ARBITRATION LAW, POLICY, & PRACTICE

Carolina Academic Press (2018)

2022 SUPPLEMENT

MAUREEN A. WESTON
Professor of Law
Pepperdine University School of Law

KRISTEN BLANKLEY
Professor of Law
University of Nebraska College of Law

JILL GROSS
Professor of Law
Elisabeth Haub School of Law at Pace University

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

August 2022

A Note to Users of ARBITRATION LAW, POLICY & PRACTICE:

This *2022 Supplement to Arbitration: Law, Policy, & Practice* presents key developments in arbitration law and scholarship since the 2018 publication of ARBITRATION LAW, POLICY & PRACTICE (Carolina Academic Press).

Since 2017, the U.S. Supreme Court has issued ten commercial arbitration decisions. *Infra.* Recall that from 2006 to 2011, and 2011-2017, the Court issued ten and eight decisions, respectively. By our count, the Court has issued sixty commercial arbitration decisions since *Wilko v. Swan* in 1953. The attached updated Appendix III list of U.S. Supreme Court Arbitration Decisions attempts to identify all such decisions. The litigation over the private process of arbitration certainly is ironic. We emphasize in our courses that arbitration mostly works! However, the federal policy favoring the privatized adjudication of disputes does raise important policy, fairness, and practice issues which we address throughout the casebook.

On the legislative front, Congress amended the Federal Arbitration Act (FAA) in March 2022, when it enacted the **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§ 401, 402**, voiding the enforcement of arbitration provisions regarding claims of sexual harassment or sexual assault, at the option of the person(s) alleging such claims.

Congress and state legislatures continue to propose legislation related to arbitration; however, to date the above-referenced legislation is the most significant development.

This **2022 ARBITRATION LPP SUPPLEMENT** focuses primarily on recent U.S. Supreme Court decisions and federal arbitration legislation developments.

Many of the arbitration decisions address multiple issues which are not easily compartmentalized for purposes of studying a particular arbitration issue. For example, the big questions about unconscionability, preemption of state laws, "employment" exceptions, or class action waivers are often addressed by the Court under the more technical questions of arbitrability, whether an arbitrator or court decides those questions, or FAA preemption. Many of the recent Supreme Court cases arguably raise more questions than they answer. We attempt to highlight these questions herein.

We welcome your comments as we prepare our next edition of Arbitration LPP.

Maureen Weston, Pepperdine School of Law, mweston@pepperdine.edu
Kristen Blankley, University of Nebraska College of Law, kblankley2@unl.edu
Jill Gross, Elisabeth Haub School of Law at Pace University, jgross@law.pace.edu

Chapter 1 ▪ The Nature and Scope of Arbitration

C. Modern U.S. Commercial Arbitration Law and Practice

1. Arbitration Legislation

➢ Note that Chapters 2 and 3 of the FAA adopt the international arbitration treaties set forth in the New York and Panama Convention, respectively (Ch. 12)

➢ In March 2021, Congress amended the FAA to add Chapter 4, **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021**

Chapter 2 ▪ Arbitration Preemption, Jurisdiction, and Choice of Law

C. FAA Preemption of State Law

➢ ***Note: Viking River Cruises v. Moriana*, 596 U.S. – , 142 S.Ct. 1906 (2022)** (whether the FAA preempts a state law rule that invalidates contractual waivers of the right to assert private attorney general actions (PAGA) representative claims?) [Option to cover in Ch 10.]

D. Federal Court Jurisdiction for Arbitration Matters

After *Vaden v. Discover Bank,* 129 S. Ct. 1269 (2009)

Preview Note: Chapter 9 C.2 – In ***Badgerow v. Walters***, 142 S. Ct. 1310 (2022), the Supreme Court declined to extend the "look through" approach to subject-matter jurisdiction in *Vaden* to petitions to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA.

Chapter 3 ▪ Allocation of Authority between Courts and Arbitrators

B. Who Decides Arbitrability?

The *Henry Schein* case addressed both the substantive arbitrability question along with analyzing the delegation provision, so may be appropriate to assign after *Rent-a-Center.*

C. The Separability Doctrine and Delegation Clauses: *Prima Paint* and Its Progeny

➢ **Henry Schein Inc. v. Archer and White Sales Inc., 139 S.Ct. 524 (2019)** (rejecting the "wholly groundless" doctrine permitting courts to decide arbitrability where a claim is allegedly "wholly groundless" when the power to decide arbitrability has been delegated to the arbitrator)

➢ ***New Prime v. Oliveria*, 586 U.S. _ , 139 S.Ct. 532 (2019) (Gorsuch, J.)** (holding that the FAA Section 1 exception for "contracts of employment" for transportation workers applies to independent contractors and a court should decide for itself whether the exception applies before ordering arbitration even if the contract delegated arbitrability questions to the arbitrator)

D. Arbitrability of Statutory Claims

1. Federal Securities Laws

2. Employment Discrimination Claims

Gilmer v. Interstate/Johnson, 500 U.S. 20 (1991)

Add: 2.b. FAA "Contracts of Employment Exception"

Note: Circuit City "transportation worker" exemption

New Prime Inc. v. Oliveira, 586 U.S. __, 139 S.Ct. 532 (2019 (is an "independent contractor" covered by transportation worker exemption? Ch 3.C. asked who decides?)

Southwest Airlines Co. v. Saxon, 596 U.S. – (2022)
Issue: "Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act."

3. Other Statutory Claims

In March 2022, Congress amended the FAA to add Chapter 4, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021/ (Ending Forced Arbitration Act), 9 U.S.C.§ 402

FAA, Chapter 4 **Arbitration of Disputes Involving Sexual Harassment or Sexual Assault**

§ 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.

§ 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.

The Act provides individuals alleging sexual harassment or sexual assault the right to void pre-dispute joint-action waivers and proceed in the appropriate court or agency under federal, state or tribal law.to exclude any disputes that raise claims of sexual harassment, misconduct in the workplace. The Act thus restricts employers from forcing sexual harassment and sexual assault claims into arbitration, which often requires an employee to incur greater cost and keeps the information out of the public record. Whether the Act only severs these claims from arbitration and thus other potential non-sexual harassment claims that may proceed in arbitration or whether the supplemental claim doctrine applies to allow all claims in arbitration. The Act gives employees to an arbitration the right to file sex misconduct claims in court.

Chapter 4 ▪ Defenses to Arbitrability

B. Lack of Mutual Assent

Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002)
Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2d Cir. 2017)

C. Unconscionability

Chavarria v. Ralphs Grocery Co., 733 F.3d 916 (9th Cir. 2013)

D. Losing the Right to Arbitrate: Waiver

Delete - Nicholas v. KBR, Inc., 565 F.3d 904 (5th Cir. 2009)

Add: ***Morgan v. Sundance*, 596 U. S. __, 142 S.Ct. 1708 (2022)**

Issue: whether an employee claiming employer waived right to arbitration must show "prejudice."

Held: Prejudice is a court-created, arbitration-specific element added to the waiver doctrine and therefore is preempted by the FAA. Rather, courts can find waiver only if a party "knowingly

relinquish[ed] the right to arbitrate by acting inconsistently with that right.

Chapter 5 ▪ The Arbitration Process

Chapter 6 ▪ The Arbitration Agreement

Chapter 7 ▪ Arbitration Advocacy

Chapter 8 ▪ The Role of the Arbitrator: Ethics, Neutrality, and Immunity

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Chapter 9 ▪ Judicial Enforcement and Review of Arbitration Awards

B. The *Functus Officio* Doctrine

C. Procedural Prerequisites to Judicial Review of Arbitration Awards

1. Statutory Timelines to Seek Confirmation, Vacatur, and Modification of Arbitral Awards

2. State or Federal Court? Jurisdiction to Review Arbitration Awards Governed by the FAA

➢ ***NEW -- Badgerow v. Walters, et. al.*, 142 S.Ct. 1310 (2022)**

When does FAA provide federal court subject matter jurisdiction in enforcement and vacatur actions?

Issue: "Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under FAA §§ 9 and 10 where the only basis for jurisdiction is that the underlying dispute involved a federal question?"

D. Judicial Review of Arbitration Awards: Standard of Review

E. FAA Statutory Grounds for Review and Vacating Arbitration Awards

1. Fraud or Misconduct in the Arbitration
2. Evident Partiality or Arbitrator Bias
3. Misconduct in the Proceedings: Refusing to Postpone Hearing or to Hear Evidence, or Prejudicing Rights
4. Exceeding Authority

Chapter 10 ▪ Class Arbitration

B. Did the Parties Agree to Class Arbitration?

Suggest omitting: *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)

Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S 662 (2010)

NEW -- Lamps Plus Inc. v. Varela, 139 SCT 1407 (2019)

In a 5-4 opinion authored by Chief Justice John Roberts, the Court held that the arbitration agreement between Varela and his employer, Lamps Plus, which contained only general language commonly used in arbitration agreements, did not provide the necessary contractual basis for compelling class arbitration.

C. Express Contractual Bans on Class Actions

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

Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013)

D. Colliding Federal Statutes

1. National Labor Relations Act (NLRA)

NEW -- Epic Systems, Corp. v. Lewis, 583 U.S -, 138 S. Ct. 1612 (2018)
(interpreting whether the National Labor Relations Act precludes enforcement of the FAA's mandate to enforce arbitration contracts according to their terms as a "contrary Congressional command" that precludes class action waivers in arbitration clauses)

NEW -- **Intersection of PAGA & FAA (noted in Ch 2 Preemption)**

Viking River Cruises v. Moriana, 596 U.S. – , 142 S.Ct. (2022) (PAGA)
(whether the Federal Arbitration Act, 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)

Chapter 11 ▪ Complex Arbitration Procedures Involving Multiple Parties and Forums

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➢ **GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, 590 U.S. _ (2020)** (Holding (9-0): The Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories to those agreements).

Discovery in Aid of Private International Arbitration

➢ **ZF Automotive US, Inc., v. Luxshare, 596 U.S. _ (2022)**

28 USC § 1782(a) provides that "[t]he 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*."

(1) Does § 1782, which authorizes federal district courts to order discovery "for use in a foreign or international tribunal," apply to foreign or international private commercial arbitral tribunals?

(2) Are commercial arbitration tribunals a "foreign or international tribunal" under § 1782(a)?

➢ Note: *Badgerow v. Walters* is not relevant to New York Convention or Inter-American Convention cases, which benefit from a separate FAA provision directly conferring Federal court jurisdiction.)

Supplemental US Supreme Court Cases

Insert – Chapter 3.C. Arbitrability – Who Decides?

Henry Schein Inc. v. Archer and White Sales Inc., 139 S.Ct. 524 (2019),

KAVANAUGH, J., delivered the opinion for a unanimous Court.

Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. (2010); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995).

Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly groundless." The question presented in this case is whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a "wholly groundless" exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.

I

Archer and White is a small business that distributes dental equipment. Archer and White entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton and Crane's equipment. The relationship eventually soured. As relevant here, Archer and White sued Pelton and Crane's successor-in-interest and Henry Schein, Inc. (collectively, Schein) in Federal District Court in Texas. Archer and White's complaint alleged violations of federal and state antitrust law, and sought both money damages and injunctive relief.

The relevant contract between the parties provided:

"Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina." App. to Pet. for Cert. 3a.

After Archer and White sued, Schein invoked the Federal Arbitration Act and asked the District Court to refer the parties' antitrust dispute to arbitration. Archer and White objected, arguing that the dispute was not subject to arbitration because Archer and White's complaint sought injunctive relief, at least in part. According to Archer and White, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part.

The question then became: Who decides whether the antitrust dispute is subject to arbitration? The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions. Schein contended that the contract's express incorporation of the American Arbitration Association's rules meant that an arbitrator—not the court—had to decide whether the arbitration agreement applied to this particular dispute. Archer and White responded that in cases where the defendant's argument for arbitration is wholly groundless—as Archer and White argued was the case here—the District Court itself may resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the District Court agreed with Archer and White about the existence of a "wholly groundless" exception, and ruled that Schein's argument for arbitration was wholly groundless. The District Court therefore denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

In light of disagreement in the Courts of Appeals over whether the "wholly groundless" exception is consistent with the Federal Arbitration Act, we granted certiorari.

II

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also " 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." We have explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent–A–Center,* 561 U.S., at 70.

Even when the parties' contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the "wholly groundless" exception enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.

We conclude that the "wholly groundless" exception is inconsistent with the text of the Act and with our precedent.

We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." A court has "'no business weighing the merits of the grievance' " because the " 'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.' " . . . Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

In an attempt to overcome the statutory text and this Court's cases, Archer and White advances four main arguments. None is persuasive.

First, Archer and White points to §§ 3 and 4 of the Federal Arbitration Act. Section 3 provides that a court must stay litigation "upon being satisfied that the issue" is "referable to arbitration" under the "agreement." Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

Archer and White interprets those provisions to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Second, Archer and White cites § 10 of the Act, which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers." § 10(a)(4). According to Archer and White, if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable. The dispositive answer to Archer and White's § 10 argument is that Congress designed the Act in a specific way, and it is not our proper role to redesign the statute. Archer and White's § 10 argument would mean, moreover, that courts presumably also should decide frivolous merits questions that have been delegated to an arbitrator. Yet we have already rejected that argument: When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. *AT & T Technologies,* 475 U.S., at 649. So, too, with arbitrability.

Third, Archer and White says that, as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless. In cases like this, as Archer and White sees it, the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. So why waste the time and money? The short answer is that the Act contains no "wholly groundless" exception, and we may not engraft our own exceptions onto the statutory text.

In addition, contrary to Archer and White's claim, it is doubtful that the "wholly groundless" exception would save time and money systemically even if it might do so in some individual cases. Archer and White assumes that it is easy to tell when an argument for arbitration of a particular dispute is wholly groundless. We are dubious. The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

Fourth, Archer and White asserts another policy argument: that the "wholly groundless" exception is necessary to deter frivolous motions to compel arbitration. Again, we may not rewrite the statute simply to accommodate that policy concern. In any event, Archer and White overstates the potential problem. Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable. And under certain circumstances, arbitrators may be able to respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration. We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

In sum, we reject the "wholly groundless" exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

Insert at Chapter 3.C Arbitrability & "Transportation Worker" § 1 Exception

NEW PRIME INC. v. OLIVEIRA. 586 U. S. _ , 139 S.Ct. 532 (2019)

Justice GORSUCH delivered the opinion of the Court.

The Federal Arbitration Act requires courts to enforce private arbitration agreements. But like most laws, this one bears its qualifications. Among other things, § 1 says that "nothing herein" may be used to compel arbitration in disputes involving the "contracts of employment" of certain transportation workers. 9 U.S.C. § 1. And that qualification has sparked these questions: When a contract delegates questions of arbitrability to an arbitrator, must a court leave disputes over the application of § 1's exception for the arbitrator to resolve? And does the term "contracts of employment" refer only to contracts between employers and employees, or does it also reach contracts with independent contractors? Because courts across the country have disagreed on the answers to these questions, we took this case to resolve them.

I

New Prime is an interstate trucking company and Dominic Oliveira works as one of its drivers. But, at least on paper, Mr. Oliveira isn't an employee; the parties' contracts label him an independent contractor. Those agreements also instruct that any disputes arising out of the parties' relationship should be resolved by an arbitrator—even disputes over the scope of the arbitrator's authority.

Eventually, of course, a dispute did arise. In a class action lawsuit in federal court, Mr. Oliveira argued that New Prime denies its drivers lawful wages. The company may call its drivers independent contractors. But, Mr. Oliveira alleged, in reality New Prime treats them as employees and fails to pay the statutorily due minimum wage. In response to Mr. Oliveira's complaint, New Prime asked the court to invoke its statutory authority under the Act and compel arbitration according to the terms found in the parties' agreements.

That request led to more than a little litigation of its own. Even when the parties' contracts mandate arbitration, Mr. Oliveira observed, the Act doesn't *always* authorize a court to enter an order compelling it. In particular, § 1 carves out from the Act's coverage "contracts of employment of ... workers engaged in foreign or interstate commerce." And at least for purposes of this collateral dispute, Mr. Oliveira submitted, it doesn't matter whether you view him as an employee or independent contractor. Either way, his agreement to drive trucks for New Prime qualifies as a "contract[ ] of employment of ... [a] worker[ ] engaged in ... interstate commerce." Accordingly, Mr. Oliveira argued, the Act supplied the district court with no authority to compel arbitration in this case.

Naturally, New Prime disagreed. Given the extraordinary breadth of the parties' arbitration agreement, the company insisted that any question about § 1's application belonged for the arbitrator alone to resolve. Alternatively and assuming a court could address the question, New Prime contended that the term "contracts of employment" refers only to contracts that establish an employer-employee relationship. And because Mr. Oliveira is, in fact as well as form, an independent contractor, the company argued, § 1's exception doesn't apply; the rest of the statute does; and the district court was (once again) required to order arbitration.

Ultimately, the district court and the First Circuit sided with Mr. Oliveira. The court of appeals held, first, that in disputes like this a court should resolve whether the parties' contract falls within the Act's ambit or § 1's exclusion before invoking the statute's authority to order arbitration. Second, the court of appeals held that § 1's exclusion of certain "contracts of employment" removes from the Act's coverage not only employer-employee contracts but also contracts involving independent contractors. So under any account of the parties' agreement in this case, the court held, it lacked authority under the Act to order arbitration.

II

In approaching the first question for ourselves, one thing becomes clear immediately. While a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional. If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§ 3 and 4 of the Act often

require a court to stay litigation and compel arbitration "accord[ing to] the terms" of the parties' agreement. But this authority doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration.

Instead, antecedent statutory provisions limit the scope of the court's powers under §§ 3 and 4. Section 2 provides that the Act applies only when the parties' agreement to arbitrate is set forth as a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce." And § 1 helps define § 2's terms. Most relevant for our purposes, § 1 warns that "nothing" in the Act "shall apply" to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Why this very particular qualification? By the time it adopted the Arbitration Act in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers. And it seems Congress "did not wish to unsettle" those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate. *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001).

Given the statute's terms and sequencing, we agree with the First Circuit that a court should decide for itself whether § 1's "contracts of employment" exclusion applies before ordering arbitration. After all, to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.

Nothing in our holding on this score should come as a surprise. We've long stressed the significance of the statute's sequencing. In *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198 (1956), we recognized that "Sections 1, 2, and 3 [and 4] are integral parts of a whole.... [Sections] 1 and 2 define the field in which Congress was legislating," and §§ 3 and 4 apply only to contracts covered by those provisions. In *Circuit City,* we acknowledged that "Section 1 exempts from the [Act] ... contracts of employment of transportation workers." And in *Southland v. Keating,* we noted that "the enforceability of arbitration provisions" under §§ 3 and 4 depends on whether those provisions are "part of a written maritime contract or a contract 'evidencing a transaction involving commerce' " under § 2—which, in turn, depends on the application of § 1's exception for certain "contracts of employment."

To be sure, New Prime resists this straightforward understanding. The company argues that an arbitrator should resolve any dispute over § 1's application because of the "delegation clause" in the parties' contract and what is sometimes called the "severability principle." A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration. *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63 (2010). And under the severability principle, we treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears. Unless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all their disputes—including disputes about the validity of their broader contract—to arbitration. . Applying these principles to this case, New Prime notes that Mr. Oliveira has not specifically challenged the parties' delegation clause and submits that any controversy should therefore proceed only and immediately before an arbitrator.

But all this overlooks the necessarily antecedent statutory inquiry we've just discussed. A delegation clause is merely a specialized type of arbitration agreement, and the Act "operates on this additional arbitration agreement just as it does on any other." So a court may use §§ 3 and 4 to enforce a delegation clause only if the clause appears in a "written provision in ... a contract evidencing a transaction involving commerce" consistent with § 2. And only if the contract in which the clause appears doesn't trigger § 1's "contracts of employment" exception. In exactly the same way, the Act's severability principle applies only if the parties' arbitration agreement appears in a contract that falls within the field §§ 1 and 2 describe. We acknowledged as much some time ago, explaining that, before invoking the severability principle, a court should "determine[ ] that the contract in question is within the coverage of the Arbitration Act." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967).

III

That takes us to the second question: Did the First Circuit correctly resolve the merits of the § 1 challenge in this case? Recall that § 1 excludes from the Act's compass "contracts of employment of ... workers engaged in ... interstate commerce." Happily, everyone before us agrees that Mr. Oliveira qualifies as a "worker[ ] engaged in ... interstate commerce." For purposes of this appeal, too, Mr. Oliveira is willing to assume (but not grant) that his contracts with New Prime establish only an independent contractor relationship.

With that, the disputed question comes into clear view: What does the term "contracts of employment" mean? If it refers only to contracts that reflect an employer-employee relationship, then § 1's exception is irrelevant and a court is free to order arbitration, just as New Prime urges. But if the term *also* encompasses contracts that require an independent contractor to perform work, then the exception takes hold and a court lacks authority under the Act to order arbitration, exactly as Mr. Oliveira argues.

A

In taking up this question, we bear an important caution in mind. "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.' After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS v. Chadha,* 462 U.S. 919 (1983). We would risk, too, upsetting reliance interests in the settled meaning of a statute. Of course, statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included. But nothing like that exists here. Nor has anyone suggested any other appropriate reason that might allow us to depart from the original meaning of the statute at hand.

That, we think, holds the key to the case. To many lawyerly ears today, the term "contracts of employment" might call to mind only agreements between employers and employees (or what the common law sometimes called masters and servants). Suggestively, at least one recently published law dictionary defines the word "employment" to mean "the relationship between master and servant." But this modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925. At that time, a "contract of employment" usually meant nothing more than an agreement to perform work. As a result, most people then would have understood § 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work.

What's the evidence to support this conclusion? It turns out that in 1925 the term "contract of employment" wasn't defined in any of the (many) popular or legal dictionaries the parties cite to us. And surely that's a first hint the phrase wasn't then a term of art bearing some specialized meaning. It turns out, too, that the dictionaries of the era consistently afforded the word "employment" a broad construction, broader than may be often found in dictionaries today. Back then, dictionaries tended to treat "employment" more or less as a synonym for "work." Nor did they distinguish between different kinds of work or workers: All work was treated as employment, whether or not the common law criteria for a master-servant relationship happened to be satisfied.

What the dictionaries suggest, legal authorities confirm. This Court's early 20th-century cases used the phrase "contract of employment" to describe work agreements involving independent contractors. Many state court cases did the same. So did a variety of federal statutes. And state statutes too. We see here no evidence that a "contract of employment" necessarily signaled a formal employer-employee or master-servant relationship.

More confirmation yet comes from a neighboring term in the statutory text. Recall that the Act excludes from its coverage "contracts of employment of ... any ... class of *workers* engaged in foreign or interstate commerce." 9 U.S.C. § 1. Notice Congress didn't use the word "employees" or "servants," the natural choices if the term "contracts of employment" addressed them alone. Instead, Congress spoke of "workers," a term that everyone agrees easily embraces independent contractors. That word choice may not mean everything, but it does supply further evidence still that Congress used the term "contracts of employment" in a broad sense to capture any contract for the performance of *work* by *workers*.

B

What does New Prime have to say about the case building against it? Mainly, it seeks to shift the debate from the

term "contracts of employment" to the word "employee." Today, the company emphasizes, the law often distinguishes between employees and independent contractors. Employees are generally understood as those who work "in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Meanwhile, independent contractors are sometimes described as those "entrusted to undertake a specific project but who [are] left free to do the assigned work and to choose the method for accomplishing it." New Prime argues that, by 1925, the words "employee" and "independent contractor" had already assumed these distinct meanings. And given that, the company contends, the phrase "contracts of *employment* " should be understood to refer only to relationships between *employers and employees*.

Unsurprisingly, Mr. Oliveira disagrees. He replies that, while the term "employment" dates back many centuries, the word "employee" only made its first appearance in English in the 1800s. At that time, the word from which it derived, "employ," simply meant to "apply (a thing) to some definite purpose." And even in 1910 . . . that the term "employee" had only "become somewhat naturalized in our language."

Still, the parties do share some common ground. They agree that the word "employee" eventually came into wide circulation and came to denote those who work for a wage at the direction of another. They agree, too, that all this came to pass in part because the word "employee" didn't suffer from the same "historical baggage" of the older common law term "servant," and because it proved useful when drafting legislation to regulate burgeoning industries and their labor forces in the early 20th century. The parties even agree that the development of the term "employee" may have come to influence and narrow our understanding of the word "employment" in comparatively recent years and may be why today it might signify to some a "relationship between master and servant."

But if the parties' extended etymological debate persuades us of anything, it is that care is called for. The words "employee" and "employment" may share a common root and an intertwined history. But they also developed at different times and in at least some different ways. The only question in this case concerns the meaning of the term "contracts of *employment* " in 1925. And, whatever the word "employee" may have meant at that time, and however it may have later influenced the meaning of "employment," the evidence before us remains that, as dominantly understood in 1925, a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship.

When New Prime finally turns its attention to the term in dispute, it directs us to *Coppage v. Kansas,* 236 U.S. 1 (1915). There and in other cases like it, New Prime notes, courts sometimes used the phrase "contracts of employment" to describe what today we'd recognize as agreements between employers and employees. But this proves little. No one doubts that employer-employee agreements to perform work qualified as "contracts of employment" in 1925—and documenting that fact does nothing to negate the possibility that "contracts of employment" *also* embraced agreements by independent contractors to perform work. Coming a bit closer to the mark, New Prime eventually cites a handful of early 20th-century legal materials that seem to use the term "contracts of employment" to refer *exclusively* to employer-employee agreements. But from the record amassed before us, these authorities appear to represent at most the vanguard, not the main body, of contemporaneous usage.

New Prime's effort to explain away the statute's suggestive use of the term "worker" proves no more compelling. The company reminds us that the statute excludes "contracts of employment" for "seamen" and "railroad employees" as well as other transportation workers. And because "seamen" and "railroad employees" included *only* employees in 1925, the company reasons, we should understand "any other class of workers engaged in ... interstate commerce" to bear a similar construction. But this argument rests on a precarious premise. At the time of the Act's passage, shipboard surgeons who tended injured sailors were considered "seamen" though they likely served in an independent contractor capacity. Even the term "railroad employees" may have swept more broadly at the time of the Act's passage than might seem obvious today. In 1922, for example, the Railroad Labor Board interpreted the word "employee" in the Transportation Act of 1920 to refer to anyone "engaged in the customary work directly contributory to the operation of the railroads." And the Erdman Act, a statute enacted to address disruptive railroad strikes at the end of the 19th century, seems to evince an equally broad understanding of "railroad employees."

Unable to squeeze more from the statute's text, New Prime is left to appeal to its policy. This Court has said that Congress adopted the Arbitration Act in an effort to counteract judicial hostility to arbitration and establish "a liberal federal policy favoring arbitration agreements." To abide that policy, New Prime suggests, we must order arbitration according to the terms of the parties' agreement. But often and by design it is "hard-fought compromise[ ]," not cold logic, that supplies the solvent needed for a bill to survive the legislative process. If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to "tak[e] ... account of" legislative compromises essential to a law's passage and, in that way, thwart rather than honor "the effectuation of congressional intent." . By respecting the qualifications of § 1 today, we "respect the limits up to which Congress was prepared" to go when adopting the Arbitration Act.

Finally, and stretching in a different direction entirely, New Prime invites us to look beyond the Act. Even if the statute doesn't supply judges with the power to compel arbitration in this case, the company says we should order it anyway because courts always enjoy the inherent authority to stay litigation in favor of an alternative dispute resolution mechanism of the parties' choosing. That, though, is an argument we decline to tangle with. The courts below did not address it and we granted certiorari only to resolve existing confusion about the application of the Arbitration Act, not to explore other potential avenues for reaching a destination it does not.

When Congress enacted the Arbitration Act in 1925, the term "contracts of employment" referred to agreements to perform work. No less than those who came before him, Mr. Oliveira is entitled to the benefit of that same understanding today. Accordingly, his agreement with New Prime falls within § 1's exception, the court of appeals was correct that it lacked authority under the Act to order arbitration, and the judgment is Affirmed.

Justice GINSBURG, concurring.

"[W]ords generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.' The Court so reaffirms, and I agree. Looking to the period of enactment to gauge statutory meaning ordinarily fosters fidelity to the "regime ... Congress established."

Congress, however, may design legislation to govern changing times and circumstances . . . sometimes, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."

SOUTHWEST AIRLINES CO., v. SAXON, 596 U.S. – 142 S.Ct. 1783 (2022)

Justice THOMAS delivered the opinion of the Court.

Latrice Saxon works for Southwest Airlines as a ramp supervisor. Her work frequently requires her to load and unload baggage, airmail, and commercial cargo on and off airplanes that travel across the country. The question presented is whether, under § 1 of the Federal Arbitration Act, she belongs to a "class of workers engaged in foreign or interstate commerce" that is exempted from the Act's coverage. We hold that she does.

I

Southwest Airlines moves a lot of cargo. In 2019, Southwest carried the baggage of over 162 million passengers to domestic and international destinations. In total, Southwest transported more than 256 million pounds of passenger, commercial, and mail cargo.

To move that cargo, Southwest employs "ramp agents," who physically load and unload baggage, airmail, and freight. It also employs "ramp supervisors," who train and supervise teams of ramp agents. Frequently, ramp supervisors step in to load and unload cargo alongside ramp agents.

Saxon is a ramp supervisor for Southwest at Chicago Midway International Airport. As part of her employment contract, she agreed to arbitrate wage disputes individually. Nevertheless, when Saxon came to believe that

Southwest was failing to pay proper overtime wages to her and other ramp supervisors, she brought a putative class action against Southwest under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*

Southwest sought to enforce its arbitration agreement with Saxon under the Federal Arbitration Act (FAA), 9 U.S.C. § 1., and moved to dismiss the lawsuit. In response, Saxon invoked § 1 of the FAA, which exempts from the statute's ambit "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Saxon argued that ramp supervisors, like seamen and railroad employees, were an exempt "class of workers engaged in foreign or interstate commerce."

The District Court disagreed, holding that only those involved in "actual transportation," and not the "mer[e] handling [of] goods," fell within the exemption. The Court of Appeals reversed. It held that "[t]he act of loading cargo onto a vehicle to be transported interstate is itself commerce, as that term was understood at the time of the [FAA's] enactment in 1925." 993 F.3d at 494..

We granted certiorari to resolve the disagreement.

II

In this case, we must decide whether Saxon falls within a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. We interpret this language according to its " 'ordinary, contemporary, common meaning.'" To discern that ordinary meaning, those words " 'must be read' " and interpreted " 'in their context,' " not in isolation..

We begin by defining the relevant "class of workers" to which Saxon belongs. Then, we determine whether that class of workers is "engaged in foreign or interstate commerce."

A First, the parties dispute how to define the relevant "class of workers." Saxon argues that because air transportation "[a]s an industry" is engaged in interstate commerce, "airline employees" constitute a " 'class of workers' " covered by § 1. Southwest, by contrast, maintains that § 1 "exempts classes of workers based on *their* conduct, not their *employer's*," and the relevant class therefore includes only those airline employees who are actually engaged in interstate commerce in their day-to-day work. The Court of Appeals rejected Saxon's industrywide approach, and so do we.

As we have observed before, the FAA speaks of " 'workers,' " not " 'employees' or 'servants.' " *New Prime*, 139 S.Ct., at 540-541. The word "workers" directs the interpreter's attention to "the *performance* of work." Further, the word "engaged"—meaning "[o]ccupied," "employed," or "[i]nvolved,"—similarly emphasizes the actual work that the members of the class, as a whole, typically carry out. Saxon is therefore a member of a "class of workers" based on what she does at Southwest, not what Southwest does generally.

On that point, Southwest has not meaningfully contested that ramp supervisors like Saxon frequently load and unload cargo. Thus, as relevant here, we accept that Saxon belongs to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis.[1]

B Second, the parties dispute whether that class of airplane cargo loaders is "engaged in foreign or interstate commerce" under § 1. We hold that it is.

As always, we begin with the text. Again, to be "engaged" in something means to be "occupied," "employed," or "involved" in it. "Commerce," meanwhile, includes, among other things, "the transportation of ... goods, both by land and by sea." Thus, any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption.

Airplane cargo loaders are such a class. We have said that it is "too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it." We think it equally plain that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods. They form "a class of workers engaged in foreign or interstate commerce."[2]

Context confirms this reading. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), we considered whether § 1 exempts all employment contracts or only those contracts involving "transportation workers." In concluding that § 1 exempts only transportation-worker contracts, we relied on two well-settled canons of statutory interpretation. First, we applied the meaningful-variation canon. See, *e.g.*, A. Scalia & B. Garner, Reading Law 170 (2012) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea"). We observed that Congress used "more open-ended formulations" like " 'affecting' " or " 'involving' " commerce to signal "congressional intent to regulate to the outer limits of authority under the Commerce Clause.". By contrast, Congress used a "narrower" phrase—" 'engaged in commerce' "—when it wanted to regulate short of those limits. Second, we applied the *ejusdem generis* canon, which instructs courts to interpret a "general or collective term" at the end of a list of specific items in light of any "common attribute[s]" shared by the specific items. As applied to § 1, that canon counseled that the phrase " 'class of workers engaged in ... commerce' " should be "controlled and defined by reference" to the specific classes of " 'seamen' " and " 'railroad employees' " that precede it..

Taken together, these canons showed that § 1 exempted only contracts with transportation workers, rather than all employees, from the FAA. And, while we did not provide a complete definition of "transportation worker," we indicated that any such worker must at least play a direct and "necessary role in the free flow of goods" across borders. Put another way, transportation workers must be actively "engaged in transportation" of those goods across borders via the channels of foreign or interstate commerce.

Cargo loaders exhibit this central feature of a transportation worker. As stated above, one who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (*e.g.,* transportation) of that cargo. "[T]here could be no doubt that [interstate] transportation [is] still in progress," and that a worker is engaged in that transportation, when she is "doing the work of unloading" or loading cargo from a vehicle carrying goods in interstate transit.

A final piece of statutory context further confirms that cargo loading is part of cross-border "commerce." The first sentence of § 1 of the FAA defines exempted "maritime transactions" to include, among other things, "agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any *other* matters in foreign commerce." The use of "other" in the catchall provision indicates that Congress considered the preceding items to be "matters in foreign commerce." And agreements related to the enumerated "matte[r] in foreign commerce" of "wharfage," to take one example, included agreements for mere access to a wharf—which is simply a cargo-loading facility. . . . It stands to reason, then, that if payments to access a cargo-loading facility relate to a "matte[r] in foreign commerce," then an individual who actually loads cargo on foreign-bound ships docked along a wharf is himself engaged in such commerce. Likewise, any class of workers that loads or unloads cargo on or off airplanes bound for a different State or country is "engaged in foreign or interstate commerce."

In sum, text and context point to the same place: Workers, like Saxon, who load cargo on and off airplanes belong to a "class of workers in foreign or interstate commerce."

III

Both Saxon and Southwest proffer arguments that disagree with portions of our analysis. Neither of them convinces us to change course.

A. For her part, Saxon thinks that we should define the "class of workers" as all airline employees who carry out the "customary work" of the airline, rather than cargo loaders more specifically. That larger class of employees potentially includes everyone from cargo loaders to shift schedulers to those who design Southwest's website.

To support this reading, Saxon invokes the *ejusdem generis* canon. She argues, first, that "railroad employees" and "seamen" refer generally to employees in those industries providing "dominant mode[s] of transportation" in interstate and foreign commerce. She then reasons, second, that all "workers who do the work of the airlines have the same relationship to commerce as those who do the work of the railroad or ship."

Saxon's attempted invocation of *ejusdem generis* is unavailing because it proceeds from the flawed premise that "seamen" and "railroad employees" are both industrywide categories. The statute's use of "seamen" shows why that premise is mistaken. In 1925, seamen did not include all those employed by companies engaged in maritime shipping. Rather, seamen were only those "whose occupation [was] to assist in the management of ships at sea; a mariner; a sailor; ... any person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." Webster's 1906.

Because "seamen" includes only those who work on board a vessel, they constitute a subset of workers engaged in the maritime shipping industry. Regardless of whether "railroad employees" include all rail-transportation workers, the narrow definition of "seamen" shows that the two terms cannot share a "common attribute" of identifying transportation workers on an industrywide basis. We therefore reject Saxon's argument that § 1 exempts virtually all employees of major transportation providers.

B. While Saxon defines the relevant class of workers too broadly, Southwest construes § 1's catchall category —"any other class of workers engaged in foreign or interstate commerce"—too narrowly. The airline argues that only workers who physically move goods or people across foreign or international boundaries—pilots, ship crews, locomotive engineers, and the like—are "engaged in foreign or interstate commerce." So construed, § 1 does not exempt cargo loaders because they do not physically accompany freight across state or international boundaries.

Southwest's reading rests on three arguments. None persuades us. First, taking its turn with *ejusdem generis*, the airline argues that because "seamen" are "employed *on board* a vessel," and " 'railroad employees' is somewhat ambiguous," Brief for Petitioner 26, we should limit the exempted class of railroad employees to those who are physically on board a locomotive as it crosses state lines. Then, having limited railroad employees in that way, Southwest likewise urges us to narrow § 1's catchall provision to exclude those airline-transportation workers, like Saxon and other cargo loaders, who do not ride aboard an airplane in interstate or foreign transit.

Southwest's application of *ejusdem generis* is as flawed as Saxon's. It purports to import a limitation from the definition of "seamen" into the definition of "railroad employees" and then engrafts that limit onto the catchall provision. But by conceding that "railroad employees" is ambiguous, Southwest sinks its own *ejusdem generis* argument. Again, the "inference embodied in *ejusdem generis* [is] that Congress remained focused on [some] common attribute" shared by the preceding list of specific items "when it used the catchall phrase." By recognizing that the term "railroad employees" is at most ambiguous, Southwest in effect concedes that it does not necessarily share the attribute that Southwest would like us to read into the catchall provision. *Ejusdem generis* neither demands nor permits that we limit a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms.

Second, Southwest argues that cargo loading is similar to other activities that this Court has found to lack a necessary nexus to interstate commerce in other contexts. But the cases Southwest invokes all addressed activities far more removed from interstate commerce than physically loading cargo directly on and off an airplane headed out of State. . . .

But unlike those who sell asphalt for intrastate construction or those who clean up after corporate employees, our case law makes clear that airplane cargo loaders plainly do perform "activities within the flow of interstate commerce" when they handle goods traveling in interstate and foreign commerce, either to load them for air travel or to unload them when they arrive.

Third, Southwest falls back on statutory purpose. It observes that § 2 of the FAA broadly requires courts to enforce arbitration agreements in any "contract evidencing a transaction involving commerce," while § 1 provides only a narrower exemption. This structure, in its view, demonstrates the FAA's "proarbitration purposes" and counsels in favor of an interpretation that errs on the side of fewer § 1 exemptions. Brief for Petitioner 16, 30–33.

To be sure, we have relied on statutory purpose to inform our interpretation of the FAA when that "purpose is readily apparent from the FAA's text." But we are not "free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal." Here, § 1's plain text suffices to show that airplane cargo loaders are

exempt from the FAA's scope, and we have no warrant to elevate vague invocations of statutory purpose over the words Congress chose.

* * *

Latrice Saxon frequently loads and unloads cargo on and off airplanes that travel in interstate commerce. She therefore belongs to a "class of workers engaged in foreign or interstate commerce" to which § 1's exemption applies. Accordingly, we affirm the judgment of the Court of Appeals.

It is so ordered.

Justice BARRETT took no part in the consideration or decision of this case.

Insert Chapter 4.D., Losing the Right to Arbitrate: Waiver

Morgan v. Sundance, 596 U. S. ____, 142 S.Ct. 1708 (2022)

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*, 139 S.Ct. 1407 (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 (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 (1993). 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.". 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*, 389 F.2d 692 (C.A.2 1968); *Erdman*, 650 F.3d at 1120, n. 4 ("trac[ing] the origins of [the Eighth Circuit's] prejudice requirement to *Carcich*"). "[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. 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." 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 (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 (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. *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774

(C.A.D.C. 1987) ("The Supreme Court has made clear" that the FAA's policy "is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism").

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.

Insert Chapter 9.C – Jurisdiction to Enforce and Vacate Awards

Badgerow v. Walters, et al., 596 U. S. -, 142 S.Ct. 1310 (2022)

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 (2008).

In *Vaden v. Discover Bank*, 556 U.S. 49 (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.. 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 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. 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*. 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. 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." But the court thought it should apply the look-through approach anyway, so that "consistent jurisdictional principles" would govern all kinds of FAA applications. 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. 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. 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." 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, 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 statuteCongress 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 (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). But those provisions, this Court has held, do not themselves support federal jurisdiction. See *Vaden*, 556 U.S., at 59. (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. 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." 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.

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. And quarrels about legal settlements—even settlements of federal claims—typically involve only state law, like disagreements about other contracts. 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. See Brief for Respondents 26–27. 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 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." . (first alteration in original). 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. The opposite view was not merely faulty; it was "textual[ly] implausib[le]."

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. (The dissent's vaunted practical "advantages" also mostly concern avoiding those diversity issues. 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 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." *Id.*, at 44. 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. Indeed, past practice belies Walters's and the dissent's gloomy predictions. Although they spin out hypotheticals designed to make the project look ultra-confusing, they fail to identify any actual problems that have arisen from courts' longstanding application of diversity standards to FAA applications (without using look-through). And Walters's solution does not even avoid the (purported) difficulty of which he complains. For he does not claim (nor could he) that look-through is the exclusive means of establishing federal jurisdiction. Even if the underlying action does not fall within a district court's jurisdiction, the application still might do so—say, because the parties have changed, and are now diverse. So courts, on Walters's own view, will still have to resolve questions about—and develop rules for—determining diversity in the FAA context. The difference is only one of degree—and too small, under any plausible theory of statutory interpretation, to adopt Walters's proposal to rewrite the law.

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 **1322** belongs in state courts. 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. 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 (1983). 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." 9 U.S.C. §§ 4, 5, 7, 9, 10, 11. 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 v. Discover Bank*, 556 U.S. 49 (2009), 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). See 28 U.S.C. §§ 1331, 1332. 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." 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.' "

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. *Ante*, at 1314. This reasoning necessarily extends to Sections 5, 7, and 11 as well, for those sections, too, lack Sections 4's "save for" language. . ("Without [Section 4's] statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction"). 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. Cf. *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (rejecting "[c]omplex jurisdictional tests" in favor of "straightforward" and "[s]imple jurisdictional rules").

Moreover, diversity jurisdiction requires not only that the relevant parties be from different States but also that the amount in controversy exceed $75,000. See 28 U.S.C. § 1332(a). 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.

…[C]onsider 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. See § 7 ("United States district court"); § 9 ("the United States court"); § 10 (same); § 11 (same). 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. See, *e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015) (THOMAS, J., dissenting). State courts have reached similar conclusions. See, *e.g.*, *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 190 P.3d 586, 597 (2008) (holding that §§ 4, 10, and 11 apply only in federal court).

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. 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." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). "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. See *Allied–Bruce*, 513 U.S., at 279 (adopting interpretation of FAA that "the statute's language permits" and that is more consistent with "[t]he Act's history"); *Pierce v. Underwood*, 487

U.S. 552 (1988) (adopting outcome "that the text of the statute permits, and sound judicial administration counsels").

V

The FAA's legislative history reinforces the view of the statute that I have just described. The Senate Report on the bill that became the FAA refers to the FAA's general purposes. It makes clear Congress' hope to avoid procedural complexity. It refers to parties' "desire to avoid the delay and expense of litigation." Proponents of the bill thought it would successfully serve that purpose because it would provide "very simple machinery"; "simplify legal matters"; offer "speedy" and "plain justice"; and allow "no opportunity for technical procedure." Joint Hearings on S. 1005 et al. before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 16 (1924) (hereinafter Joint Hearings). These general purposes support a simplified jurisdictional rule.

The language of the House Report suggests more. It suggests that the bill created a *single* jurisdictional procedure, not a set of different procedures with distinct jurisdictional rules. The Report says that the bill "provides *a procedure* in the Federal courts for" enforcement of arbitration agreements. "*The procedure*," the Report continues, "is very simple, ... reducing technicality, delay, and expense ...." . That singular procedure, the Report explains, encompasses not only the initial request for a federal court to order arbitration under Section 4, but subsequent requests to vacate or modify an arbitration award under Sections 10 and 11 as well. See .

The principal drafter of the bill made the same point yet more explicitly. He testified that under the FAA, "Federal courts are given jurisdiction to enforce [arbitration] agreements *whenever ... they would normally have jurisdiction of a controversy between the parties*." Immediately following, he said that "such enforcement" includes the power to appoint arbitrators under Section 5, which, of course, lacks Section 4's "save for" language.. And he then proceeded to discuss the FAA's other sections, all without suggesting that their jurisdictional requirements were any different.

Together, this history reinforces the interpretation of the statute that I would adopt. It suggests that Congress intended a single approach for determining jurisdiction of the FAA's interrelated enforcement mechanisms, not one approach for the mechanism provided in Section 4 and a different approach for the mechanisms provided in all other sections.

* * *

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." *Abramski v. United States*, 573 U.S. 169 (2014). Rather, we should interpret those words "with reference to the statutory context, structure, history and purpose[,] ... not to mention common sense." . (internal quotation marks omitted). 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.

Insert – Chapter 10.D. Colliding Federal Statutes

Epic Systems v. Lewis, 538 U.S. - 138 S. Ct. 1612 (2018)

Justice GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. . . .

[The question before the Court focuses on the validity of class action waivers in employment contracts. The National Labor Relation Act (NLRA) protects "concerted activity," and the Court was asked whether "concerted activity" under the NLRA includes the availability of class actions. In 2012, a panel of the National Labor Relations Board (NLRB) ruled that class procedures constituted protected concerted activities in *D.R. Horton v. NLRB*. The Circuits have since split on whether the NLRB opinion is consistent with the FAA].

II

The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. . . .

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law ... for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings. . . .

The [savings] clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.' At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. . . .Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. But *Concepcion* 's essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by

mandating classwide arbitration procedures without the parties' consent. . . .Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. The intention must be "clear and manifest." And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities fo*r the purpose of collective bargaining or *other mutual aid* or protection. (emphasis added by editor)
.
From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Rule 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. And while some forms of group litigation existed even in 1935, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of ... other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist [ing] labor organizations," and "bargain[ing] collectively." And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "embrace only objects similar in nature to those objects enumerated by the preceding specific words." All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." . . .

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, explains employees' and employers' obligation to bargain collectively, and conscribes certain labor organization practices. The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, and strikes. It even sets rules for adjudicatory proceedings under the NLRA itself. Many of these provisions were part of the original NLRA in 1935, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. . . . The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." But of course the NLRA doesn't say even that much. . . . .

Consider a few examples. In *Italian Colors,* this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made "no mention of class actions" and was adopted before Rule 23 introduced its exception to the "usual rule" of "individual" dispute resolution. In *Gilmer,* this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though" the Age Discrimination in Employment Act "expressly permitted collective legal actions." And in *CompuCredit,* this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a "right to sue," "repeated[ly]" used the words "action" and "court" and "class action," and even declared "[a]ny waiver" of the rights it provided to be "void." If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court's cases interpreting Section 7 itself. But, as it turns out, this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration

proceedings. . .

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. But even under *Chevron* 's terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron* 's essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively " 'bootstrap[ping] itself into an area in which it has no jurisdiction.'" All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment.

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." . . . Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage." . . .

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. . . .
So ordered.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA). Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone [under the NLRA]? The answer should be a resounding "No." . . .

Relevant here, § 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§

7].” § 158(a)(1). To oversee the Act’s guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer “labor policy for the Nation.” . . .

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. For decades, federal courts have endorsed the Board’s view, comprehending that “the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7.”

In face of the NLRA’s text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court’s reasons for diminishing § 7 should carry the day.

The Court relies principally on the *ejusdem generis* canon. . . . The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. Courts must take care, however, not to deploy the canon to undermine Congress’ efforts to draft encompassing legislation. Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i.e.,* to “protec[t] the exercise by workers of full freedom of association.” . . .

When Congress enacted the NLRA in 1935, the only § 7 activity Congress addressed with any specificity was employees’ selection of collective-bargaining representatives. The Act did not offer “specific guidance” about employees’ rights to “form, join, or assist labor organizations.” Nor did it set forth “specific guidance” for any activity falling within § 7’s “other concerted activities” clause. The only provision that touched upon an activity falling within that clause stated: “Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.” That provision hardly offered “specific guidance” regarding employees’ right to strike. . . .

Because I would hold that employees’ § 7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* “waivers,” are unlawful. As earlier recounted § 8(a)(1) makes it an “unfair labor practice” for an employer to “interfere with, restrain, or coerce” employees in the exercise of their § 7 rights. Beyond genuine dispute, an employer “interfere[s] with” and “restrain[s]” employees in the exercise of their § 7 rights by mandating that they prospectively renounce those rights in individual employment agreements. The law could hardly be otherwise: Employees’ rights to band together to meet their employers’ superior strength would be worth precious little if employers could condition employment on workers signing away those rights. Properly assessed, then, the “waivers” rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. . . .

Through the Arbitration Act, Congress sought “to make arbitration agreements as enforceable as other contracts, but not more so.”. Congress thus provided in § 2 of the FAA that the terms of a written arbitration agreement “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*.” Pursuant to this “saving clause,” arbitration agreements and terms may be invalidated based on “generally applicable contract defenses, such as fraud, duress, or unconscionability.”

Illegality is a traditional, generally applicable contract defense. “[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract.” For the reasons stated *supra*, I would hold that the arbitration agreements’ employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA’s saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy. . .

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment.

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. The statutes the Court cites, however, are of recent vintage. Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. The Congress that drafted the NLRA in 1935 was scarcely on similar alert. . . .

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.

Insert Chapter 10 Class Arbitration – replace *Stolt-Nielson*

LAMPS PLUS, INC., et al., v. VARELA, 139 S.Ct. 1407 (2019)

Chief Justice ROBERTS delivered the opinion of the Court.

The Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms. See 9 U.S.C. § 2. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), we held that a court may not compel arbitration on a classwide basis when an agreement is "silent" on the availability of such arbitration. Because class arbitration fundamentally changes the nature of the "traditional individualized arbitration" envisioned by the FAA, *Epic Systems Corp.* v. *Lewis*, 584 U.S. ——, (2018), "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,". We now consider whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather "ambiguous" about the availability of such arbitration.

I

Petitioner Lamps Plus is a company that sells light fixtures and related products. In 2016, a hacker impersonating a company official tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 other employees. Soon after, a fraudulent federal income tax return was filed in the name of Frank Varela, a Lamps Plus employee and respondent here.

Like most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. But after the data breach, he sued Lamps Plus in Federal District Court in California, bringing state and federal claims on behalf of a putative class of employees whose tax information had been compromised. Lamps Plus moved to compel arbitration on an individual rather than classwide basis, and to dismiss the lawsuit. In a single order, the District Court granted the motion to compel arbitration and dismissed Varela's claims without prejudice. But the court rejected Lamps Plus's request for individual arbitration, instead authorizing arbitration on a classwide basis. Lamps Plus appealed the order, arguing that the court erred by compelling class arbitration.

The Ninth Circuit affirmed. The court acknowledged that *Stolt-Nielsen* prohibits forcing a party "to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" and that Varela's agreement "include[d] no express mention of class proceedings.". But that did not end the inquiry, the court reasoned, because the fact that the agreement "does not expressly refer to class arbitration is not the 'silence' contemplated in *Stolt-Nielsen*." In *Stolt-Nielsen*, the parties had *stipulated* that their agreement was silent about class arbitration. Because there was no such stipulation here, the court concluded that *Stolt-Nielsen* was not controlling.

The Ninth Circuit then determined that the agreement was ambiguous on the issue of class arbitration. […] The Ninth Circuit followed California law to construe the ambiguity against the drafter, a rule that "applies with peculiar force in the case of a contract of adhesion" such as this. […]Because Lamps Plus had drafted the agreement, the court adopted Varela's interpretation authorizing class arbitration. Judge Fernandez dissented. In his view, the agreement was not ambiguous, and the majority's holding was a "palpable evasion of *Stolt-Nielsen*." [….]

II

[Varela had argued that SCOTUS did not have jurisdiction to hear an appeal because Lamps Plus had been ordered to arbitration. The Court found, however, that since shifting from individual for class arbitration is a "fundamental" change that Lamps Plus did have the grounds to appeal.]

III

A

[We] face the question whether, consistent with the FAA, an ambiguous agreement can provide the necessary "contractual basis" for compelling class arbitration. We hold that it cannot—a conclusion that follows directly from our decision in *Stolt-Nielsen*. Class arbitration is not only markedly different from the "traditional individualized arbitration" contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration. The statute therefore requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis.

[The Court emphasizes that arbitration is a matter of consent between the parties.]

A

In carrying out that responsibility, it is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. *Epic Systems*, 138 S.Ct., at 1622. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.". […]

Because of these "crucial differences" between individual and class arbitration, *Stolt-Nielsen* explained that there is "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration." And for that reason, we held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party *agreed* to do so." Silence is not enough; the "FAA requires more."

Our reasoning in *Stolt-Nielsen* controls the question we face today. Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to "sacrifice[ ] the principal advantage of arbitration." *Concepcion*, 563 U.S. at 348.

[….]

B

The Ninth Circuit reached a contrary conclusion based on California's rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*. […] Although the rule enjoys a place in every hornbook and treatise on contracts, we noted in a recent FAA case that "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. ——, 136 S.Ct. 463 (2015). This case brings those limits into focus.

[19]Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties. When a contract is ambiguous, *contra proferentem* provides a default rule based on public policy considerations; "it can scarcely be said to be designed to ascertain the meanings attached by the parties." 2 Farnsworth, Contracts § 7.11. Like the contract rule preferring interpretations that favor the public interest, see *id.,* at 304, *contra proferentem* seeks ends other than the intent of the parties.

"[C]lass arbitration, to the extent it is manufactured by [state law] rather than consen[t], is inconsistent with the FAA." *Concepcion*, 563 U.S. at 348. We recently reiterated that courts may not rely on state contract principles to "reshape traditional individualized arbitration by mandating classwide arbitration

procedures without the parties' consent." *Epic Systems*, 138 S.Ct., at 1623. […].

Varela and Justice KAGAN defend application of the rule on the basis that it is nondiscriminatory. It does not conflict with the FAA, they argue, because it is a neutral rule that gives equal treatment to arbitration agreements and other contracts alike. We have explained, however, that such an equal treatment principle cannot save from preemption general rules "that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.' "

[….]

Our opinion today is far from the watershed Justice KAGAN claims it to be. Rather, it is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements. For example, we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration. See, *e.g., Mitsubishi Motors Corp.*, 473 U.S. at 626; *Moses H. Cone Memorial Hospital*, 460 U.S. 1, 24–25 (1983). In those cases, we did not seek to resolve the ambiguity by asking who drafted the agreement. Instead, we held that the FAA itself provided the rule. As in those cases, the FAA provides the default rule for resolving ambiguity here.

* * *

Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. The doctrine of *contra proferentem* cannot substitute for the requisite affirmative "contractual basis for concluding that the part[ies] *agreed* to [class arbitration]." *Stolt-Nielsen*, 559 U.S. at 684.

We reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion. It is so ordered.

Justice THOMAS, concurring.

As our precedents make clear and the Court acknowledges, the Federal Arbitration Act (FAA) requires federal courts to enforce arbitration agreements "just as they would ordinary contracts: in accordance with their terms." […]

I remain skeptical of this Court's implied pre-emption precedents […], but I join the opinion of the Court because it correctly applies our FAA precedents, see *Epic Systems Corp.* v. *Lewis*, 138 S.Ct. 1612 (2018); *Concepcion*, *supra*.

Justice GINSBURG, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

Joining Justice KAGAN's dissenting opinion in full, I write separately to emphasize once again how treacherously the Court has strayed from the principle that "arbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A., supra*. […] Propelled by the Court's decisions, mandatory arbitration clauses in employment and consumer contracts have proliferated.

[T]he Court has hobbled the capacity of employees and consumers to band together in a judicial or arbitral forum. See *Epic*, *supra* (GINSBURG, J., dissenting) (noting Court decisions enforcing class-action waivers imposed by the party in command, who wants no collective proceedings). The Court has pursued this course even though "neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself." *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 362 (2011) (BREYER, J., dissenting).

[Ginsburg discusses some recent developments states and companies have made to "ameliorate some of the harm this Court's decisions have occasioned." These include no lingering requiring arbitration of

sexual harassment claims or provide state law protections to bring those cases to court.]

Notwithstanding recent steps to counter the Court's current jurisprudence, mandatory individual arbitration continues to thwart "effective access to justice" for those encountering diverse violations of their legal rights. *DIRECTV*, 136 S.Ct., at 471 (GINSBURG, J., dissenting). The Court, paradoxically reciting the mantra that "[c]onsent is essential," has facilitated companies' efforts to deny employees and consumers the "important right" to sue in court, and to do so collectively, by inserting solo-arbitration-only clauses that parties lacking bargaining clout cannot remove. [….]

Justice BREYER, dissenting.

[Justice Breyer believed the court lacked jurisdiction to hear the claim. He discusses §16 in some detail, noting interlocutory appeals are given for denial of arbitration.]

The point, however, is that the appellate scheme of the FAA reflects Congress' policy decision that, if a district court determines that arbitration of a claim is called for, there should be no appellate interference with the arbitral process unless and until that process has run its course.

With § 16's structure, and Congress' policy in mind, we can turn to the facts of this case.

[….]When Lamps Plus responded to Varela's lawsuit by seeking a motion to compel arbitration, and the District Court granted that motion, this case fell neatly into § 16(b)'s description of unappealable district court orders under the FAA. The parties were obligated by the FAA to arbitrate their dispute without the expense and delay of further litigation. If, after arbitration, the parties were dissatisfied with the award or with the District Court's arbitration related decisions, § 16(a) of the FAA provides for an appeal at that later date. See §§ 16(a)(1)(D)–(E) (permitting appeals of orders confirming, modifying, or vacating an award); see also § 16(a)(3) (permitting appeal of "a final decision with respect to an arbitration"). But, in the interim, § 16(b) deprived the Court of Appeals of jurisdiction to hear any such complaint. See §§ 16(b)(1)–(4). I recognize that Lamps Plus is dissatisfied with the arbitration that the District Court ordered here. But the District Court's order nonetheless granted the motion compelling arbitration, leaving Lamps Plus to bring its claim to an appellate court only after the arbitration is completed. See § 16(b)(2). I believe we should enforce the statutory provisions that lead to this conclusion.

[….] We held in *Stolt-Nielsen* that a party may not be compelled to "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." We did *not* hold that class arbitration is not arbitration at all. And because class arbitration *is* arbitration, the District Court's interpretation of Lamps Plus and Varela's arbitration agreement to permit class arbitration could not create appellate jurisdiction over the District Court order compelling the parties to arbitrate their dispute. See 9 U.S.C. §16(b)(2) (prohibiting interlocutory appeals of district court orders "directing arbitration to proceed").

Nor did we hold in *Stolt-Nielsen* (or anywhere else) that § 16 of the FAA permits appeals of interlocutory orders directing arbitration to proceed, so long as the order incorporates some ruling that one party dislikes. If that were the rule, then §16's limitations on appellate jurisdiction would be near meaningless. […]

Consequently, I would hold that we lack jurisdiction over this case. But because the Court accepts jurisdiction and decides the substantive legal question before us, I shall do the same. And in respect to that question I agree with Justice GINSBURG and Justice KAGAN, and I join their dissents.

Justice SOTOMAYOR, dissenting.

I join Justice GINSBURG's dissent in full and Part II of Justice KAGAN's dissent. This Court went wrong years ago in concluding that a "shift from bilateral arbitration to class-action arbitration" imposes such "fundamental changes," *Stolt-Nielsen S.A., supra*, that class-action arbitration "is not arbitration as

envisioned by the" Federal Arbitration Act (FAA), *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). See, *e.g., id.*, at 362–365 (BREYER, J., dissenting). A class action is simply "a procedural device" that allows multiple plaintiffs to aggregate their claims, 1 W. Rubenstein, Newberg on Class Actions § 1:1 (5th ed. 2011), "[f]or convenience ... and to prevent a failure of justice," *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). Where, as here, an employment agreement provides for arbitration as a forum for all disputes relating to a person's employment and the rules of that forum allow for class actions, an employee who signs an arbitration agreement should not be expected to realize that she is giving up access to that procedural device.

In any event, as Justice KAGAN explains, the employment contract that Frank Varela signed went further. It states that "'any and all disputes, claims or controversies arising out of or relating to[ ] the employment relationship between the parties[ ] shall be resolved by final and binding arbitration.' " It adds that Varela and Lamps Plus "consent to the resolution by arbitration of all claims that may hereafter arise in connection with [Varela's] employment." And it provides for arbitration " 'in accordance with' " the rules of the arbitral forum, which in turn allow for class arbitration. That is enough to persuade me that the contract was at least ambiguous as to whether Varela in fact agreed that no class-action procedures would be available in arbitration if he and his co-workers all suffered the same harm "relating to" and "in connection with" their "employment." And the court below was correct to turn to state law to resolve the ambiguity.

The Court today reads the FAA to pre-empt the neutral principle of state contract law on which the court below relied. I cannot agree. I also note that the majority reaches its holding without actually agreeing that the contract is ambiguous. See *ante,* ("[W]e defer to the Ninth Circuit's interpretation and application of state law"). The concurrence, meanwhile, offers reasons to conclude that the contract unambiguously precludes class arbitration, which would avoid the need to displace state law at all. This Court normally acts with great solicitude when it comes to the possible pre-emption of state law, but the majority today invades California contract law without pausing to address whether its incursion is necessary. Such haste is as ill advised as the new federal common law of arbitration contracts it has begotten.

Justice KAGAN, with whom Justice GINSBURG and Justice BREYER join, and with whom Justice SOTOMAYOR joins as to Part II, dissenting.

The Federal Arbitration Act (FAA or Act) requires courts to enforce arbitration agreements according to their terms. But the Act does not federalize basic contract law. Under the FAA, state law governs the interpretation of arbitration agreements, so long as that law treats other types of contracts in the same way. See *DIRECTV, Inc.* v. *Imburgia*, 136 S.Ct. 463 (2015). That well-established principle ought to resolve this case against Lamps Plus's request for individual arbitration. In my view, the arbitration agreement Lamps Plus wrote is best understood to authorize arbitration on a classwide basis. But even if the Court is right to view the agreement as ambiguous, a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter—and so likewise permits a class proceeding here. The majority can reach the opposite conclusion only by insisting that the FAA trumps that neutral state rule whenever its application would result in class arbitration. That holding has no basis in the Act—or in any of our decisions relating to it (including the heavily relied-on *Stolt-Nielsen*). Today's opinion is rooted instead in the majority's belief that class arbitration "undermine[s] the central benefits of arbitration itself." But that policy view—of a piece with the majority's ideas about class litigation—cannot justify displacing generally applicable state law about how to interpret ambiguous contracts. I respectfully dissent.

[Justice Kagan looks at the actual arbitration agreement between Varela and Lamps Plus in great depth. She notes the agreement refers to arbitration providers' rules and that those rules allow for class arbitration. She also gives a reading of the language that allows for classwide arbitration.]

Under California law (which applies unless preempted) the answer is clear: The agreement must be read to authorize class arbitration. That is because California—like every other State in the country—applies a default rule construing "ambiguities" in contracts "against their drafters." […]And the rule makes quick

work of interpreting the arbitration agreement here. Lamps Plus drafted the agreement. It therefore had the opportunity to insert language expressly barring class arbitration if that was what it wanted. It did not do so. It instead (at best) left an ambiguity about the availability of class arbitration. So California law holds that Lamps Plus cannot now claim the benefit of the doubt as to the agreement's meaning. Even the majority does not dispute that point.

And contrary to the rest of the majority's opinion,[3] the FAA contemplates that such a state contract rule will control the interpretation of arbitration agreements. Under the FAA, courts must "enforce arbitration agreements according to their terms." *Epic Systems Corp.* v. *Lewis*, 138 S.Ct. 1612 (2018); 9 U.S.C. § 4 (requiring that "arbitration proceed in the manner provided for in such agreement"). But the construction of those contractual terms (save for in limited circumstances, addressed below) is "a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). The Court has made that crucial point many times. Nothing in the FAA (as contrasted to today's majority opinion) "purports to alter background principles of state contract law regarding" the scope or content of agreements. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, (2009). Or again: When ruling on an arbitration agreement's meaning, courts "should apply ordinary state-law principles." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Or yet again: The interpretation of such an agreement is "a matter of state law to which we defer." *DIRECTV, Inc.*, *supra*. In short, the FAA does not federalize contract law.

Except when state contract law discriminates against arbitration agreements. As this Court has explained, the FAA came about because courts had shown themselves "unduly hostile to arbitration." *Epic Systems*. To remedy that problem, Congress built an "equal-treatment principle" into the Act, requiring courts to "place arbitration agreements on an equal footing with other contracts." *Kindred Nursing Centers L. P.* v. *Clark*, 137 S.Ct. 1421 (2017); see 9 U.S.C. § 2 (making arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). So any state rule treating arbitration agreements worse than other contracts "stand[s] as an obstacle" to achieving the Act's purposes—and is preempted. *Concepcion*. That means the FAA displaces any state rule discriminating on its face against arbitration. And the Act likewise preempts any more subtle law "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S.Ct., at 1426. What matters, as this Court reiterated last Term, is whether the state law in question "target[s]" arbitration agreements, blatantly or covertly, for substandard treatment. *Epic Systems*, 138 S.Ct., at 1622. When the law does so, it cannot operate; when, conversely, it treats arbitration agreements the same as all other contracts, the FAA leaves it alone.

Here, California's anti-drafter rule is as even-handed as contract rules come. It does not apply only to arbitration contracts. Nor does it apply (as the rule we rejected in *Concepcion* did) only a tad more broadly to "dispute-resolution contracts," pertaining to both arbitration and litigation. *Id.* (holding that a ban on collective-action waivers in those contracts worked to "disfavor[ ] arbitration"). Instead, the anti-drafter rule, as even the majority admits, applies to every conceivable type of contract—and treats each identically to all others. […] And contrary to what the majority is left to insist, the rule does not "target arbitration" by "interfer[ing] with [one of its] fundamental attributes"—*i.e.,* its supposed individualized nature. The anti-drafter rule (again, quite unlike *Concepcion*'s ban on class-action waivers) takes no side —favors no outcome—as between class and individualized dispute resolution. All the anti-drafter rule asks about is who wrote the contract. So if, for example, Varela had drafted the agreement here, the rule would have prevented, rather than permitted, class arbitration. Small wonder, then, that this Court has itself used the anti-drafter canon to interpret an arbitration agreement. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (construing an ambiguous arbitration agreement against the drafter's interest). In that case (as properly in any other), the rule's through-and-through neutrality made preemption unthinkable.[6]

So this case should come out Varela's way even if the agreement is ambiguous. To repeat the simple logic applicable here: Under the FAA, state law controls the interpretation of arbitration agreements unless that law discriminates against arbitration; the anti-drafter default rule is subject to no such objection; the rule therefore compels this Court to hold that the agreement here authorizes class arbitration. That the majority

thinks the contract, as so read, seriously disadvantages Lamps Plus is of no moment (any more than if state law had instead construed the contract to produce adverse consequences for Varela). The FAA was enacted to protect against judicial hostility toward arbitration agreements. But the Act provides no warrant for courts to disregard neutral state law in service of ensuring that those agreements give defendants the best terms possible. Or said otherwise: Nothing in the FAA shields a contracting party, operating against the backdrop of impartial state law, from the consequences of its own drafting decisions. How, then, could the majority go so wrong?

Stolt-Nielsen offers the majority no excuse: Far from "control[ling]" this case, that decision addressed a different situation—and explicitly reserved decision of the question here. In *Stolt-Nielsen*, the contracting parties entered into a formal stipulation that "they had not reached any agreement on the issue of class arbitration." The case thus involved not the mere absence of express language about class arbitration, but a joint avowal that the parties had never resolved the issue. Facing that oddity, an arbitral panel compelled class arbitration based solely on its "own conception of sound policy." *Id.,* at 676 ("[T]he panel did [nothing] other than impose its own policy preference"). This Court rejected the panel's decision for that reason, holding that a party need not "submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* But the Court went no further. In particular, it did not resolve cases like this one, where a neutral interpretive rule (even if not an express term) enables an adjudicator to determine a contract's meaning. To the contrary, the Court disclaimed any view on that question. Yes, the Court held, "*a* contractual basis" was needed for class arbitration. But given the panel's reliance on policy alone, the Court explained that it had "no occasion to decide *what* contractual basis" was required. *Id.,*; see *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) ("We overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked *any* contractual basis for ordering class procedures," not because it relied on an inadequate one).

Indeed, parts of *Stolt-Nielsen*—as well as later decisions—indicate that applying the anti-drafter rule to ambiguous language provides a sufficient contractual basis for class arbitration. In *Stolt-Nielsen*, we faulted the arbitrators for failing to inquire whether the relevant law "contain[ed] a default rule" that would construe an arbitration clause "as allowing class arbitration in the absence of express consent." We thus implied that such a default rule—like the anti-drafter canon here—can operate to authorize class arbitration when an agreement's language is ambiguous. And that is just how *Concepcion* (the other decision the majority relies on, understood *Stolt-Nielsen*'s reasoning. Said *Concepcion*: We held in *Stolt-Nielsen* "that an arbitration panel exceeded its power [by] imposing class procedures based on policy judgments rather than the arbitration agreement itself *or* some background principle of contract law that would affect its interpretation." 563 U.S. at 347; see *Oxford Health,* 569 U.S. at 571 (similarly noting that *Stolt-Nielsen* criticized the arbitrators for failing to consider whether a "default rule" resolved the class arbitration question (internal quotation marks omitted)). The Court has thus (rightly) viewed the use of default rules as a run-of-the-mill aspect of contract interpretation, which (so long as neutrally applied) can support class arbitration.

[….]

[T]he FAA does not empower a court to halt the operation of such a garden-variety principle of state law. Nothing in the Act's text requires the displacement of state contract rules, as the majority implicitly concedes. Nor do the Act's purposes, so long as the state rule (as is true here) extends to all contracts alike, without disfavoring arbitration. The idea that the FAA blocks a state rule satisfying that standard because (a court finds) the rule has too much "public policy" in it comes only from the majority's collective mind. That approach disrespects the preeminent role of the States in designing and enforcing contract rules. It discards a universally accepted principle of contract interpretation in favor of unsupported assertions about what the parties must have (or could not possibly have) consented to. It subordinates authoritative state law to (at most) the impalpable emanations of federal policy, impossible to see except in just the right light. For that reason, it would never have graced the pages of the U.S. Reports save that this case involves ... class proceedings.

The heart of the majority's opinion lies in its cataloging of class arbitration's many sins. In that respect,

the opinion comes from the same place as (though goes a step beyond) this Court's prior arbitration decisions. See, *e.g.,* *Concepcion*, 563 U.S. at 350 (lamenting that class arbitration "greatly increases risks to defendants" by "aggregat[ing] and decid[ing] at once" the "damages allegedly owed to tens of thousands of potential claimants"); *Epic Systems*, 138 S.Ct., at 1646 (similarly bemoaning the greater costs and complexity of class proceedings). The opinion likewise has more than a little in common with this Court's efforts to pare back class litigation. See, *e.g.,* *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In this case, the result is to disregard the actual contract the parties signed. And to dismiss the neutral and commonplace default rule that would construe that contract against the drafting party. No matter what either requires, the majority will prohibit class arbitration. Does that approach remind you of anything? It should. Here (again) is *Stolt-Nielsen* as *Concepcion* described it: The panel exceeded its authority by "imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation." Substitute "foreclosing" for "imposing" and that is what the Court today has done. It should instead—as the FAA contemplates—have left the parties' agreement, as construed by state law, alone.

Insert Chapter 10 ***Intersection of FAA and State Private Attorney General Action Laws***

Viking River Cruises v. Moriana, 596 U.S. _ , 142 S.Ct. 734 (2021)

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 ***1914** 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.

California law characterizes PAGA as creating a "type of *qui tam* action,"[1] *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 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," 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.

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. The primary function of PAGA is to delegate a power to employees to assert "the same legal right and interest as state law enforcement agencies." 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. 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*, 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. 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."

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. 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 (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 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," 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.

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, 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. 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 (2011); *Epic Systems Corp.* v. *Lewis*, 138 S.Ct. 1612 (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 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 (2017). 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.' ".

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*, 139 S.Ct. 1407 (2019). 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*, 138 S.Ct., at 1623. 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.'".

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." 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. 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."

We disagree with both characterizations of the statute. Moriana is correct that the FAA does not require courts to enforce contractual waivers of substantive rights and remedies. The FAA's mandate is to enforce "*arbitration agreements*." 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." 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.

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."

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 (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, "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. 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 (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. This obviates the need to consider adequacy of representation, numerosity, commonality, or 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. 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." 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*, 138 S.Ct., at 1622–1624; see also *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *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. 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. 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."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." 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*, 138 S.Ct., at 1632; see also *Italian Colors*, 570 U.S., at 238; *Concepcion*, 563 U.S. at 347–349; *Stolt-Nielsen*, 559 U.S. at 685–686 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*, 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 ***1923** 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.

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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*, 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. 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 (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*, 139 S.Ct., at 1416.

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 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. 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 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (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. 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. See *Lamps Plus*, 139 S.Ct., at 1415–1416; *Epic Systems*, 138 S.Ct., at 1621–1624; *Concepcion*, 563 U.S. at 347; *Stolt-Nielsen*, 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*, 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. The absence of "multilayered review" in arbitral proceedings "makes it more likely that errors will go uncorrected." . And suits featuring a vast number of claims entail the same "risk of 'in terrorem' settlements that class actions entail.". 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. 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 ***1925** 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." 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). 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." 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. . 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 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems Corp.* v. *Lewis*, 584 U.S. , (2018); *Lamps Plus, Inc.* v. *Varela*, 587 U.S. —, (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 (1995) (THOMAS, J., dissenting); see also *Kindred Nursing Centers L. P.* v. *Clark*, 581 U.S. 246 (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.

ARBITRATION LAW, POLICY, AND PRACTICE (2022 Supplement to Appendix A)

Weston, Blankley, Gross & Huber

UNITED STATES SUPREME COURT COMMERCIAL ARBITRATION DECISIONS[1]

	NAME/DATE	SUBJECT(S)	SUMMARY
1.	Wilko v. Swan, 346 US 427 (1953)	Arbitrability of Statutory Claims	Judicial "hostility" to arbitration
2.	Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)	Separability Doctrine	
3.	Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968)	Arbitrator Neutrality	
4.	Alexander v. Gardner-Denver (1974) 94 S.Ct. 1011.	Application of external law in arbitration. Title VII	Limited by *Gilmer* & *BG Group* (below)
5.	Scherk v. Albert-Culver Co, 417 U.S. 506 (1974)	Arbitrability of statutory claims	
6.	Barrentine v. Arkansas-Best (1981) 101 S.Ct. 1437	Application of external law in arbitration. Limited by *Gilmer*.	*Gardner-Denver* applied to case under FLSA
7.	Moses Cohn v. Mercury Const. Corp., 460 US 1, 24 (1983)	Presumption of arbitrability	Instructing courts to presume a dispute is arbitrability
8.	Southland Corporation v. Keating (1984) 465 U.S 1.	Preemption.	
9.	Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,(1985). 473 U.S. 614	Arbitrability.	
10.	*Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S 213 (1985)	Arbitrable and nonarbitrable claims	
11.	*AT&T Technologies v. CWA*, 106 S.Ct. 1415 (1986)	Arbitrability	
12.	**Shearson/American Express, Inc. v. McMahan,** 482 U.S. 220 (1987)		

13.	***Perry v. Thomas (US 1987)***.	Preemption.	Judicial forum wage claims.
14.	***United Paperworkers v. Misco*** *(1987) 108 S.Ct 364*	Judicial Review.	Labor arbitration will be upheld as long as it draws its essence from CBA and not arbitrator's own brand of industrial justice
15.	Rodruiquez de Quijas v. Shearson//American Express, Inc. 490 U.S. 477 (1989)		
16.	***Volt Information Sciences, Inc. v. Stanford*** (1989) 109 S.Ct. 1248.	Preemption.	
17.	***Gilmer v. Interstate/ Johnson Lane Corp,*** 500 U.S. 20 (1991) .	Application of external law in arbitration ADEA Limits *Gardner-Denver, Barrentine, McDonald.*	
18.	***Mastrobuono v. Shearson*** Lehman Hutton, Inc. , 514 U.S. 62 (1995)	Punitive Damages.	
19.	Allied Bruce Terminex Co. v Dobson , 513 U.S. 265 (1995)	Preemption	FAA reach of interstate commerce
20.	First Options of Chicago v. Kaplan, 514 U.S. 538 (1995)	Arbitrability	Arbitrability -
21.	Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996)	Preemption	
22.	***Wright v. Universal Maritime*** (1998) 525 U.S. 70.	Arbitration and Collective Bargaining	
23.	***Cortez Byrd v. Harbert Construction Company*** (2000) 529 U.S. 193.	Venue for action to confirm, vacate, or modify.	
24.	***Eastern Assoc. Coal v. United Mine Workers of America*** (2000) 531 U.S. 57	Judicial review.	Public Policy
25.	***Green Tree v. Randolph*** (2000) 531 U.S. 79	Finality Appeal Attorney fees and costs	
26.	***C & L Ent. Inc v. Potawatomi Indian Tribe*** (2001) 121 S.Ct. 1589	Arbitration and sovereign immunity	

27.	***Circuit City v. Adams*** (2001) 532 U.S. 105	Application of FAA to employment contracts. FAA § 1 exemption.	
28.	***Major League Baseball Players Association v. Garvey*** (2001) 121 S.Ct. 1724.	Judicial review of arbitration awards.	
29.	***EEOC v. Waffle*** **House, Inc**. 122 S.Ct. 754 (2002)	Arbitration as the Exclusive Forum	Federal Administrative Agency
30.	***Howsam v. Dean Witter Reynolds***, 537 U.S. 79 (2002)	Arbitrability Deferral to arbitrator	
31.	***Green Tree Financial Corp. v. Bazzle***, 123 S. Ct. 2402 (2003)	Class action silence	
32.	***Pacificare Health Systems, Inc. v. Book,*** 538 U.S. 401 (2003)	Punitive damages	
33.	***Citizens Bank v. Alfabco, Inc.***, 123 S.Ct. 2037 (2003)	Interstate Commerce under FAA	
34.	**Hall Street Associates, L.L.C. v. Mattel, Inc.,** 552 U.S. 576 (2008).	FAA 10 Vacatur	
35	Preston v. Ferrer, 552 U.S. 346, 359 (2008)	Preemption	State Administrative Procedures
36.	Vaden v. Discover Bank, 556 U.S. 49 (2009) (5-4).	Federal Court Jurisdiction	
37.	Arthur Anderson LLP v. Carlisle, 129 US. 1896 (2009)		
38.	*Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 **(2010)**	Arbitration Agreements	
39.	***Granite Rock v. Int'l Teamsters,*** 561 US 287 (2010)	**Arbitrability**	
40.	*Stolt-Nielsen SA v. Animal Feeds Int'l Corp.*, 130 S.Ct.1758 (2010)	**Class Arbitration.**	
41.	***KPMG LLP v. Cocci***, 132 S.Ct. 23 (2011)	Arbitrability	

42.	***AT&T Mobility v. Concepcion,*** 131 S.Ct. 1740 (April 27, US 2011)	Preemption	
43.	***CompuCredit Corp. v. Greenwood,*** 132 S.Ct. 665 (2012)		
44.	***Marmet Health Care Center, Inc. v. Brown*****,** 132 S.Ct. 1201 (2012)	Preemption	
45.	***Nitro-Lift Technologies, LLC v. Howard*****,** 568 U.S. – (2012)		
46.	**American Exp. Co. v. Italian Colors Restaurant,** 133 S.Ct. 2304 (2013)	Vindication of Rights	
47.	*Oxford Health Plans, LLC v. Sutter***,** 569 U.S. -- , 133 S.Ct. 2064 (2013)		
48.	DirectTV, Inc. v. Imburgia, 577 U.S. -- (Dec. 2015)	Preemption	
49.	*BG Group PLC v. Republic of Argentina,* - U.S. -- , 2014 WL 838424 (2014)	Deference to arbitrator	
50.	Kindred Nursing Centers LLP v. Clark, 581 U.S. – , 137 S. Ct. 1421 (2017)	Preemption	

51.	Epic Systems, Corp. v. Lewis, 583 U.S -, 138 S. Ct. 1612 (2018)	NLRA v. FAA Ch 3.D(4); CH 10	(NLRA does not preclude enforcement of FAA mandate to enforce arbitration contracts according to terms)
52.	New Prime Inc. v. Oliveira, 586 U.S. –, 139 S.Ct. 532 (2019)	Ch 3.D	Sec. 1 exception for employment K for transportation worker apply to independent contractor?
53.	Lamps Plus Inc. v. Varela, 139 SCT 1407 (2019)	Ch 10 Class Arbitration	FAA v. State law contract interpretation of claim aggregation and consent to class arbitration
54.	Henry Schein Inc. v. Archer and White Sales Inc., 139 S.Ct. 524 (2019), 141 S.Ct. 646 (2021) (certiorari dismissed as improvidently granted (DIG)).	Delegation/ Arbitrability Ch 3.C	Whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless."
55.	GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC, 590 U.S. __ (2020)	Ch 12 International Arbitration	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories to those agreements.
56	Southwest Airlines Co. v. Saxon, 596 U.S. – (2022)	Ch 2 Arbitrability	Does ramp supervisor fall within Sec, 1 “transportation worker” exemption; who decides?
57	ZF Automotive US, Inc., v. Luxshare 596 U.S. – (2022)	Ch 12	Whether private commercial arbitration tribunals are a “foreign or international tribunal” under 28 USC § 1782(a).
58	Badgerow v. Walters, et al., 596 U. S. ____ (2022)	Ch 9 Jurisdiction	Federal subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal
59	Morgan v. Sundance, 596 U. S. ____ (2022)	Chapter 4	Waiver and ‘prejudice’”
60	Viking River Cruises v. Moriana, 596 U.S. _ (2022)	Preemption Ch 2, 11	Preemption of state PAGA laws
61			

Legislative: **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021**