 or 10 because those sections lack Section 4's "save for" language. This reasoning necessarily extends to Sections 5, 7, and 11 as well, for those sections, too, lack Sections 4's "save for" language. Although this result may be consistent with the statute's text, it creates what *Vaden* feared—curious consequences and artificial distinctions. It also creates what I fear will be consequences that are overly complex and impractical.

II

I would use the look-through approach to determine jurisdiction under each of the FAA's related provisions—Sections 4, 5, 7, 9, 10, and 11. Doing so would avoid the same kinds of "curious practical consequences" that drove the *Vaden* Court to adopt the look-through approach in the first place. Most notably, this approach would provide a harmonious and comparatively simple jurisdiction-determining rule—advantages that the

majority's jurisdictional scheme seems to lack.

Consider some of the likely consequences of the majority's reading, which applies the look-through approach only to Section 4 (where the "save for" language appears), but not to the FAA's other sections (where it does not appear).

First, consider Section 5. That section says that, upon application of one of the parties to an arbitration agreement, "*the* court shall designate and appoint an arbitrator." 9 U.S.C. § 5 (emphasis added). What happens when the look-through approach shows that the underlying controversy raises a federal question, but the application to appoint an arbitrator raises no federal question and does not establish diversity? A party could ask a federal judge to *order* arbitration under Section 4, but they could not then ask that same (or any other) federal judge to *appoint* an arbitrator for that very same arbitration under Section 5. That does not seem to be what Congress had in mind for these neighboring provisions—provisions that appear to assume that a judge can appoint an arbitrator in tandem with ordering parties to arbitration. Moreover, how is a federal court to determine, for diversity jurisdiction purposes, the amount at stake in a motion to appoint an arbitrator without a look-through approach? Surely not by assessing the value of the arbitrator's request for pay.

Second, consider Section 7. It says that "upon petition the United States district court for the district in which" an arbitrator is sitting "may compel the attendance" of persons whom the arbitrator has "summoned." § 7. Suppose that the underlying substantive controversy does not qualify for federal jurisdiction, meaning that a federal court would not have jurisdiction to order arbitration under Section 4. If arbitration proceeds by other means, can a federal judge nonetheless compel the attendance of a witness at that arbitration, based on diversity jurisdiction, if a request to do so shows that the summoned witness lives out of State? If there are two witnesses, one in State and one out of State, can the federal judge compel the attendance of the second, but not the first? Why would Congress have wanted parties to toggle between federal and state court when seeking judicial enforcement of summons issued during a single arbitration?

And at a more basic level, *who* are the relevant parties to a Section 7 request when determining, for diversity purposes, whether the Section 7 dispute is between citizens of different States? The arbitrator and summoned witness? The parties in arbitration? Only the "summoning" party and the witness? Compare *Washington National Insurance Co. v. OBEX Group LLC*, 958 F.3d 126, 134 (CA2 2020) (evaluating diversity based on summoning party and witness), with *Amgen*, *Inc.* v. *Kidney Center of Del. Cty. Ltd.*, 95 F.3d 562, 567–568 (CA7 1996) (evaluating diversity based on parties in arbitration). And assume that a federal court finds it does have jurisdiction over a Section 7 request, even though the underlying controversy involves neither a federal question nor diversity. "Why would Congress have wanted federal courts to intervene to enforce a subpoena issued in an arbitration proceeding involving a controversy that itself is not important enough, from a federalism standpoint, to warrant federal-court oversight?" *Maine Community Health Options v. Albertsons Cos.*, 993 F.3d 720, 726 (CA9 2021) (Watford, J., concurring).

Moreover, diversity jurisdiction requires not only that the relevant parties be from different States but also that the amount in controversy exceed $75,000. How does a federal judge determine whether summoning a witness is itself worth $75,000? By examining the value of what the witness might say? By accounting for travel expenses? As courts have recognized, there is "very little case law to guide [them] in determining whether enforcement of an arbitration subpoena against a third party will enable someone to recover more than $75,000 in an arbitration dispute with a different party." These and other jurisdiction-related questions do not arise if a federal judge can simply follow *Vaden*'s principle for all FAA motions: Look through the motions and determine whether there is federal jurisdiction over the underlying substantive controversy.

Third, consider now Sections 9 and 10, the FAA sections directly before us, along with Section 11. Section 9 gives "the United States court in and for the district within which [an arbitration] award was made" the power to issue "an order confirming the award." Section 10 gives the same court the power to "vacat[e]" the award for certain specified reasons. And Section 11 gives that court the power to "modif[y] or correc[t] the award." Where the parties' underlying dispute involves a federal question (but the parties are not diverse), the majority holds that a party can ask a federal court to order arbitration under Section 4, but it cannot ask that same court to confirm, vacate, or modify the order resulting from that arbitration under Section 9, 10, or 11. But why prohibit a federal court from considering the results of the very arbitration it has ordered and is likely familiar with? Why force the parties to obtain relief—concerning arbitration of an underlying *federal*-question dispute—from a state court unfamiliar with the matter?

Or suppose that a party asks a federal court to vacate an arbitration award under Section 10 because the arbitrator "refus[ed] to hear evidence pertinent and material to the controversy." § 10(a)(3). To determine at least one important aspect of diversity jurisdiction—the amount in controversy—must the court not look to the underlying dispute? The same question arises with respect to a Section 11 motion to modify an arbitral award on the ground that it "is imperfect in matter of form not affecting the merits of the controversy." § 11(c).

The majority says that these and other problems require only that the parties bring their FAA requests to state courts. But we cannot be sure that state courts have the same powers under the FAA that federal courts have. The FAA says nothing about state courts; it only explicitly mentions federal courts. We have never held that the FAA provisions I have discussed apply in state courts, and at least one Member of this Court has concluded that they do not apply there. * * *

Relatedly, the majority also notes, correctly, that Section 9, 10, and 11 disputes about the enforceability of arbitral awards "typically involve only state law." It thus makes sense, the majority says, that these disputes would belong primarily in state court. But the same can be said for Section 4 disputes about the enforceability of arbitration agreements. These, too, typically involve only questions of state law. That the dispute does not implicate federal questions thus does not explain why Congress would have wanted more federal court involvement at the Section 4 stage than during the later stages.

It may be possible to eliminate some of these problems by using a federal-question lawsuit or Section 4 motion as a jurisdictional anchor. If a party to an arbitration agreement files a lawsuit in federal court but then is ordered to resolve the claims in arbitration, the federal court may stay the suit and possibly retain jurisdiction over related FAA motions. See § 3; *Vaden*, 556 U.S., at 65, 129 S.Ct. 1262. Similarly, some courts have held that if a federal court adjudicates a Section 4 motion to order arbitration, the court retains jurisdiction over any subsequent, related FAA motions. But, as *Vaden* points out, to turn jurisdiction over these later motions on the presence or absence of a federal lawsuit or Section 4 motion is to turn jurisdiction on a " 'totally artificial distinction' "—particularly when the very purpose of arbitration is to avoid litigation.

I relate these practical difficulties in part to illustrate a more fundamental point. The majority has tried to split what is, or should be, a single jurisdictional atom—a single statute with connected parts, which parts give federal judges the power to facilitate a single arbitration proceeding from start to finish: to order arbitration; appoint an arbitrator; summon witnesses; and confirm, vacate, or modify an arbitration award. The need for simplicity, comprehension, workability, and fairness all suggest that these interrelated provisions should follow the same basic jurisdictional approach, namely, as *Vaden* explains, the look-through approach.

III

The majority's interpretation is also at odds with what this Court has said about the purposes underlying the FAA. We have recognized that the statute reflects a clear " 'policy of rapid and unobstructed enforcement of arbitration agreements.' "

We have thus interpreted the FAA to avoid "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." "Why," we asked, "would Congress intend a test that risks the very kind of costs and delay through litigation ... that Congress wrote the Act to help the parties avoid?" In other words, the FAA *is* a "sphere" in which "uniformity in and of itself provides [a] real advantage."

IV

The majority's main point is straightforward: The text of the statute compels the result. As the majority rightly points out, we cannot disregard the statutory text or "overcome a clear statutory directive." A statute that says it applies only to "fish" does not apply to turnips. The majority also rightly points out that the "save for" language setting forth the look-through approach appears only in Section 4, and does not appear in any of the later sections.

That fact, however, does not produce the "clear statutory directive" upon which the majority relies. Nothing in the text prohibits us from applying Section 4's look-through approach to the succeeding sections. The statute does not say that Section 4's jurisdictional rule applies *only* to Section 4, or that the same look-through approach does *not* apply elsewhere. Nor does any other section provide its own jurisdictional rule that would suggest Section 4's rule should not apply there.

Moreover, when we consider Section 4's text setting forth the look-through approach, we "consider not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme." Various

aspects of the FAA's text and structure suggest that Section 4's jurisdictional rule should apply throughout. Section 5, for example, which grants the power to appoint an arbitrator, simply refers to "the court." Those words, most naturally read, refer to the same court to which the immediately preceding section—Section 4—refers: a "United States district court" with jurisdiction as determined by the look-through approach. Requests under the FAA's various sections are also generally described in the text as "applications" or "motions." See § 4 ("application"); § 5 (same); § 9 (same); § 10 (same); § 11 (same); see also § 6; § 12 ("motion to vacate, modify, or correct"); § 13 ("application to confirm, modify, or correct"). This implies that the requests are all constituent parts of one broader enforcement proceeding, not standalone disputes meriting individual jurisdictional inquiries.

And, more importantly, all the sections describe connected components of a single matter: a federal court's arbitration-related enforcement power. One can read these sections as a single whole, with each section providing one enforcement tool, and one section—Section 4—providing both an enforcement tool and a jurisdictional rule applicable to the entire toolbox. Read this way, the FAA provides one set of complementary mechanisms through which a federal court might facilitate a single arbitration—but only when the underlying substantive controversy is one that, jurisdictionally speaking, could be brought in a federal court had the parties not agreed to arbitrate. There is no language in any of the sections that states, or suggests, that we cannot interpret the Act in this way.

In brief, the text does not prevent us from reading the statute in a way that better reflects the statute's structure and better fulfills the statute's basic purposes.

* * *

In this dissent I hope to have provided an example of what it means to say that we do not interpret a statute's words "in a vacuum." Rather, we should interpret those words "with reference to the statutory context, structure, history and purpose[,] ... not to mention common sense." Here, these considerations all favor a uniform look-through approach. And the statute's language permits that approach. Interpretation of a statute must, of course, be consistent with its text. But looking solely to the text, and with a single-minded focus on individual words in the text, will sometimes lead to an interpretation at odds with the statute as a whole. And I fear that is what has happened in this case.

I suggest that by considering not only the text, but context, structure, history, purpose, and common sense, we would read the statute here in a different way. That way would connect the statute more directly with the area of law, and of human life, that it concerns. And it would allow the statute, and the law, to work better and more simply for those whom it is meant to serve. With respect, I dissent.

Page 229, add after last full paragraph:

The Supreme Court's 2022 decision in *Southwest Airlines Co. v. Saxon*, held that "[w]orkers * * * who load cargo on and off airplanes belong to a class of workers in foreign or interstate commerce," so the arbitration agreement of such a worker is not governed by the FAA. Sw. Airlines Co. v. Saxon, No. 21-309, 2022 WL 1914099, at *6 (U.S. June 6, 2022) ("one who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (e.g., transportation) of that cargo").

Page 285, replace *Bowles* (2019) with:

The *Bowles* decision reproduced in the Fourth Edition of the book was withdrawn by the Fifth Circuit, which issued this revised opinion:

BOWLES v. ONEMAIN FINANCIAL GROUP, L.L.C.

United States Court of Appeals, Fifth Circuit, 2020

954 F.3d 722, No. 18-60749

- E. GRADY JOLLY, Circuit Judge delivered the opinion of the Court.

Cathy Bowles appeals the district court's order compelling the arbitration of her federal age discrimination suit against OneMain Financial. Bowles objected to arbitration on the grounds that a valid arbitration agreement was never formed between her and OneMain for two reasons: first, there was no meeting of the minds and, second, the circumstances surrounding the arbitration agreement's formation render it procedurally unconscionable. We hold that the district court correctly rejected Bowles's meeting of the minds argument and correctly held that her procedural unconscionability[1] challenge must be decided by an arbitrator, not the courts. For those reasons, we AFFIRM the district court's order.

Bowles had worked for OneMain Financial Group and its predecessors since 1998. Over that period she had agreed several times through employment contracts and acknowledgments of employee handbooks to refer all employment disputes to arbitration. In 2016, Bowles was again required to review and acknowledge OneMain's Employee Dispute Resolution Program/Agreement ("Arbitration Agreement"). This Arbitration Agreement provides that any employment-related dispute will be referred to arbitration in accordance with the rules and procedures of the American Arbitration Association. In addition, the Arbitration Agreement contained a delegation clause, which delegated to the arbitrator as follows: "any legal dispute ... arising out of, relating to, or concerning the validity, enforceability or breach of this Agreement, shall be resolved by final and binding arbitration." On November 15, 2016, Bowles viewed the Arbitration Agreement[2] and electronically signed a certificate that reads: "I hereby certify that I have carefully read the Employment Dispute Resolution Program/Agreement within and that I understand and agree to its terms."

In October 2017, OneMain terminated Bowles for allegedly inappropriate interactions with employees under her supervision. Bowles filed an unsuccessful administrative complaint with the EEOC. She next filed suit in federal court alleging that her termination violated the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. In response, OneMain moved the district court, under the Federal Arbitration Act, to compel Bowles to arbitrate her claims pursuant to the 2016 Arbitration Agreement.

Bowles objected to OneMain's motion to compel by challenging the formation of the Arbitration Agreement itself on two grounds. First, she argued that there was no "meeting of the minds" because she did not understand that she was agreeing to a binding arbitration agreement and therefore there was not the mutual assent necessary for contract formation under Mississippi law. Second, she argued that the Agreement was procedurally unconscionable because of disparate bargaining power and her lack of a meaningful opportunity to bargain.

The district court granted OneMain's motion to compel and dismissed the case with prejudice. It first found that there was the meeting of the minds necessary for contract formation in Mississippi. Next, instead of considering Bowles's procedural unconscionability claim on the merits, the district court found that "[c]laims of unconscionability do not affect whether an arbitration agreement has been entered but, instead, such claims permit a court to invalidate an otherwise existing agreement." Thus, finding that Bowles's procedural unconscionability objection went to the enforceability of the Arbitration Agreement and not its formation, the court held that this argument must be decided by the arbitrator under the Arbitration Agreement's delegation clause, which we have earlier quoted. Accordingly, the district court granted OneMain's motion to compel arbitration and dismissed the case with prejudice.

Bowles appealed, arguing that the district court incorrectly upheld the validity of the Arbitration Agreement on the erroneous ground that there was a meeting of the minds, and further erred by referring her

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[1] We recently set out the difference between procedural and substantive unconscionability under Mississippi law:

> Under substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, the contracting parties. Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms.

Neither party disputes that Bowles's objection is to procedural rather than substantive unconscionability. Furthermore, by using the term "procedural unconscionability" and grounding her objection in disparate bargaining power and her lack of a meaningful opportunity to bargain, it is clear that Bowles's objection is indeed to procedural unconscionability.

[2] Before signing, the software required Bowles to open the Arbitration Agreement.

procedural unconscionability claim to the arbitrator when, under Mississippi law, such objections are for the court to decide.

This court issued an opinion on June 19, 2019. 927 F.3d 878. Upon petition for rehearing, that opinion was withdrawn on January 24, 2020. 947 F.3d 874. Subsequently, the case was placed on the calendar of this panel for March 31, 2020 consideration. We thus turn to that consideration.

II.

* * * If the *existence* of an arbitration contract between parties is challenged, the challenge is always for the courts to decide. *Will-Drill Resources, Inc., v. Samson Resources Co.*, 352 F.3d 211, 219 (5th Cir. 2003). Once the arbitration contract itself has been established, however, then whether that contract may be enforced for or against the parties in the particular case is for an arbitrator to decide. In determining whether a challenge is to formation itself or to subsequent enforcement, courts should "apply[ ] state-law principles of contract." This case concerns a Mississippi contract. In Mississippi, "[t]he elements of a contract are (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation."

III.

We address each of Bowles's two challenges in turn. First, Bowles says that there was no meeting of the minds because she did not intend to agree to arbitrate employment-related disputes. The district court found that this challenge goes to the formation of the Arbitration Agreement and is therefore to be decided by the courts. We agree.

On the merits, the district court dismissed this argument based on Mississippi law. Bowles challenges this application of Mississippi law to the merits of her meeting of the minds objection, arguing, as she did below, that she never had the intent to sign an arbitration agreement and was unaware of the nature of the document she signed.

We can find no error in the district court's ruling on the merits of Bowles's meeting of the minds objection. The court correctly found that the electronic communications transmitting the Arbitration Agreement clearly identified an arbitration agreement as the subject of the communications. Furthermore, Bowles was given the opportunity to read the Agreement and certified that she had "carefully read the Employment Dispute Resolution Program/Agreement within and that I understand and agree to its terms." Bowles cannot deny that she thus agreed to the Arbitration Agreement. Instead, she argues that she thought she was "simply acknowledging receipt of another policy or directive" and did not understand she was agreeing to arbitrate her employment disputes. The district court correctly held that such a unilateral lack of diligence does not preclude contract formation under Mississippi law. *See Hicks v. Bridges*, 580 So. 2d 743, 746 (Miss. 1991) (quoting *Busching v. Griffin*, 542 So. 2d 860, 865 (Miss. 1989)) ("A person cannot avoid a signed, written contract on the grounds that he did not read it .... 'To permit a party when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.' "). The district court thus made no error in concluding that there was the meeting of the minds between Bowles and OneMain necessary for contract formation, and this portion of the district court's ruling is affirmed.

IV.

Second, Bowles argues that there was no arbitration contract because the circumstances surrounding its formation rendered it procedurally unconscionable. She argues that in the procedure that led to the arbitration contract, *i.e.* the negotiations, there was disparate bargaining power and lack of a meaningful opportunity for her to bargain.

The district court was correct to find that Bowles's procedural unconscionability challenge went to whether the Arbitration Agreement should be enforced rather than to whether an agreement had been formed between the parties. Thus, the district court did not err to refer this challenge to the arbitrator for decision. This referral was consistent with Mississippi Supreme Court precedent.

In *Caplin Enters. Inc. v. Arrington*, 145 So. 3d 608 (Miss. 2014), plaintiffs challenged an arbitration agreement contained within a larger contract as *both* procedurally and substantively unconscionable. The Mississippi Supreme Court explicitly categorized *both* of these unconscionability claims as relating to the enforcement of the arbitration agreement, not to whether the agreement to arbitrate was itself validly formed. The Court first found that a valid contract had been formed. *See id.* ("[C]onsideration [was given]; the agreement was sufficiently definite; and there was no legal prohibition precluding the contract. The parties have not presented any evidence that they lacked the legal capacity to contract or that mutual assent was lacking. Therefore, we find that each element of a contract is present."). *After* determining that "the parties agreed to arbitrate the dispute," the court then considered "whether 'defenses available under state contract law such as fraud, duress, and unconscionability' may invalidate the arbitration agreement." The court then focused on both procedural and substantive unconscionability as *defenses*, to the enforcement of the contract.

Several other Mississippi Supreme Court cases have classified unconscionability challenges as challenges to enforcement rather than formation, without distinguishing between procedural and substantive unconscionability. Each such case involved a procedural unconscionability challenge.

Applying Mississippi law to an arbitration challenge, this court has likewise categorized *both* procedural and substantive unconscionability as challenges to contract enforcement, not contract formation.

Bowles's procedural unconscionability challenge is a challenge to contract enforcement rather than contract formation. Her challenge therefore must be referred to an arbitrator.

* * *

AFFIRMED.

Page 309, add after Questions:

d. Waiver of the Right to Arbitrate

Many contract rights can be waived, including the right to arbitrate. So, a defense to enforcement of an arbitration agreement is that the party seeking arbitration has waived its right to enforce the other party's promise to arbitrate.

Robyn MORGAN v. SUNDANCE, INC.

Supreme Court of the United States, 2022
142 S.Ct. 1708, No. 21-328

- Justice KAGAN delivered the opinion of the Court.

When a party who has agreed to arbitrate a dispute instead brings a lawsuit, the Federal Arbitration Act (FAA) entitles the defendant to file an application to stay the litigation. See 9 U.S.C. § 3. But defendants do not always seek that relief right away. Sometimes, they 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. When that happens, the court faces a question: Has the defendant's request to switch to arbitration come too late?

Most Courts of Appeals have answered that question by applying a rule of waiver specific to the arbitration context. Usually, a federal court deciding whether a litigant has waived a right does not ask if its actions caused harm. But when the right concerns arbitration, courts have held, a finding of harm is essential: A party can waive its arbitration right by litigating only when its conduct has prejudiced the other side. That special rule, the courts say, derives from the FAA's "policy favoring arbitration."

We granted certiorari to decide whether the FAA authorizes federal courts to create such an arbitration-specific procedural rule. We hold it does not.

I

Petitioner Robyn Morgan worked as an hourly employee at a Taco Bell franchise owned by respondent Sundance. When applying for the job, she signed an agreement to "use confidential binding arbitration, instead of going to court," to resolve any employment dispute.

Despite that agreement, Morgan brought a nationwide collective action against Sundance in federal court for violations of the Fair Labor Standards Act. Under that statute, employers must pay overtime to covered employees who work more than 40 hours in a week. See 29 U.S.C. § 207(a). Morgan alleged that Sundance routinely flouted the Act—most notably, by recording hours worked in one week as instead worked in another to prevent any week's total from exceeding 40.

Sundance initially defended itself against Morgan's suit as if no arbitration agreement existed. Sundance first moved to dismiss the suit as duplicative of a collective action previously brought by other Taco Bell employees. In that motion, Sundance suggested that Morgan either "join" the earlier suit or "refile her claim on an individual basis." But Morgan declined the invitation to litigate differently, and the District Court denied Sundance's motion. Sundance then answered Morgan's complaint, asserting 14 affirmative defenses—but none mentioning the arbitration agreement. Soon afterward, Sundance met in a joint mediation with the named plaintiffs in both collective actions. The other suit settled, but Morgan's did not. She and Sundance began to talk about scheduling the rest of the litigation.

And then—nearly eight months after the suit's filing—Sundance changed course. It moved to stay the litigation and compel arbitration under Sections 3 and 4 of the FAA. See § 3 (providing for a stay of judicial proceedings on "issue[s] referable to arbitration"); § 4 (providing for an order "directing the parties to proceed to arbitration"). Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by litigating for so long. Sundance responded that it had asserted its right as soon as this Court's decision in *Lamps Plus*, *Inc.* v. *Varela*, 587 U. S. ——, 139 S.Ct. 1407, 203 L.Ed.2d 636 (2019), clarified that the arbitration would proceed on a bilateral (not collective) basis.

The courts below applied Eighth Circuit precedent to decide the waiver issue. Under that Circuit's test, a party waives its contractual right to arbitration if it knew of the right; "acted inconsistently with that right"; and—critical here—"prejudiced the other party by its inconsistent actions." *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (C.A.8 2011). The prejudice requirement, as explained later, is not a feature of federal waiver law generally. The Eighth Circuit adopted the requirement in the arbitration context because of the "federal policy favoring arbitration."

Although the District Court found the prejudice requirement satisfied, the Court of Appeals disagreed and

sent Morgan's case to arbitration. The panel majority reasoned that the parties had not yet begun formal discovery or contested any matters "going to the merits." Judge Colloton dissented. He argued that Sundance had "led Morgan to waste time and money" opposing the motion to dismiss and "engaging in a fruitless mediation." More fundamentally, he raised doubts about the Eighth Circuit's prejudice requirement. Outside the arbitration context, Judge Colloton observed, prejudice is not needed for waiver. In line with that general principle, he continued, "some circuits allow a finding of waiver of arbitration without a showing of prejudice."

We granted certiorari, to resolve that circuit split. Nine circuits, including the Eighth, have invoked "the strong federal policy favoring arbitration" in support of an arbitration-specific waiver rule demanding a showing of prejudice. Two circuits have rejected that rule. We do too.

II

We decide today a single issue, responsive to the predominant analysis in the Courts of Appeals, rather than to all the arguments the parties have raised. In their briefing, the parties have disagreed 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. The parties have also quarreled about whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness. We do not address those issues. The Courts of Appeals, including the Eighth Circuit, have generally resolved cases like this one as a matter of federal law, using the terminology of waiver. For today, we assume without deciding they are right to do so. We consider only the next step in their reasoning: that they may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's "policy favoring arbitration." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). They cannot. For that reason, the Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice.

Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. Waiver, we have said, "is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal quotation marks omitted). To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other. As Judge Colloton noted in dissent below, a contractual waiver "normally is effective" without proof of "detrimental reliance." 992 F.3d at 716; see *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (C.A.7 1995) (Posner, C. J., for the Court). So in demanding that kind of proof before finding the waiver of an arbitration right, the Eighth Circuit applies a rule found nowhere else—consider it a bespoke rule of waiver for arbitration.

The Eighth Circuit's arbitration-specific rule derives from a decades-old Second Circuit decision, which in turn grounded the rule in the FAA's policy. See *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (C.A.2 1968); "[T]here is," the Second Circuit declared, "an overriding federal policy favoring arbitration." For that reason, the court held, waiver of the right to arbitrate "is not to be lightly inferred": "[M]ere delay" in seeking a stay of litigation, "without some resultant prejudice" to the opposing party, "cannot carry the day." Over the years, both that rule and its reasoning spread. Circuit after circuit (with just a couple of holdouts) justified adopting a prejudice requirement based on the "liberal national policy favoring arbitration."

But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. 927. Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). If 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. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

And indeed, the text of the FAA makes clear that courts are not to create arbitration-specific procedural

rules like the one we address here. Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—"shall be made and heard in the manner provided by law for the making and hearing of motions" (unless the statute says otherwise). A directive to a federal court to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put conversely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration. As explained above, the usual federal rule of waiver does not include a prejudice requirement. So Section 6 instructs that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the FAA.

Stripped of its prejudice requirement, the Eighth Circuit's current waiver inquiry would focus on Sundance's conduct. Did Sundance, as the rest of the Eighth Circuit's test asks, knowingly relinquish the right to arbitrate by acting inconsistently with that right? On remand, the Court of Appeals may resolve that question, or (as indicated above) determine that a different procedural framework (such as forfeiture) is appropriate. Our sole holding today is that it may not make up a new procedural rule based on the FAA's "policy favoring arbitration."

* * *

For the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Chapter 4. The Arbitration Proceeding

Page 402, add before Questions to Review and Synthesize:

Mass Individual Arbitrations

Enterprising plaintiffs' lawyers responded to enforcement of agreements requiring individual arbitration by filing many of them together in what has come to be known as "mass individual arbitration." Arbitration organizations' rules tend to require lower filing fees of individual claimants than responding businesses. See, e.g., Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020) ("AAA's Commercial Arbitration Rules require each individual to pay a filing fee of $300 and the responding company to pay a filing fee of $1,900.") So, those businesses have balked at the costs of mass individual arbitration. "For example, over 12,000 Uber drivers filed arbitration claims against Uber in August 2018; it would have cost more than $18.7 million for Uber to participate in all of the arbitration proceedings." Amy J. Schmitz, Arbitration in the Age of Covid: Examining Arbitration's Move Online, 22 Cardozo J. Conflict Resol. 245, 282–83 (2021).

Similar mass individual arbitrations against DoorDash led the federal district court ordering DoorDash to pay more than $9 million in arbitration filing fees to write:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.

Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067–68 (N.D. Cal. 2020). The innovation of mass individual arbitration led the AAA and CPR to institute new rules for them. *Supplementary Rules for Multiple Case Filings*, Am. Arb. Ass'n, https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf (Jan. 27, 2022); *Employment-Related Mass Claims Protocol*, Int'l Inst. for Conflict Prevention & Resol., https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol (Jan. 27, 2022).

This innovation has also led some businesses to remove arbitration clauses from their form contracts. For instance, Amazon removed arbitration from its terms of service in 2021 "after plaintiffs' lawyers flooded Amazon with more than 75,000 individual arbitration demands on behalf of Echo users. That move triggered a bill for tens of millions of dollars in filing fees." Sara Randazzo, Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us, Wall St. J., June 1, 2021, https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000

Chapter 5. International Arbitration

Page 440, add:

In 2022, the Supreme Court held that this statute applies only to bodies exercising governmental authority and not to arbitration tribunals.

ZF AUTOMOTIVE US, INC., et al. v. LUXSHARE, LTD.
AlixPartners, LLP, et al. v. The Fund for Protection of Investors' Rights in Foreign States

Supreme Court of the United States, 2022

WL 2111355, No. 21-401

- Justice BARRETT delivered the opinion of the Court.

Congress has long allowed federal courts to assist foreign or international adjudicative bodies in evidence gathering. The current statute, 28 U.S.C. § 1782, permits district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal." These consolidated cases require us to decide whether private adjudicatory bodies count as "foreign or international tribunals." They do not. The statute reaches only governmental or intergovernmental adjudicative bodies, and neither of the arbitral panels involved in these cases fits that bill.

I

Both cases before us involve a party seeking discovery in the United States for use in arbitration proceedings abroad. In both, the party seeking discovery invoked § 1782, which permits a district court to order the production of certain evidence "for use in a proceeding in a foreign or international tribunal." And in both, the party resisting discovery argued that the arbitral panel at issue did not qualify as a "foreign or international tribunal" under the statute.

But while these cases present the same threshold legal question, their factual contexts differ. We discuss each in turn.

A

The first case involves an allegation of fraud in a business deal gone sour. ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation, sold two business units to Luxshare, Ltd., a Hong Kong-based company, for almost a billion dollars. Luxshare claims that after the deal was done, it discovered that ZF had concealed information about the business units. As a result, Luxshare says, it overpaid by hundreds of millions of dollars.

In the contract governing the sale, the parties had agreed that all disputes would be "exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS)." DIS is a private dispute-resolution organization based in Berlin. The agreement, which is governed by German law, provides that arbitration take place in Munich and that the arbitration panel be formed by Luxshare and ZF each choosing one arbitrator and those two arbitrators choosing a third.

With an eye toward initiating a DIS arbitration against ZF, Luxshare filed an *ex parte* application under § 1782 in the U.S. District Court for the Eastern District of Michigan, seeking information from ZF and two of its senior officers. (Section 1782 allows a party to obtain discovery even in advance of a proceeding.) The District Court granted the request, and Luxshare served subpoenas on ZF and the officers.

ZF moved to quash the subpoenas, arguing (among other things) that the DIS panel was not a "foreign or international tribunal" under § 1782. As ZF acknowledged, however, Circuit precedent foreclosed that argumentThe District Court ordered ZF to produce documents and an officer to sit for a deposition, and the Sixth Circuit denied ZF's request for a stay.

We granted a stay and certiorari before judgment to resolve a split among the Courts of Appeals over whether the phrase "foreign or international tribunal" in § 1782 includes private arbitral panels.

B

The second case began with a dispute between Lithuania and a disappointed Russian investor in AB bankas SNORAS (Snoras), a failed Lithuanian bank. After finding Snoras unable to meet its obligations, Lithuania's central bank nationalized it and appointed Simon Freakley, currently the CEO of a New York-based consulting firm called AlixPartners, LLP, as a temporary administrator. After Freakley issued a report on Snoras' financial status, Lithuanian authorities commenced bankruptcy proceedings and declared Snoras insolvent. The Fund for Protection of Investors' Rights in Foreign States—a Russian corporation and the assignee of the Russian investor—claims that Lithuania expropriated certain investments from Snoras along the way.

The Fund initiated a proceeding against Lithuania under a bilateral investment treaty between Lithuania and Russia.

Relevant here, the treaty addresses the procedure for resolving "any dispute between one Contracting Party and [an] investor of the other Contracting Party concerning" investments in the first Contracting Party's territory. It provides that if the parties cannot resolve their dispute within six months, "the dispute, at the request of either party and at the choice of an investor, shall be submitted to" one of four specified forums. The Fund chose "an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)," with each party selecting one arbitrator and those two choosing a third Under the treaty, "[t]he arbitral decision shall be final and binding on both parties of the dispute."

After initiating arbitration, but before the selection of arbitrators, the Fund filed a § 1782 application in the U.S. District Court for the Southern District of New York, seeking information from Freakley and AlixPartners about Freakley's role as temporary administrator of Snoras. AlixPartners resisted discovery, arguing that the ad hoc arbitration panel was not a "foreign or international tribunal" under § 1782 but instead a private adjudicative body. The District Court rejected that argument and granted the Fund's discovery request.

The Second Circuit affirmed. Unlike the Sixth Circuit, the Second Circuit had previously held that a private arbitration panel does not constitute a "foreign or international tribunal" under § 1782. But it still had to decide how to classify the ad hoc panel that would adjudicate the dispute between the Fund and Lithuania. After employing a multifactor test to determine " 'whether the body in question possesses the functional attributes most commonly associated with private arbitration,' " it concluded that the ad hoc panel was "foreign or international" rather than private.

We granted certiorari and consolidated the two cases.

II

We begin with the question whether the phrase "foreign or international tribunal" in § 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies. If the former, all agree that § 1782 permits discovery to proceed in both cases. If the latter, we must determine whether the arbitral panels in these cases qualify as governmental or intergovernmental bodies.

A

Section 1782(a) provides:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."

The key phrase for purposes of this case is "foreign or international tribunal."

Standing alone, the word "tribunal" casts little light on the question. It can be used as a synonym for "court," in which case it carries a distinctively governmental flavor. See, *e.g.,* Black's Law Dictionary 1677 (4th ed. rev. 1968) ("[t]he seat of a judge" or "a judicial court; the jurisdiction which the judges exercise"). But it can also be used more broadly to refer to any adjudicatory body. See, *e.g.,* American Heritage Dictionary 1369 (1969) ("[a]nything having the power of determining or judging"). Here, statutory history indicates that Congress used "tribunal" in the broader sense. A prior version of § 1782 covered "any judicial proceeding" in "any court in a foreign country," 28 U.S.C. § 1782 (1958 ed.), but in 1964, Congress expanded the provision to cover proceedings in a "foreign or international tribunal." As we have previously observed, that shift created " 'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.' " So a § 1782 "tribunal" need not be a formal "court," and the broad meaning of "tribunal" does not

itself exclude private adjudicatory bodies. If we had nothing but this single word to go on, there would be a good case for including private arbitral panels.

This is where context comes in. "Tribunal" does not stand alone—it belongs to the phrase "foreign or international tribunal." And attached to these modifiers, "tribunal" is best understood as an adjudicative body that exercises governmental authority.

Take "foreign tribunal" first. Congress could have used "foreign" in one of two ways here. It could mean something like "[b]elonging to another nation or country," which would support reading "foreign tribunal" as a governmental body. Black's Law Dictionary, at 775. Or it could more generally mean "from" another country, which would sweep in private adjudicative bodies too. See, *e.g.,* Random House Dictionary of the English Language 555 (1966) ("derived from another country or nation; not native"). The first meaning is the better fit.

The word "foreign" takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations. That is why "foreign" suggests something different in the phrase "foreign leader" than it does in "foreign films." The phrase "foreign leader" brings to mind "an official of a foreign state, not a team captain of a European football club." So too with "foreign tribunal." "Tribunal" is a word with potential governmental or sovereign connotations, so "foreign tribunal" more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation.

This reading of "foreign tribunal" is reinforced by the statutory defaults for discovery procedure. In addition to authorizing district courts to order testimony or the production of evidence, § 1782 permits them to "prescribe the practice and procedure, which may be in whole or part *the practice and procedure of the foreign country or the international tribunal*, for taking the testimony or statement or producing the document or other thing." § 1782(a) (emphasis added). The reference to the procedure of "the foreign country or the international tribunal" parallels the authorization for district courts to grant discovery for use in a "foreign or international tribunal" mentioned just before in § 1782. The statute thus presumes that a "foreign tribunal" follows "the practice and procedure of the foreign country." It is unremarkable for the statute to presume that a foreign court, quasi-judicial body, or any other governmental adjudicatory body follows the practice and procedures prescribed by the government that conferred authority on it. But that would be an odd assumption to make about a private adjudicatory body, which is typically the creature of an agreement between private parties who prescribe their own rules. See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). That the default discovery procedures for a "foreign tribunal" are governmental suggests that the body is governmental too.

Now for "international tribunal." "International" can mean either (1) involving or of two or more "nations," or (2) involving or of two or more "nationalities." American Heritage Dictionary, at 685 ("[o]f, relating to, or involving two or more nations or nationalities"); see also Random House Dictionary, at 743 ("between or among nations; involving two or more nations"; "of or pertaining to two or more nations or their citizens"). The latter definition is unlikely in this context because an adjudicative body would be "international" if it had adjudicators of different nationalities—and it would be strange for the availability of discovery to turn on the national origin of the adjudicators. So no party argues that "international" carries that meaning here. A tribunal is "international" when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes.

So understood, "foreign tribunal" and "international tribunal" complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations.

B

Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*.

From the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create. From 1855 until 1964, § 1782 and its antecedents covered assistance only to foreign "courts." And before 1964, a separate strand of law covered assistance to " 'any international tribunal or commission ... in which the United States participate[d] as a party.' " The process of combining these two statutory lines began when Congress established the Commission on International Rules of Judicial

Procedure. It charged the Commission with improving the process of judicial assistance, specifying that the "assistance and cooperation" was "*between the United States and foreign countries*" and that "the rendering of assistance *to foreign courts and quasi-judicial agencies*" should be improved. In 1964, Congress adopted the Commission's proposed legislation, which became the modern version of § 1782.

Interpreting § 1782 to reach only bodies exercising governmental authority is consistent with Congress' charge to the Commission. Seen in light of the statutory history, the amendment did not signal an expansion from public to private bodies, but rather an expansion of the types of public bodies covered. By broadening the range of governmental and intergovernmental bodies included in § 1782, Congress increased the "assistance and cooperation" rendered by the United States to those nations.

After all, the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies would serve that end. Such a broad reading of § 1782 would open district court doors to any interested person seeking assistance for proceedings before any private adjudicative body—a category broad enough to include everything from a commercial arbitration panel to a university's student disciplinary tribunal. Why would Congress lend the resources of district courts to aid purely private bodies adjudicating purely private disputes abroad?

Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery than the FAA allows. Among other differences, the FAA permits only the arbitration panel to request discovery, see 9 U.S.C. § 7, while district courts can entertain § 1782 requests from foreign or international tribunals or any "interested person," 28 U.S.C. § 1782(a). In addition, prearbitration discovery is off the table under the FAA but broadly available under § 1782. Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration. And as the Seventh Circuit observed, "[i]t's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations."

* * *

In sum, we hold that § 1782 requires a "foreign or international tribunal" to be governmental or intergovernmental. Thus, a "foreign tribunal" is one that exercises governmental authority conferred by a single nation, and an "international tribunal" is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within § 1782.

III

That leaves the question whether the adjudicative bodies in the cases before us are governmental or intergovernmental. They are not.

A

Analyzing the status of the arbitral panel involved in Luxshare's dispute with ZF is straightforward. Private parties agreed in a private contract that DIS, a private dispute-resolution organization, would arbitrate any disputes between them. See *Stolt-Nielsen*, 559 U.S. at 682, 130 S.Ct. 1758 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution"). By default, DIS panels operate under DIS rules, just like panels of any other private arbitration organization operate under private arbitral rules. The panels are formed by the parties—with each party selecting one arbitrator and those two arbitrators choosing a third. No government is involved in creating the DIS panel or prescribing its procedures. This adjudicative body therefore does not qualify as a governmental body.

Luxshare weakly suggests that a commercial arbitral panel like the DIS panel qualifies as governmental so long as the law of the country in which it would sit (here, Germany) governs some aspects of arbitration and courts play a role in enforcing arbitration agreements. But private entities do not become governmental because laws govern them and courts enforce their contracts—that would erase any distinction between private and governmental adjudicative bodies. Luxshare's implausibly broad definition of a governmental adjudicative body is nothing but an attempted end run around § 1782's limit.

B

The ad hoc arbitration panel at issue in the Fund's dispute with Lithuania presents a harder question. A

sovereign is on one side of the dispute, and the option to arbitrate is contained in an international treaty rather than a private contract. These factors, which the Fund emphasizes, offer some support for the argument that the ad hoc panel is intergovernmental. Yet neither Lithuania's presence nor the treaty's existence is dispositive, because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit. What matters is the substance of their agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty? See *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 37, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014) ("As a general matter, a treaty is a contract, though between nations," and "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent").

The provision regarding ad hoc arbitration appears in Article 10, which permits an investor to choose one of four forums to resolve disputes:

> "a) [a] competent court or court of arbitration of the Contracting Party in which territory the investments are made;
>
> "b) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> "c) the Court of Arbitration of the International Chamber of Commerce;
>
> "d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."

The options on this menu vary in form. For example, a "competent court or court of arbitration of the Contracting Party" (*i.e.,*the state in which an investor does business) is clearly governmental; a court "of " a sovereign belongs to that sovereign. The inclusion of courts on the list reflects Russia and Lithuania's intent to give investors the choice of bringing their disputes before a pre-existing governmental body.

An ad hoc arbitration panel, by contrast, is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes. And nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. For instance, the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum. In addition, the ad hoc panel "functions independently" of and is not affiliated with either Lithuania or Russia. It consists of individuals chosen by the parties and lacking any "official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity." And it lacks other possible indicia of a governmental nature. "[T]he panel receives zero government funding," "the proceedings ... maintain confidentiality," and the " 'award may be made public only with the consent of both parties' ".[4]

Indeed, the ad hoc panel at issue in the Fund's dispute with Lithuania is "materially indistinguishable in form and function" from the DIS panel resolving the dispute between ZF and Luxshare. In a private arbitration, the panel derives its authority from the parties' consent to arbitrate. The ad hoc panel in this case derives its authority in essentially the same way. Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it. The Fund took Lithuania up on that offer by initiating such an arbitration, thereby triggering the formation of an ad hoc panel with the authority to resolve the parties' dispute. That authority exists because Lithuania and the Fund consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority. Cf. *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent' "); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648–649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"). So inclusion in the treaty does not, as the Fund suggests, automatically render ad hoc arbitration governmental. Instead, it reflects the countries' choice to offer investors the potentially appealing option of bringing their disputes to a private arbitration panel that operates like commercial arbitration panels do. In a treaty designed to attract foreign investors by offering "favourable conditions for investments," that choice makes sense.

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[4] Comparing Article 10 of the treaty (governing investor-state disputes) with Article 11 (governing state-to-state disputes) further suggests that the ad hoc panel under Article 10 is of a nongovernmental nature. Article 11 provides that an unsettled dispute between the countries "shall, upon the request of either Contracting Party, be submitted to an Arbitral Tribunal." Each country is involved in forming that arbitral body and funds its operations. Article 11 also provides, under some circumstances, for the countries to invite officials of the International Court of Justice to appoint the body's members. This reflects a higher level of government involvement and highlights the absence of such details in Article 10's ad hoc arbitration option.

None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority. Governmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured. The point is only that a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it. The relevant question is whether the nations intended that the ad hoc panel exercise governmental authority. And here, all indications are that they did not.

The Fund tries to bolster its case by analogizing to past adjudicatory bodies: (1) the body at issue in the dispute over the sinking of the Canadian ship *I'm Alone*, which derived from a treaty between the United States and Great Britain; and (2) the United States-Germany Mixed Claims Commission. There appears to be broad consensus that these bodies would qualify as intergovernmental. Ergo, the Fund says, the ad hoc panel must be intergovernmental too.

This does not follow. It is not dispositive whether an adjudicative body shares some features of other bodies that look governmental. Instead, the inquiry is whether those features and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority. And though we need not decide the status of the *I'm Alone* and Mixed Claims commissions, it is worth noting some differences between the treaties providing for them and the treaty at issue here. For instance, those treaties specified that each sovereign would be involved in the formation of the bodies, and, with respect to the treaty creating the Mixed Claims Commission in particular, it also specified where the commission would initially meet, the method of funding, and that the commissioners could appoint other officers to assist in the proceedings. So while there are some similarities between the ad hoc arbitration panel and the *I'm Alone* and Mixed Claims commissions, there are distinctions too. Thus, even taking the Fund's argument on its own terms, its analogies are less helpful than it hopes.

* * *

In sum, only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under § 1782. Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies.

It is so ordered.

Page 442, add before E. Enforcement and Vacatur of International Commercial Arbitration Awards:

GE ENERGY POWER CONVERSION FRANCE SAS, CORP. v. OUTOKUMPU STAINLESS USA, LLC, et al.

Supreme Court of the United States, 2020
140 S.Ct. 1637, No. 18-1048

- Justice THOMAS delivered the opinion of the Court.

The question in this case is whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. We hold that it does not.

I

In 2007, ThyssenKrupp Stainless USA, LLC, entered into three contracts with F.L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each of the contracts contained an identical arbitration clause. The clause provided that "[a]ll disputes arising between both parties in connection with or in the performances of the Contract ... shall be submitted to arbitration for settlement."

After executing these agreements, F.L. Industries, Inc., entered into a subcontractor agreement with petitioner GE Energy Power Conversion France SAS, Corp. (GE Energy), then known as Converteam SAS. Under

that agreement, GE Energy agreed to design, manufacture, and supply motors for the cold rolling mills. Between 2011 and 2012, GE Energy delivered nine motors to the Alabama plant for installation. Soon thereafter, respondent Outokumpu Stainless USA, LLC, acquired ownership of the plant from ThyssenKrupp.

According to Outokumpu, GE Energy's motors failed by the summer of 2015, resulting in substantial damages. In 2016, Outokumpu and its insurers filed suit against GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U.S.C. § 205, which authorizes the removal of an action from state to federal court if the action "relates to an arbitration agreement ... falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards]." GE Energy then moved to dismiss and compel arbitration, relying on the arbitration clauses in the contracts between F.L. Industries, Inc., and ThyssenKrupp.

The District Court granted GE Energy's motion to dismiss and compel arbitration with Outokumpu and Sompo Japan Insurance Company of America. The court held that GE Energy qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors. Because the court concluded that both Outokumpu and GE Energy were parties to the agreements, it declined to address GE Energy's argument that the agreement was enforceable under equitable estoppel.

The Eleventh Circuit reversed the District Court's order compelling arbitration. The court interpreted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) to include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." The court concluded that this requirement was not satisfied because "GE Energy is undeniably not a signatory to the Contracts." It then held that GE Energy could not rely on state-law equitable estoppel doctrines to enforce the arbitration agreement as a nonsignatory because, in the court's view, equitable estoppel conflicts with the Convention's signatory requirement.

Given a conflict between the Courts of Appeals on this question, we granted certiorari.

II

A

Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements. Section 2 of that chapter provides that an arbitration agreement in writing "shall be ... enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As we have explained, this provision requires federal courts to "place [arbitration] agreements ' "upon the same footing as other contracts." ' " *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). But it does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009).

The "traditional principles of state law" that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory. For example, we have recognized that arbitration agreements may be enforced by nonsignatories through " 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.' " *Ibid.* (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)).

This case implicates domestic equitable estoppel doctrines. Generally, in the arbitration context, "equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." In *Arthur Andersen*, we recognized that Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement.

B

The New York Convention is a multilateral treaty that addresses international arbitration. It focuses almost entirely on arbitral awards. Article I(1) describes the Convention as applying only to "the recognition and enforcement of arbitral awards." Articles III, IV, and V contain recognition and enforcement obligations related to arbitral awards for contracting states and for parties seeking the enforcement of arbitral awards. Article VI addresses when an award can be set aside or suspended. And Article VII(1) states that the "Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner

and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

Only one article of the Convention addresses arbitration agreements—Article II. That article contains only three provisions, each one sentence long. Article II(1) requires "[e]ach Contracting State [to] recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Article II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Finally, Article II(3) states that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

C

In 1970, the United States acceded to the New York Convention, and Congress enacted implementing legislation in Chapter 2 of the FAA. See 9 U.S.C. §§ 201–208. Chapter 2 grants federal courts jurisdiction over actions governed by the Convention, § 203; establishes venue for such actions, § 204; authorizes removal from state court, § 205; and empowers courts to compel arbitration, § 206. Chapter 2 also states that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." § 208.

III

We must determine whether the equitable estoppel doctrines permitted under Chapter 1 of the FAA, "conflict with ... the Convention." § 208. Applying familiar tools of treaty interpretation, we conclude that they do not conflict.

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to recite it," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).

This silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines. Only one Article of the Convention addresses arbitration agreements—Article II—and only one provision of Article II addresses the enforcement of those agreements—Article II(3). The text of Article II(3) states that courts of a contracting state "shall ... refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration. The provision, however, does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances. That is, Article II(3) provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements. Article II(3) contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language.

This interpretation is especially appropriate in the context of Article II. Far from displacing domestic law, the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention. For example, Article II(1) refers to disputes "capable of settlement by arbitration," but it does not identify what disputes are arbitrable, leaving that matter to domestic law. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, n. 21, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Similarly, Article II(3) states that it does not apply to agreements that are "null and void, inoperative or incapable of being performed," but it fails to define those terms. Again, the Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law.

In sum, the only provision of the Convention that addresses the enforcement of arbitration agreements is

Article II(3). We do not read the nonexclusive language of that provision to set a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements. Thus, nothing in the text of the Convention "conflict[s] with" the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA. 9 U.S.C. § 208.

B

"Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellín*, 552 U.S. at 507, 128 S.Ct. 1346 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996)). These aids confirm our interpretation of the Convention's text.

1

Our precedents have looked to the "negotiating and drafting history" of a treaty as an aid in determining the shared understanding of the treaty. Invoking this interpretive aid, Outokumpu argues that the Convention's drafting history establishes a "rule of consent" that "displace[s] varying local laws." We are unpersuaded. For one, nothing in the text of the Convention imposes a "rule of consent" that displaces domestic law—let alone a rule that allows some domestic-law doctrines and not others, as Outokumpu proposes. The only time the Convention uses the word "consent" is in Article X(3), which addresses ratification and accession procedures. Moreover, the statements relied on by Outokumpu do not address the specific question whether the Convention prohibits the application of domestic law that would allow nonsignatories to compel arbitration. Cherry-picked "generalization[s]" from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text.

To the extent the drafting history sheds any light on the meaning of the Convention, it shows only that the drafters sought to impose baseline requirements on contracting states. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries ... should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U.S. at 520, n. 15, 94 S.Ct. 2449 Nothing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.

2

"[T]he postratification understanding" of other contracting states may also serve as an aid to our interpretation of a treaty's meaning. *Medellín*, 552 U.S. at 507, 128 S.Ct. 1346. To discern this understanding, we have looked to the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999), as well as the "postratification conduct" of the governments of contracting states, *Zicherman*, 516 U.S. at 227, 116 S.Ct. 629.

Here, the weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. The courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement. See 1 G. Born, International Commercial Arbitration § 10.02, pp. 1418–1484 (2d ed. 2014) (compiling cases). The United States identifies at least one contracting state with domestic legislation illustrating a similar understanding. And GE Energy points to a recommendation issued by the United Nations Commission on International Trade Law that, although not directly addressing Article II(3), adopts a nonexclusive interpretation of Article II(1) and (2).

These sources, while generally pointing in one direction, are not without their faults. The court decisions, domestic legislation, and UN recommendation relied on by the parties occurred decades after the finalization of the New York Convention's text in 1958. This diminishes the value of these sources as evidence of the original shared understanding of the treaty's meaning. Moreover, unlike the actions and decisions of signatory nations, we have not previously relied on UN recommendations to discern the meaning of treaties. But to the extent this evidence is given any weight, it confirms our interpretation of the Convention's text.

* * *

IV

The Court of Appeals did not analyze whether Article II(3) of the New York Convention conflicts with equitable estoppel. Instead, the court held that Article II(1) and (2) include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." But those provisions address the recognition of arbitration agreements, not who is bound by a recognized agreement. Article II(1) simply requires contracting states to "recognize an agreement in writing," and Article II(2) defines the term "agreement in writing." Here, the three agreements at issue were both written and signed. Only Article II(3) speaks to who may request referral under those agreements, and it does not prohibit the application of domestic law.

Because the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination. Those questions can be addressed on remand. We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

- Justice SOTOMAYOR, concurring.

I agree with the Court that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate.

This limitation is part and parcel of the Federal Arbitration Act (FAA) itself. It is a "basic precept," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), that "[a]rbitration under the [FAA] is a matter of consent, not coercion," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); see also, *e.g.*, *Lamps Plus, Inc. v. Varela*, 587 U.S. ——, ——, 139 S.Ct. 1407, 1416, 203 L.Ed.2d 636 (2019) ("Consent is essential under the FAA"); *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent' "). "We have emphasized th[is] 'foundational FAA principle' many times," *Lamps Plus*, 587 U.S., at ——, 139 S.Ct., at 1415 (quoting *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758) (citing cases), and even the parties find common ground on the point.

Because this consent principle governs the FAA on the whole, it constrains any domestic doctrines under Chapter 1 of the FAA that might "appl[y]" to Convention proceedings (to the extent they do not "conflict with" the Convention). 9 U.S.C. § 208. Parties seeking to enforce arbitration agreements under Article II of the Convention thus may not rely on domestic nonsignatory doctrines that fail to reflect consent to arbitrate.

While the FAA's consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part because some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party's consent to arbitrate while another does not. Lower courts must therefore determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction.*

Article II of the Convention leaves much to the contracting states to resolve on their own, and the FAA

* In this case, however, I am skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy. The contract provided that disputes arising between the buyer and seller in connection with the contract were subject to arbitration. App. 171. It also specified that the seller in the contract "shall be understood" to include "[s]ub-contractors." Id., at 88–89. And it appended a list of potential subcontractors, one of which was GE Energy's predecessor, Converteam. Id., at 184–185.

imposes few restrictions. Nevertheless, courts applying domestic nonsignatory doctrines to enforce arbitration agreements under the Convention must strictly adhere to "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758. Because the Court's opinion is consistent with this limitation, I join it in full.

Appendix A. Federal Arbitration Act

Page 550, add

CHAPTER 4. ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

§ 401. Definitions

In this chapter:

(1) Predispute arbitration agreement.--The term "predispute arbitration agreement" means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

(2) Predispute joint-action waiver.--The term "predispute joint-action waiver" means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

(3) Sexual assault dispute.--The term "sexual assault dispute" means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

(4) Sexual harassment dispute.--The term "sexual harassment dispute" means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law. The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

§ 402. No validity or enforceability

(a) In general.--Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

(b) Determination of applicability.--An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.