ARGUING ARBITRATION WAIVER AFTER *MORGAN V. SUNDANCE*: A PATH TO HOLD DEBT BUYERS ACCOUNTABLE FOR ABUSIVE COLLECTION LITIGATION

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INTRODUCTION

Debt buying, a practice that includes buying and litigating collection actions for profit, is an $18.6 billion per year industry:[1] "one of the biggest industries most Americans have never heard of."[2] Debt buyers, often large corporations, primarily acquire the defaulted credit card debts of lower-income Americans.[3] They then aggressively litigate debt collection claims.[4] Debt buyers are some of the top filers in state courts across the country, which generates "economies of scale to permit the profitable submission of masses of small-dollar cases."[5] The vast majority of collections lawsuits end in default judgments—official court decisions rendered in favor of the debt buyer because consumers fail to appear or challenge the creditor's version of events.[6]

The rate of default judgments in debt collection litigation is higher in majority-Black neighborhoods;[7] in St. Louis, for example, "only about a quarter of the population" lives in mostly-Black neighborhoods, but over half

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[1] CONSUMER FIN. PROT. BUREAU, CFPB ANNUAL REPORT 2022, FAIR DEBT COLLECTION PRACTICES ACT 8 (2022) [hereinafter CFPB ANNUAL REPORT 2022].

[2] HUM. RTS. WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS AND THE POOR 10 (2016) [hereinafter RUBBER STAMP JUSTICE]; *see* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 190-91 n.35 (2014) [hereinafter *Junk Justice*] (citing Walter V. Robinson & Beth Healy, *Regulators, Policy Makers Seldom Intervene*, BOS. GLOBE (Aug. 2, 2006), http://archive.boston.com/news/specials/debt/part4_main (statement of Donald Friedman, Chief Operating Officer of Liberty Point Corp., "[[D]ebt buying] is one of the sexiest, one of the most financially lucrative businesses you can get into.")).

[3] *See* LEGAL AID SOC'Y, NEIGHBORHOOD ECON. DEV. ADVOC. PROJECT, MFY LEGAL SERVS. & URB. JUST. CTR., CMTY. DEV. PROJECT, DEBT DECEPTION: HOW DEBT BUYERS ABUSE THE LEGAL SYSTEM TO PREY ON LOWER-INCOME NEW YORKERS 3 (2010) [hereinafter DEBT DECEPTION] (noting that charged-off credit card debt accounted for roughly 91% of the more than $110 billion in face value in debt purchased by debt buyers by 2005); FED. TRADE COMM'N, THE STRUCTURE AND PRACTICES OF THE DEBT BUYING INDUSTRY 8 (2013) (reporting "credit card debt was by far the most common type of debt" purchased by debt buyers in 2008).

[4] *See* DEBT DECEPTION, *supra* note 3, at 6.

[5] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708 (2022). An economy of scale is "the reduction of production costs that is a result of making and selling goods in large quantities." *Economies of scale*, CAMBRIDGE ENG. BUS. DICTIONARY (11th ed. 2019), https://dictionary.cambridge.org/dictionary/english/economies-of-scale (last visited Nov. 15, 2023).

[6] DEBT DECEPTION, *supra* note 3, at 1 (finding 94.3% of debt buyers' collection lawsuits ended in default judgment in favor of the debt buyer); RUBBER STAMP JUSTICE, *supra* note 2, at 33 ("In a typical court, between 60 and 95 percent of all debt collection lawsuits, including debt buyer cases, end with default judgments in favor of the plaintiffs."); *see also* FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010) [hereinafter REPAIRING A BROKEN SYSTEM].

[7] Neighborhoods are a useful unit of measurement here because in the twentieth century they became "increasingly homogenous across both race and class lines." *See* JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES, 98-99 (2018).

of debt collection judgments "were concentrated in those neighborhoods."[8] Indeed, racial disparities exist at every level of the debt collection process.[9] Debt collection lawsuits are filed at high rates in majority-Black neighborhoods, even where the amounts owed by these debtors are lower than the debts owed by other groups.[10] For instance, in Chicago and Newark, two cities with significant Black populations,[11] the debts that collectors pursued in mostly-Black neighborhoods "were, on average, about 20 to 25 percent smaller than the debts of residents of mostly white ones."[12] One study found that "the counties [in Maryland with the] fewest proportionate shares of [debt-buyer initiated] lawsuits are richer and less diverse than Maryland as a whole."[13]

Several factors contribute to the high default judgment rate.[14] For example, "sewer service" is a pervasive problem where the summons and complaint are not served on the defendant, but a false proof of service is delivered to the court.[15] Consumers also often fear they are being scammed by debt buyers or the collection agencies the buyers contract with because these companies do not match the name of the original creditor.[16] Lastly, debt collectors routinely "contact the wrong consumer or collect for the wrong amount."[17] Since the Consumer Financial Protection Bureau

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[8] Paul Kiel & Annie Waldman, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, PROPUBLICA (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

[9] *See generally* TASHFIA HASAN, KATHERINE LUCAS MCKAY & JOANNA SMITH-RAMANI, FIN. SEC. PROGRAM, ASPEN INST., DISPARITIES IN DEBT: WHY DEBT IS A DRIVER OF THE RACIAL WEALTH GAP 6 (2022) [hereinafter DISPARITIES IN DEBT].

[10] Kiel & Waldman, *supra* note 8.

[11] Current data show 46% of Newark, NJ residents are Black. *Newark, NJ*, CENSUS REP., https://censusreporter.org/profiles/16000US3451000-newark-nj (last visited Nov. 2, 2023). 28% of Chicago, IL residents are Black. *Chicago, IL*, CENSUS REP., https://censusreporter.org/profiles/16000US1714000-chicago-il (last visited Nov. 2, 2023).

[12] Kiel & Waldman, *supra* note 8.

[13] *Junk Justice*, *supra* note 2, at 220-21.

[14] PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 16 (2020).

[15] *E.g.*, Sykes v. Mel Harris & Assocs., LLC, 780 F.3d 70 (2d Cir. 2015) (allowing a class action to proceed alleging "sewer service" in violation of the FDCPA); Benjamin Muller, *Victims of Debt Collection Scheme in New York Win $59 Million in Settlement*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement.html (reporting on the *Sykes* settlement); *see also* REPAIRING A BROKEN SYSTEM, *supra* note 6 at 8, n.22.

[16] Dalié Jiménez, *Dirty Debts Sold Cheap*, 52 HARV. J. ON LEGIS. 41, at 1-2 (explaining how a debt changes hands among multiple entities causing confusion for consumers); *see also* Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91, 91-92 (2017).

[17] CHERYL R. COOPER, CONG. RSCH. SERV., R46477, THE DEBT COLLECTION MARKET AND SELECTED POLICY ISSUES 13 (2021); *e.g.*, RUBBER STAMP JUSTICE, *supra* note 2, at 28 n.61 (highlighting a case in Flint, Michigan where a debt buyer garnished the wages of a woman with the same first and last

("CFPB") began accepting consumers' debt collection complaints in 2013, the most common complaint—over fifty-six percent of total complaints filed with the agency—is that the collector is attempting to collect a debt that the consumer does not actually owe.[18] These "errors" could be remedied, but debt buyers prefer the current regime because default judgments alleviate the need to adjudicate a small-value debt and, often, the judgment amount exceeds the original debt by including interest and attorneys' fees.[19] Further, default judgments allow debt collectors to garnish paychecks and bank accounts and attach property liens—in essence, guaranteeing payment of the judgment.[20]

To understand this scheme's harmful effects on individuals, consider the story of Mr. Clifford Cain Jr. Mr. Cain only learned that he had been sued for outstanding credit card debt after Midland Funding ("Midland"), a subsidiary of Encore Capital Group ("Encore"), garnished $4,500 from his bank account, claiming Mr. Cain owed that amount on an old debt.[21] Encore is the largest debt buyer in the United States, and it primarily sues consumers through its subsidiary, Midland.[22] However, Midland was not licensed to collect debt in Mr. Cain's home state of Maryland.[23] When Mr. Cain tried to sue Midland to reclaim his funds, Midland forced him into arbitration—a form of alternative dispute resolution overseen by a private third party, instead of a judge, where proceedings and decisions are not public—pursuant to the arbitration agreement in the underlying credit card agreement.[24] Mr. Cain could not afford to arbitrate his claim because he lived on a fixed income.[25] "I can't for the life of me understand how this is allowed to happen,"[26] said Mr. Cain, who is not alone in being effectively prevented

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name of the defendant and "the plaintiff's attorney said he could not explain how the mistake had happened").

[18] CFPB ANNUAL REPORT 2022, *supra* note 1, at 15.

[19] PEW CHARITABLE TRS., *supra* note 14, at 17-19.

[20] *Id.* at 17-18; *see, e.g.*, RUBBER STAMP JUSTICE, *supra* note 2, at 14 (reporting that a Michigan court clerk "described debt buyer attorneys bringing in new case filings and wage garnishment requests 'by the box load.'").

[21] Jessica Silver-Greenberg & Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES (Dec. 22, 2015), https://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html.

[22] Paul Kiel, *So Sue Them: What We've Learned About the Debt Collection Lawsuit Machine*, PROPUBLICA (May 5, 2016, 7:57 AM), https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine.

[23] Silver-Greenberg & Corkery, *supra* note 21.

[24] *Id.*

[25] *Id.*; *see generally* Mark Fotohabadi, *How Much Does Arbitration Cost?*, ADR TIMES (June 10, 2022), https://www.adrtimes.com/how-much-does-arbitration-cost (as of June 2022, "arbitrators charge $375 to $1125 an hour, with the midpoint being around $600"). In addition to paying attorneys' fees and filing fees, arbitration requires paying the arbitrator for their time. *See id.*

[26] Silver-Greenberg & Corkery, *supra* note 21.

from holding debt collectors accountable following collection litigation conducted in violation of consumer protection legislation and regulation.[27]

When individuals like Mr. Cain bring claims against a debt buyer for its wrongful collection practice, they typically do so via the Fair Debt Collection Practices Act ("FDCPA").[28] The FDCPA governs debt collection, provides a private right of action for consumers harmed by unlawful collection practices, and anticipates private litigation as its primary enforcement tool.[29] Congress enacted the FDCPA "to eliminate abusive debt collection practices, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[30] The FDCPA targets debt buyers' abusive litigation practices, such as collecting time-barred debt[31] and failing to comply with procedural obligations.[32] Additionally, some debt buyers collect where they are not properly licensed to do so by the state,[33] while others collect where

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[27] *See* REPAIRING A BROKEN SYSTEM, *supra* note 6, at 45 (noting that "consumers should, but generally do not, have a meaningful choice regarding mandatory pre-dispute arbitration provisions in credit card contracts.").

[28] Consumers harmed by wrongful debt collection litigation may also sue under the Fair Credit Reporting Act ("FCRA"), the Telephone Consumer Protection Act ("TCPA"), and state consumer protection laws. *E.g.*, Guthrie v. PHH Mortgage Corp., 79 F.4th 328, 336 (4th Cir. 2023) (appeal of the denial of FCRA, TCPA, and North Carolina Debt Collection Act claims). This Note focuses on the FDCPA because it is the legislation that most specifically addresses debt collection.

[29] Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration*, 24 LOY. CONSUMER L. REV. 586, 601 (2012) (noting that there is no substantial enforcement mechanism for the FDCPA other than private litigation).

[30] 15 U.S.C. § 1692.

[31] 12 C.F.R. § 1006.26(b); Press Release, Office of the New York State Attorney General, AG Schneiderman Obtains Settlement From Major Debt Buyer Who Filed Thousands of Time-Barred Debt Collection Actions (Jan. 9, 2015), https://ag.ny.gov/press-release/2015/ag-schneiderman-obtains-settlement-major-debt-buyer-who-filed-thousands-time ("For years, Encore sued New York consumers and obtained uncontested default judgments against consumers who failed to respond to the lawsuits, even though the underlying claims were untimely under New York law.").

[32] 15 U.S.C. § 1692(g); *see also* Stifler, *supra* note 16, at 100 (highlighting four main abusive practices: "(a) suing with insufficient evidence of debt; (b) collecting time-barred debt; (c) cutting corners in the legal process; and (d) relying on default judgments to win cases."); *Junk Justice*, *supra* note 2, at 191-97.

[33] *E.g.*, Cain v. Midland Funding, LLC, 156 A.3d 807, 810 (Md. 2017); Nepomuceno v. Midland Credit Mgmt., Inc., No. 14-05719, 2017 WL 2267261, at *9 (D.N.J. May 24, 2017).

their claims are time-barred by statutes of limitations[34]—practices in violation of the FDCPA.[35]

Debt buyers have a vested interest in ensuring consumer FDCPA claims fail because their business models rely on mass debt collection litigation.[36] Consumers like Mr. Cain who seek to bring affirmative litigation under the FDCPA often encounter a major roadblock: binding arbitration clauses in underlying credit card agreements.[37] These arbitration clauses typically contain provisions banning class actions, meaning that debtors cannot band together to bring their claims as a class or group in arbitration.[38] Thus, since each individual claim for a violation of the FDCPA is often too small to be worth pursuing, most debtors simply abandon their claims.[39] Additionally, when FDCPA claims are resolved in the secrecy of arbitration, there can be no reassurance in the consistency of the claims' resolution and no doctrinal consumer law development.[40] This stymies the evolution of consumer protection law.[41]

A strategy consumers can employ to overcome an arbitration clause is to argue "arbitration waiver" meaning that the debt buyer waived its right to mandate arbitration—that is, forfeited that right—when it brought the underlying collection claim in court as opposed to in arbitration.[42] Historically, it has been difficult for consumers to succeed with this argument because courts employ arbitration-specific requirements on consumers

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[34] *E.g.*, Spencer v. Midland Funding LLC, No. 3:16-cv-000093, 2016 WL 8677216, at *1 (D. Or. Oct. 21, 2016); Nelson v. Liberty Acquisitions Servicing LLC, 374 P.3d 27, 28 (Utah Ct. App. 2016); *see also* Press Release, Consumer Fin. Prot. Bureau, *CFPB Sues Debt Collectors and Debt Buyers Encore Capital Group*, *Midland Funding, Midland Credit Management, and Asset Acceptance Capital Corp.* (Sept. 8, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-debt-collectors-and-debt-buyers-encore-capital-group-et-al (alleging companies continued to collect on debts time barred by statute of limitations).

[35] 15 U.S.C. § 1692e(10) (prohibiting the "use of any false representation"); 12 C.F.R. § 1006.26(b) (prohibiting the collection of time-barred debt).

[36] *See infra* Part I(A).

[37] Alderman, *supra* note 29, at 589 (noting that "nearly every written agreement between a creditor and a consumer" contains a binding arbitration agreement denying parties from litigating claims in courts).

[38] Ryan Miller, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed after* Concepcion *and* American Express, 32 GEO. J. LEGAL ETHICS 793, 795 (2019) (finding that "the number of businesses in this survey that use binding arbitration agreements with class action waivers has tripled in less than a decade.").

[39] Alderman, *supra* note 29 (arguing that FDCPA claims are "more appropriately handled through a class action" and that arbitration provisions prohibiting class actions (1) will result in individual consumers reaching inconsistent outcomes in arbitration or, more likely, not bringing claims at all and (2) may result in underenforcement or nonenforcement of the FDCPA).

[40] *See* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 419-20 (2016).

[41] *Id.*

[42] *See, e.g.*, Cain v. Midland Funding, LLC, 156 A.3d 807, 812 (Md. 2017).

bringing these claims in light of the "federal policy favoring arbitration."[43] An arbitration-specific requirement is a burden imposed on those arguing that a party waived its right to arbitrate and is not imposed on those arguing that a party waived other contractual terms.[44] For example, some courts place a heavy burden of proof on the party asserting arbitration waiver to show that the debt buyer acted inconsistently with its right to arbitrate.[45] Courts impose this burden on the basis that "waiver of arbitration is not a favored finding, and there is a presumption against it."[46] Accordingly, many consumers fail when they try to argue that a debt buyer waived its right to compel arbitration.[47] As a result of the federal policy favoring arbitration, some courts employ a strong presumption against arbitration waiver[48] or disfavor finding waiver of arbitration altogether.[49] For many years, an arbitration-specific requirement that the consumer show they were prejudiced[50] by the debt buyers' conduct of acting inconsistently with its right to compel arbitration doomed many FDCPA claims into arbitration.[51]

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[43] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (introducing the federal policy favoring arbitration); Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 533-34 (2014) (attributing judicial "arbitration favoritism" to "lower-court misinterpretation of thirty-year-old dicta" from *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*).

[44] *See* Frankel, *supra* note 43, at 531, 563-66 (2014) (outlining the phenomenon of courts treating an arbitration waiver argument differently from a contract waiver argument by imposing additional and more burdensome requirements on parties claiming their opponent waived their right to arbitrate).

[45] *See, e.g.*, Dean v. Biggs & Greenslade, P.C., No. H-21-0242, 2021 WL 2002440, at *6 (S.D. Tex. May 19, 2021) (noting "the party claiming that the right to arbitrate has been waived bears a heavy burden" (quoting Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 344 (5th Cir. 2004)) because "waiver of arbitration is not a favored finding, and there is a presumption against it" (quoting Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 496 (5th Cir. 1986))).

[46] *Id.*

[47] *See* Frankel, *supra* note 43, at 565-66 (outlining the phenomenon of courts treating an arbitration waiver argument differently from a contract waiver argument by imposing additional and more burdensome requirements on parties claiming their opponent waived their right to arbitrate).

[48] *E.g.*, Toddle Inn Franchising v. KPJ Assocs., 8 F.4th 56, 64 (1st Cir. 2021) (citing In re Tyco Int'l Ltd. Sec. Litig., 422 F.3d 41, 44 (1st Cir. 2005)) (noting "a strong presumption *against* waiver–so strong that any reasonable doubts as to whether a party has waived the right to arbitrate should be resolved in favor of arbitration") (internal quotations omitted).

[49] *E.g.*, Hardaway v. Toyota Fin. Servs., No. 4:21-cv-194, 2022 WL 1667036, at *2 (E.D. Tex. May 25, 2022) (citing Forby v. One Techs. L.P., 909 F.3d 780, 783 (5th Cir. 2018) (quoting Nicholas v. KBR, Inc., 565 F.3d 904, 907 (5th Cir. 2009) (internal quotations omitted))) (noting waiver of arbitration is a disfavored finding even though the right to arbitrate—like all contract rights—is subject to waiver).

[50] Prejudice is an "'unfair tactical advantage' that one party would gain over another by engaging in litigation and then moving to compel arbitration." Timothy Leake, Note, *Arbitration Waiver and Prejudice*, 119 MICH. L. REV. 397, 402 (2020) (quoting In re Tyco Int'l Ltd. Sec. Litig., 422 F.3d 41, 46-47 n.5 (1st Cir. 2005)).

[51] *E.g.*, Huser v. Midland Funding, LLC, No. 17-cv-04490, 2019 WL 4393017, at *7 (N.D. Ill. Sept. 13, 2019) (finding plaintiff "experienced minimal, if any, prejudice" from Midland's attempt to compel arbitration and thus failed to meet the burden of proof establishing Midland waived its right to compel arbitration).

However, in May 2022, the Supreme Court issued a unanimous opinion in *Morgan v. Sundance*, holding that the federal policy favoring arbitration does not permit courts to impose arbitration-specific procedural rules and specifically finding the prejudice requirement unlawful.[52] This is welcome news for consumers who respond to unlawful debt collection claims brought against them in court by raising FDCPA challenges only to have debt buyers then force those claims into arbitration.[53] In the wake of *Morgan*, this Note argues that consumers now have a powerful waiver argument at their disposal. Specifically, consumers may argue that the debt buyer made a choice to file a collection action in court, and that choice demonstrates that the debt buyer acted inconsistently with its contractual right to arbitrate, thus waiving that right.[54] This Note further argues that consumers can and should leverage the Court's holding in *Morgan* to advance arbitration waiver arguments and keep their FDCPA claims in court.

This Note posits that the opportunity to defeat arbitration clauses and bring FDCPA claims in court means the FDCPA can be enforced as Congress intended, thereby preventing debt buyers from employing abusive litigation tactics that target communities of color and primarily end in default judgments that result in economically catastrophic consequences such as garnished wages or bank accounts. Part I of this Note expounds on the business of predatory debt collection litigation prior to and during the COVID-19 pandemic and demonstrates how arbitration limits the FDCPA. Part II discusses arbitration waiver law and the unique burdens placed on parties arguing that their opposition waived its right to arbitrate the dispute. Part III analyzes *Morgan v. Sundance* and examines a recent Third Circuit case—*Hejamadi v. Midland Funding, LLC*—where an issue was whether, in light of *Morgan*, Midland's course of collection litigation in state court waived its right to compel arbitration.[55] Finally, Part IV proposes what advocates and litigants can do to successfully use *Morgan* to prevail in arguing arbitration waiver to keep FDCPA claims in court.

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

[53] *See* Karla Gilbride & Jon Sheldon, *Shocker: Supreme Court Limits Policy Favoring Arbitration*, NAT'L CONSUMER L. CTR., https://library.nclc.org/shocker-supreme-court-limits-policy-favoring-arbitration (last visited Nov. 5, 2023).

[54] *Id.*

[55] Brief for Plaintiffs-Appellants, Hejamadi v. Midland Funding, LLC, No. 22-1846, 2022 WL 3369329, at *17 (3d Cir. Aug. 10, 2022).

I. BACKGROUND

A. The Business of Predatory Debt Collection Litigation

Debt collection litigation dominates state court dockets.[56] For example, debt buyer Midland filed more than 122,000 cases across eighteen states in 2019—more than the number of total civil cases filed that year in at least thirteen states.[57] That same year, Encore, parent company of Midland, spent $202.67 million on legal actions to collect debt.[58] Those legal collections brought in $563 million—over three hundred million dollars in profits.[59] Default judgments contribute to these stark profits because "[o]nce a default judgment is entered, the consumer typically owes more than the original debt."[60] Debt buyers have access to a variety of methods to collect on the judgment ranging from garnishing wages and bank accounts to requesting that the court issue a civil arrest warrant on the consumer.[61] The working poor bear the brunt of these collection methods as "[t]he highest rates of garnishment are among workers who earn between $25,000 and $40,000 [yearly]."[62] Peter Holland, consumer attorney and author of *Junk Justice*, explained: "People don't appreciate the impact of a small claim judgment. If this is on your record, you're not going to get a housing loan or a car loan, and it impacts other areas of your life. And all for a very small debt claim."[63]

In seeking these small claim judgments, debt buyers target Black and Brown consumers.[64] A report found that, "Compared to white people, the debt held by people of color is: 1) more likely to be harmful; 2) more likely to involve the court system; and 3) more likely to have spillover non-financial consequences."[65] Data from just before the pandemic "show that millions of

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[56] PEW CHARITABLE TRS., *supra* note 14, at 1-2 (highlighting that "from 1993 to 2013, the number of debt collection suits more than doubled nationwide, from less than 1.7 million to about 4 million"); *see also* REPAIRING A BROKEN SYSTEM, *supra* note 6, at i ("The system for resolving disputes about consumer debts is broken.").

[57] Wilf-Townsend, *supra* note 5, at 1729.

[58] ENCORE CAP. GRP. INC., FORM 10-K, ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 32 (2019) [hereinafter ENCORE CAP. GRP., 2019 ANNUAL REPORT].

[59] *Id.* at 31.

[60] PEW CHARITABLE TRS., *supra* note 14, at 17 (citing PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015)).

[61] *Id.* at 18.

[62] Kiel & Waldman, *supra* note 8*; see also* Paul Kiel, *Unseen Toll: Wages of Millions Seized to Pay Past Debts*, PROPUBLICA (Sept. 15, 2014, 5:00 AM), https://www.propublica.org/article/unseen-toll-wages-of-millions-seized-to-pay-past-debts (alteration in original) (noting that most states "allow creditors to seize a quarter of a debtor's wages–the highest rate permitted under federal law").

[63] PEW CHARITABLE TRS., *supra* note 14, at 17.

[64] *See* Kiel & Waldman, *supra* note 8.

[65] DISPARITIES IN DEBT, *supra* note 9, at 6.

households were in a position of net debt rather than net worth,"[66] and debt was disproportionately high among Black (18.9%) and Hispanic/Latinx (11.3%) households.[67] Data even show that debt buyers specifically seek to collect debts from Black and Latinx consumers, presumably to capitalize on high default judgment rates.[68] In New York, the ten zip codes with the highest rates of default judgments in debt collection lawsuits are majority-minority neighborhoods.[69] During the COVID-19 pandemic, however, household debt—and credit card debt specifically—decreased.[70] The decrease can be attributed to a sharp drop in people's purchasing power, as many lost jobs and faced other uncertainties in the time before effective COVID-19 treatments and vaccines.[71]

Even though consumers took on less debt during the pandemic, debt buyers continued to use state courts to collect outstanding debts.[72] ProPublica reported that in August 2020, "the volume [of collections lawsuits filed] was well above the number [that debt buyers including Encore] filed before the coronavirus arrived [] in January and February combined."[73] In fact, debt collectors "were a clear beneficiary" of the U.S. government's stimulus funds in 2020.[74] Twenty-five percent of those surveyed said they planned to pay down debt with their stimulus payment.[75] "Debt-buying executives couldn't help marveling at their good fortune," ProPublica

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[66] *Id.* at 2.

[67] *Id.*

[68] Nusrat Choudhury, *Time for the Feds to Step In: Illegal and Abusive Debt Collection Threatens to Exacerbate Racial Inequality*, ACLU: NEWS & COMMENT. (Mar. 3, 2014), https://www.aclu.org/news/racial-justice/time-feds-step-illegal-and-abusive-debt-collection (noting that "69% of people sued by debt buyers were Black or Latino, and that 66% of *meritless* cases were brought against Black or Latino clients").

[69] SUSAN SHIN & CLAUDIA WILNER, NEW ECONOMY PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK 5 (Sarah Ludwig & Josh Zinner eds., 2013).

[70] CHERYL R. COOPER, MAURA MULLINS & LIDA R. WEINSTOCK, CONG. RSCH. SERV., R46578, COVID-19: HOUSEHOLD DEBT DURING THE PANDEMIC 5 (2020); *see also* Robert M. Adams, Vitaly M. Bord, & Bradley Katcher, *Why Did Credit Card Balances Decline So Much During the COVID-19 Pandemic*, BD. GOVERNORS FED. RSRV. SYS. (Dec. 3, 2021), https://www.federalreserve.gov/econres/notes/feds-notes/why-did-credit-card-balances-decline-so-much-during-the-covid-19-pandemic-20211203.html.

[71] *See* Scott Fulford & Marie Rush, *Credit Card Debt Fell Even for Consumers Who Were Having Financial Difficulties Before the Pandemic*, CONSUMER FIN. PROT. BUREAU (Dec. 17, 2020), https://www.consumerfinance.gov/about-us/blog/credit-card-debt-fell-even-consumers-having-financial-difficulties-before-pandemic.

[72] Paul Kiel & Jeff Ernsthausen, *Debt Collectors Have Made a Fortune This Year. Now They're Coming for More.*, PROPUBLICA (Oct. 5, 2020, 5:00 AM), https://www.propublica.org/article/debt-collectors-have-made-a-fortune-this-year-now-theyre-coming-for-more.

[73] *Id.*

[74] *Id.*

[75] Thesia I. Garner, Adam Safir & Jake Schild, *Receipt and Use of Stimulus Payments in the Time of the Covid-19 Pandemic*, 5 BEYOND THE NUMBERS (U.S. BUREAU OF LAB. STATS.), tbl.1 (2020).

reported, with the CEO of Encore's primary competitor, Portfolio Recovery Associates, explaining, "[a]ll of this created 'a perfect storm from a cash perspective.'"[76] Although there is a lack of empirical data on the racial breakdown of pandemic-era debt collection, pre-pandemic racial disparities were likely exacerbated by debt buyers cashing in on pandemic vulnerabilities.[77]

Today, debt buying is as lucrative as ever.[78] In 2021, leading debt buyer Encore spent $254.28 million on bringing debt collection claims.[79] It turned out to be a good investment: Encore brought in $662.81 million from those actions,[80] a nearly seventeen percent increase in legal collections revenue from 2019 to 2021.[81] This Note argues that debt buyers will not stop bringing predatory and deceptive collection litigation against primarily Black and Latinx consumers unless they are forced to stop, and without this forced cessation, existing disparate impacts will continue to deepen. Senator Elizabeth Warren noted, "The same giant debt buyers known for fighting consumer protection laws at every turn have been raking in cash during this pandemic…This is disgraceful and reinforces the need for Congress to protect consumers and small businesses from this predatory behavior."[82]

Yet, Congress has already provided a way to protect consumers from this predatory behavior: the FDCPA.[83] However, the FDCPA cannot be enforced as Congress intended when debt buyers move FDCPA suits into the secret silence of arbitration.[84]

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[76] Kiel & Ernsthausen, *supra* note 72.

[77] *See* Zack Stanton, *How the Pandemic Is Worsening America's Racial Gaps*, POLITICO (Oct. 16, 2020, 4:54 PM), https://www.politico.com/news/magazine/2020/10/16/coronavirus-pandemic-race-black-inequality-economics-429887 (highlighting University of Chicago economist Damon Jones's argument that the pandemic pulled Black Americans into "a cycle where racial inequities predating the pandemic are exacerbated by it.").

[78] Press Release, Marketdata LLC, U.S. Debt Collections Industry Worth $15 Billion (Feb. 23, 2022), https://ipsnews.net/business/2022/02/23/u-s-debt-collections-industry-worth-15-billion-pandemic-did-not-hurt-the-business.

[79] ENCORE CAP. GRP. INC., FORM 10-K, ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 33 (2021) [hereinafter ENCORE CAP. GRP., 2021 ANNUAL REPORT].

[80] *Id.* at 32.

[81] *See* ENCORE CAP. GRP., 2019 ANNUAL REPORT, *supra* note 58 (highlighting that, in 2019, Encore spent $202.67 million on legal actions to collect debt and brought in $563 million–over three hundred million dollars in profit).

[82] Kiel & Ernsthausen, *supra* note 72.

[83] 15 U.S.C. § 1692(a), (b) ("There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Existing laws [prior to the FDCPA] and procedures for redressing [injuries caused by abusive, deceptive, and unfair debt collection practices] are inadequate to protect consumers.").

[84] Alderman, *supra* note 29, at 601 (noting that there is no substantial enforcement mechanism for the FDCPA other than private litigation).

B. How Arbitration Curtails the FDCPA's Enforcement Potential

Congress's legislative intent behind the FDCPA is clear—they enacted the law "to eliminate abusive debt collection practices, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[85] For the FDCPA to have teeth, consumers harmed by debt collection litigation must be free to bring lawsuits alleging statutory violations.[86] Ideally, this would result "in public decisions that create binding precedent and consistency."[87]

Consumers like Mr. Clifford Cain Jr. who are harmed by predatory debt collection lawsuits are typically barred from vindicating their statutory rights under the FDCPA in court.[88] There are numerous instances of affirmative litigation brought by consumers under the FDCPA where debt buyers successfully moved for arbitration and circumvented the FDCPA's public enforcement mechanism.[89] In Michigan, Midland succeeded in forcing a consumer to arbitrate their FDCPA claim alleging that Midland sent a state court garnishment letter overstating the amount of money the consumer owed.[90] In New York, a court granted Midland's request to force a consumer to arbitrate a claim following a default judgment allegedly based on Midland's false statements.[91] Midland's parent company, Encore, brushes

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[85] 15 U.S.C. § 1692(e).

[86] Alderman, *supra* note 29, at 601 (highlighting that there is no substantial enforcement mechanism for the FDCPA other than private litigation).

[87] *Id.* at 602.

[88] *Id.* at 589 (noting that "nearly every written agreement between a creditor and a consumer" contains a binding arbitration agreement denying parties from litigating claims in courts); *see also* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015) (explaining that the Supreme Court "repeatedly holds that [the Federal Arbitration Act and its liberal policy favoring arbitration] overrides any state law or judicial doctrine that obstructs arbitration").

[89] *E.g.*, Lance v. Midland Credit Mgmt. Inc., No. 18-cv-4933, 2019 WL 2143362, at *3 (E.D. Pa. May 16, 2019) (granting motion to arbitrate an FDCPA claim regarding an allegedly false, deceptive, and misleading collection letter); Russell v. Midland Credit Mgmt. Inc., No. 20-cv-00618, 2021 WL 1192580, at *1 (E.D. Ill. Mar. 30, 2021) (granting motion to arbitrate an FDCPA claim regarding a state court complaint allegedly misrepresenting the amount and legal status of debt); Evans v. Midland Funding LLC, No. 16-cv-00421, 2017 WL 1347694, at *1 (W.D. Ky. Apr. 10, 2017) (granting motion to arbitrate an FDCPA claim regarding Midland allegedly using a judgment lien and garnishments to collect fees to which they were not entitled); Oyola v. Midland Funding, LLC, 259 F. Supp. 3d. 14, 19 (D. Mass. 2018); Marcario v. Midland Credit Mgmt. Inc., No. 17-cv-414, 2017 WL 4792238, at *1 (E.D.N.Y. Oct. 23, 2017); Clemons v. Midland Credit Mgmt. Inc., No. 18-cv-16883, 2019 WL 3336421, at *1 (D.N.J. July 25, 2019).

[90] Nettles v. Midland Funding LLC, 530 F. Supp. 3d 706, 708 (E.D. Mich. 2021).

[91] Morrison v. Midland Funding, LLC, No. 20-CV-6468, 2021 WL 2529618, at *2 (W.D.N.Y. June 21, 2021).

aside FDCPA suits as a part of "the ordinary course of business."[92] Accordingly, it is crucial to develop strategies for consumers to overcome arbitration clauses and have the opportunity to enforce the FDCPA as Congress intended.

II. ARBITRATION WAIVER LAW

A. Understanding Waiver

Waiver is a matter of contract law: "the intentional relinquishment or abandonment of a known [contractual] right."[93] Waiver of the right to arbitrate a claim can be express or implied, but "[e]ither way, the question is whether 'based on all the circumstances, the party against whom the waiver is to be enforced has acted inconsistently with the right to arbitrate.'"[94] Traditionally, "[w]hether a waiver has occurred depends entirely on the actions and intentions of the waiving party[,]"[95] but courts apply a more rigorous standard in determining whether the right to arbitrate has been waived.[96] For instance, federal appellate courts typically inquire into the actions of the party raising the arbitration waiver argument.[97] Until 2022, a mainstay of this analysis often required the party arguing waiver to demonstrate that they were prejudiced by the opposing party's delay in

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[92] ENCORE CAP. GRP., 2021 ANNUAL REPORT, *supra* note 79, at F-36.

[93] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022) (quoting United States v. Olano, 113 S. Ct. 1770, 1777 (1993)); *see* RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (AM. L. INST. 1981) (defining waiver); Paul Bennett IV, Note, *"Waiving" Goodbye to Arbitration: A Contractual Approach*, 69 WASH. & LEE L. REV. 1609, 1632 (2012) (defining waiver in the arbitral context as whether a party has lost its right to arbitrate).

[94] Brickstructures, Inc. v. Coaster Dynamix, Inc., 952 F.3d 887, 891 (7th Cir. 2020) (quoting Welborn Clinic v. MedQuist, Inc., 301 F.3d 634, 637 (7th Cir. 2002)).

[95] Brief for Petitioners at 17, *Morgan*, 142 S. Ct. 1708 (No. 21-328); *see also* 28 AM. JUR. 2D *Estoppel and Waiver* § 183 (2023) ("Waiver is essentially unilateral in its character, and no act of the party in whose favor it is made is necessary to complete it.").

[96] John Bruce Lewis & Dustin M. Dow, *Searching for Clarity Amid Confusion: An Examination of the Standards for Determining Waiver and Revival of the Right to Arbitrate*, 67 U. KAN. L. REV. 327, 340 (2018) (discussing the history of waiver of arbitration agreements and finding that "the legal analysis went further [than considering contractual aspects of waiver] to consider the equity of finding waiver at that point in the proceedings, often looking to expense, delay or prejudice").

[97] *E.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. NCR Corp., 376 Fed. App'x. 70, 71 (2d Cir. 2010) (internal quotation marks omitted) (identifying as factors in determining whether a party waived its right to arbitration: time from initial litigation to request for arbitration, amount of litigation, and proof of prejudice); Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prod., Inc., 660 F.3d 988, 994-95 (7th Cir. 2011) (identifying as factors in determining whether a party waived its right to arbitration: diligence, prejudice, and whether the allegedly waiving party participated in litigation, discovery, or substantially delayed its request for arbitration); Hodson v. Javitch, Block & Rathbone, LLP, 531 F. Supp. 2d 827, 831 (N.D. Ohio 2008) (citing O.J. Distrib., Inc., v. Hornell Brewing Co., Inc., 340 F.3d 345, 355-56 (6th Cir. 2003)) (noting a party may waive its right to arbitration if its conduct is completely inconsistent with an intent to arbitrate and the inconsistent conduct prejudices the opposing party).

moving to compel arbitration.[98] Prejudice, at its core, is "damage or detriment to one's legal rights or claims."[99] But courts vary widely in interpreting what actually constitutes prejudice.[100] For example, in determining whether a party was prejudiced, courts may consider such diverse factors as "delay, expense, attempts to relitigate issues lost in court, and the use of litigation discovery procedures."[101]

Accordingly, this malleable and "high bar for arbitration-related waiver. . . incentivizes extensive skirmishing in court before arbitration rights are invoked by either party."[102] For instance, parties might decide to "test their case in court first and only retreat to arbitration if they encounter a judicial setback or decide that arbitration has become a more strategically-attractive forum."[103] This Note argues that overcritical, arbitration-specific standards have resulted in a power imbalance between the parties which is particularly acute in the context of consumers bringing FDCPA claims against debt buyers to seek redress from the harms of predatory debt collection litigation who must then defend against the debt buyer's typical move to compel arbitration.[104]

B. Key Feature of Waiver Analysis: Federal Policy Favoring Arbitration

A common feature of courts' inquiries into arbitration waiver is an explicit regard for the federal policy favoring arbitration.[105] This federal policy grew out of courts' initial reluctance to enforce arbitration clauses in

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98 Leake, *supra* note 50, at 404 (explaining that all but two circuits look to prejudice in determining whether a litigant waived its right to arbitrate the dispute).

99 *Prejudice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

100 Lewis & Dow, *supra* note 96 ("[W]hen prejudice is required, courts offer no concrete guidance as to the necessary elements.").

101 Thomas J. Lilly, Jr., *Participation in Litigation as Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory*, 92 NEB. L. REV. 86, 106-07 (2013).

102 Brief for Petitioners at 15, Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022) (No. 21-328).

103 *Id.* at 16.

104 *See, e.g.*, Huser v. Midland Funding, LLC, No. 17-cv-04490, 2019 WL 4393017, at *7 (N.D. Ill. Sept. 13, 2019) (granting Midland's motion to compel arbitration and "finding that Huser experienced minimal, if any, prejudice from defendants' initial five-month delay in moving to compel arbitration"); *see also supra* Part I(A).

105 *E.g.*, Martin v. Yasuda, 829 F.3d 1118, 1124 (9th Cir. 2016) (citing Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986)) ("Determination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements."); Hill v. Ricoh Americas Corp., 603 F.3d 766, 775 (10th Cir. 2010) (citing Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1488 (10th Cir. 1994)) (noting that the court "must give substantial weight to the strong federal policy encouraging the expeditious and inexpensive resolution of disputes through arbitration" in its waiver analysis); Sysco Minn., Inc. v. Teamsters Loc. 120, 958 F.3d 757, 762 (8th Cir. 2020) ("Because there is a strong federal policy in favor of arbitration, we will resolve any doubts concerning waiver of arbitrability in favor of arbitration.") (internal quotations omitted).

contracts.[106] Congress addressed this reluctance by passing the Federal Arbitration Act ("FAA") in 1925, "mandating enforcement of commercial arbitration agreements on the same footing as any other contract provision."[107] The FAA maintains that a written agreement to arbitrate ". . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[108] The Supreme Court, in dicta, interpreted this statute to be "a congressional declaration of a liberal federal policy favoring arbitration agreements."[109] With this language, the Court "[t]ransform[ed] a statute that eliminated a presumption against arbitration into one that establishes a presumption favoring arbitration."[110] Judicially-developed arbitration-waiver-specific requirements like prejudice are rooted in this policy and presumption.[111] Professor Richard Frankel points out that "[a]rbitration is itself a type of contractual waiver, and the ease with which courts find that parties waived their right to go to court contrasts sharply with their reluctance to find that parties waived their right to arbitrate."[112] He convincingly argues that "courts have improperly relied on the federal policy favoring arbitration to interpret arbitration clauses in ways that conflict with traditional rules of contract interpretation."[113]

The federal policy favoring arbitration and its role in resolving disputes in favor of a contract's arbitration provision conflicts with the Supreme Court's insistence that "courts must place arbitration agreements on an equal footing with other contracts."[114] Advocates recently forced the Court to confront this tension in *Morgan v. Sundance*, asking: "Does the arbitration-specific requirement that [a party arguing arbitration waiver] prove prejudice

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[106] *Morgan*, 142 S. Ct. at 1713 (explaining that the policy "'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'" (quoting Granite Rock Co. v. Teamsters, 130 S. Ct. 2847, 2859 (2010))).

[107] Michelle L. Caton, *Form Over Fairness: How the Supreme Court's Misreading of the Federal Arbitration Act Has Left Consumers in a Lurch*, 21 GEO. MASON L. REV. 497, 498 (2014).

[108] 9 U.S.C. § 2.

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

[110] Frankel, *supra* note 43, at 546 (citing Jean R. Sternlight, *Protecting Franchises from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45, 77 n.6 (2000) ("There is a big difference between eliminating a hostility and stating a preference, with a whole lot of room in between.") (quoting Cliff Palefsky, *Arbitrary Arbitration: The Founders Would Frown on Mandatory ADR*, S.F. DAILY, Mar. 1, 1995, at 4)).

[111] *See, e.g.*, *Morgan*, 142 S. Ct. at 1712.

[112] Frankel, *supra* note 43, at 568.

[113] *Id.* at 537 (showing over-enforcement of arbitration clauses in three areas: "(1) interpreting ambiguous contracts to require arbitration, (2) restricting the circumstances in which a party will be found to have waived its right to arbitrate, and (3) expanding the rights of parties who never signed the arbitration agreement to force a dispute into arbitration").

[114] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

violate this Court's instruction that lower courts must 'place arbitration agreements on an equal footing with other contracts?'"[115]

III. *MORGAN V. SUNDANCE* AND ITS EFFECTS

A. An Arbitration Waiver Case Makes Its Way to the Supreme Court

Robyn Morgan worked as an hourly employee at a Taco Bell owned by Sundance, Inc. ("Sundance"), and the employment application she signed and submitted contained an agreement to arbitrate disputes.[116] In 2018, Morgan brought a collective lawsuit against Sundance alleging that they "did not pay [their] employees, including Ms. Morgan, for the hours they worked," in violation of the Fair Labor Standards Act ("FLSA").[117] "Sundance initially defended itself against Morgan's suit as if no arbitration agreement existed"[118] and sought to have Morgan's suit dismissed "as duplicative of a collective action previously brought by other Taco Bell employees."[119] Justice Kagan explained:

> 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…Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by litigating for so long.[120]

In determining whether Sundance waived its right to compel arbitration, the district court applied a three-part test.[121] According to the test, "[a] party may be found to have waived its right to arbitration if it: '(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3)

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[115] Brief for Petitioners at i, *Morgan*, 142 S. Ct. 1708 (No. 21-328) (quoting *Concepcion*, 563 U.S. at 339).

[116] Brief for Respondents at 7, *Morgan*, 142 S. Ct. 1708 (No. 21-328). "Nearly 54% of nonunion, private sector employers have mandatory arbitration procedures, representing 60 million workers, according to a 2018 Economic Policy Institute Study. Among companies with 1,000 or more employees, 65% have mandatory arbitration policies." Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG LAW (Oct. 28, 2021, 1:01 PM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X4V73F0O000000.

[117] Brief for Petitioners at 8-9, *Morgan*, 142 S. Ct. 1708 (No. 21-328).

[118] *Morgan*, 142 S. Ct. at 1711.

[119] *Id.*

[120] *Id.*

[121] Morgan v. Sundance, No. 4:18-cv-316, 2019 WL 5089205, at *5-8 (S.D. Iowa June 28, 2019), *rev'd and remanded*, 992 F.3d 711 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. 1708 (2022).

prejudiced the other party by these inconsistent acts.'"[122] The court determined: (1) "there was no dispute that Sundance knew of an existing right to arbitrate [because] the agreement was part of a form contract on Sundance's own website;"[123] (2) "Sundance acted inconsistently with that right when it waited for eight months before asserting its right to arbitration and failed to mention arbitration in its answer, in its motion to dismiss, or in scheduling discussions with opposing counsel;"[124] and (3) "Ms. Morgan was prejudiced by having to defend against Sundance's motion to dismiss and by spending time and resources preparing for a class-wide mediation instead of individual arbitration."[125]

An Eighth Circuit panel majority reversed the decision, finding that "Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan."[126] The appellate court determined that Morgan was not prejudiced because: (1) of the eight-month delay at issue, "[f]our months of the delay entailed the parties waiting for disposition of Sundance's motion to dismiss[;]"[127] (2) "[n]o discovery was conducted[;]"[128] (3) the record did not show that "Morgan would have to duplicate her efforts during arbitration[;]"[129] and (4) the legal issues at the time focused on jurisdictional issues, "not the merits of the case."[130] One member of the panel, Judge Colloton, dissented, classifying prejudice as "a debatable prerequisite" [131] to find waiver of the right to arbitrate and noting that, in any event, the facts established waiver consistent with circuit precedent.[132] He went on to argue that "Sundance also led Morgan to waste time and money engaging in a fruitless mediation based on an inaccurate premise that the case

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[122] Lewallen v. Green Tree Servicing, LLC, 487 F.3d 1085, 1090 (8th Cir. 2007) (quoting Ritzel Commc'ns v. Mid-Am Cellular Tel. Co., 989 F.2d 966, 969 (8th Cir. 1993))).

[123] Brief for Petitioners at 15, *Morgan*, 142 S. Ct. 1708 (No. 21-328).

[124] *Id.* at 11.

[125] *Id.*

[126] Morgan v. Sundance, Inc., 992 F.3d 711, 714 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. 1708 (2022) (alterations in original).

[127] *Morgan*, 992 F.3d at 715, *vacated and remanded*, 142 S. Ct. 1708 (2022).

[128] *Id.* (alterations in original).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 717 ("We concluded in a prior decision that nearly identical conduct by a defendant–waiting eight months to mention arbitration while forcing a plaintiff to defend against a motion to transfer venue to another judicial district–supported a finding of prejudice").

would be litigated in federal court."[133] On this procedural posture, the Supreme Court granted certiorari.[134]

B. The Supreme Court Rules in Morgan*'s Favor*

A unanimous Supreme Court "departed from [the] Eighth Circuit panel majority's holding that a prejudice inquiry was the proper analysis for whether Taco Bell franchisee Sundance, Inc. could still seek to send a worker's unpaid overtime case to arbitration."[135] The opinion is narrow in scope, addressing only the "single issue" of whether a court "may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's policy favoring arbitration."[136] Acknowledging that "[n]ine 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," Justice Kagan, writing for the majority, noted that "[t]wo circuits have rejected that rule [and] we do too."[137] The Court identified the widespread prejudice requirement specific to arbitration waiver analysis as a "bespoke rule of waiver for arbitration"[138] and held that "the FAA's policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules."[139]

Consumer advocates characterized this ruling as "striking,"[140] and the Iowa Attorney General's Office said it was "a win for workers."[141] Professor Richard Frankel explained, "[e]mphasizing that the federal policy favoring arbitration is an equality principle and not an arbitration favoritism principle is really valuable."[142] Before *Morgan*, it was nearly impossible for consumers to succeed in arguing arbitration waiver because of the uniquely high bar courts required them to meet.[143] Now, ideally, the Court's unanimous and unequivocal decision in *Morgan* "will send a message to all corporations who include arbitration provisions in their contracts with

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133 *Id.*

134 Amy Howe, *Justices grant arbitration case, won't take up Volkswagen emissions cases*, SCOTUSBLOG (Nov. 15, 2021, 11:10 AM), https://www.scotusblog.com/2021/11/justices-grant-arbitration-case-wont-take-up-volkswagen-emissions-cases.

135 Max Kutner, *Justices Say Arbitration Waiver Not Based on Prejudice*, LAW360 (May 23, 2022, 10:17 AM), https://www.law360.com/articles/1480190/justices-say-arbitration-waiver-not-based-on-prejudice; Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).

136 *Morgan*, 142 S. Ct. at 1712 (alterations in original) (internal quotations omitted).

137 *Id.* (internal quotations omitted).

138 *Id.* at 1713.

139 *Id.* (internal quotations omitted).

140 Kutner, *supra* note 135.

141 *Id.*

142 *Id.*

143 *See supra* Part I(B).

workers and consumers that those arbitration provisions will be treated just like any other term in their contract—no worse, but also no better," according to Karla Gilbride, who represented Robyn Morgan.[144]

C. Putting Morgan *into Practice*

This Note has discussed debt buyer Midland's widespread practice of filing relentless collection claims then moving to compel arbitration when a consumer tries to sue them under the FDCPA.[145] The Third Circuit recently adjudicated a case arising under this precise scenario, and after the district court granted Midland's motion to compel arbitration, the consumer appealed on the basis that Midland waived its right to arbitrate under *Morgan*.[146] The background facts are illustrative of Midland's tactics. In 2017, Shanthi R. Hejamadi learned that the $411.60 outstanding debt on her Home Depot credit card had been acquired by Midland and they were seeking to collect the money.[147] Midland's letter contained this message: "**LET US HELP YOU!** If the account goes to an attorney, our flexible options may no longer be available to you. There still is an opportunity to make arrangements with us. **We encourage you to call us**[.]"[148] Midland proceeded to file a debt collection action in New Jersey state court.[149] Hejamadi responded with an answer and a class action counterclaim alleging that Midland violated the FDCPA when they sent her two collection letters "falsely threatening that '[i]f the account goes to an attorney, our flexible options may no longer be available to you.'"[150] The parties removed the case to federal court,[151] where Midland moved to compel arbitration of the FDCPA claims.[152] Hejamadi argued, *inter alia*, that Midland waived its right to arbitrate when it brought a debt collection claim against her in state court.[153]

The district court granted Midland's motion to compel arbitration in light of the FAA's "strong policy in favor of the resolution of disputes

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144 Kutner, *supra* note 135.

145 *See supra* Part I(A); *see also supra* Part I(B).

146 Hejamadi v. Midland Funding LLC, No. 22-1846, 2023 WL 5624185, at *1-2 (3rd Cir. Aug. 31, 2023).

147 Appellants' Appendix, Vol. II of II (Appx17-Appx318) at 77, Hejamadi v. Midland Funding, LLC, No. 22-1846, (D.N.J. 2022).

148 *Id.*

149 Hejamadi v. Midland Funding LLC, No. 18-cv-13203, 2022 WL 970248, at *3 (D.N.J. Mar. 31, 2022), *vacated*, No. 22-1846, 2023 WL 5624185 (3rd Cir. Aug. 31, 2023), *remanded to* No. 18-cv-13203.

150 Appellants' Appendix, Vol. II of II, at 22 (noting that the flexible options were always available).

151 This Note does not address the parties' intervening procedural steps because it is not relevant for the purposes of this discussion.

152 Appellants' Appendix, Vol. II of II, at 67.

153 *Id.* at 278.

through arbitration,"[154] noting that "[w]here there is a contract between the parties that provides for arbitration…[a]ny doubt concerning the scope of arbitrability should be resolved in favor of arbitration."[155] Hejamadi advanced a two-pronged waiver argument in trying to defeat Midland's motion, asserting that (1) Midland waived its right to arbitrate "by initiating a debt collection suit against [her] in state court," and (2) Midland waived its right to arbitrate by "challenging her FDCPA claims on their merits."[156] Hejamadi's argument faced what Justice Kagan would later describe in *Morgan* as "bespoke" rules of waiver of arbitration.[157] The district court recognized that in the Third Circuit, "it is well settled that waiver is not to be lightly inferred in light of the strong preference for arbitration in federal courts,"[158] and, therefore, "waiver will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery."[159] Additionally, the court considered "prejudice to the party opposing arbitration" as the "touchstone" of the waiver inquiry.[160] Given the fact that Hejamadi's case did not satisfy these judicially-created, arbitration-specific threshold factors of waiver, such as extensive discovery or prejudice, the district court granted Midland's motions to dismiss Hejamadi's amended complaint and compel arbitration.[161]

On appeal, Hejamadi asked the Third Circuit to assess Midland's actions in state court during the course of its collection litigation as a basis for arbitration waiver under: (1) the longstanding principle that a party can waive its right to demand arbitration by participating in litigation,[162] and (2) *Morgan*'s command to treat arbitration waiver like general contract waiver where the inquiry "focuses on the actions of the [party] who held the right" without considering "the effects of those actions on the opposing party."[163] The Third Circuit acknowledged the change in precedent under *Morgan* and remanded the case to the district court to determine "whether there has been

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154 *Hejamadi*, 2022 WL 970248, at *4 (alterations in original) (internal quotations omitted).

155 *Id.* (internal quotations omitted).

156 *Id.*

157 Morgan v. Sundance, 142 S. Ct. 1708, 1713 (2022).

158 *Hejamadi*, 2022 WL 970248, at *5 (internal quotations omitted).

159 *Id.* (internal quotations omitted).

160 *Id.* (internal quotations omitted).

161 *Id.* at *7.

162 *See* 21 WILLISTON ON CONTRACTS § 57:17 (4th ed. 2022) ("A defendant who files an answer or other responsive pleading in a lawsuit, or engages in discovery, and fails to raise a question as to the right to arbitrate, may also be found to have waived the right to arbitrate.").

163 Morgan v. Sundance, 142 S. Ct. 1708, 1713 (2022); Brief for Plaintiffs-Appellants at 16-20, Hejamadi v. Midland Funding, LLC, No. 22-1846, 2022 WL 3369329 (3rd Cir. Aug. 31, 2023).

any arbitration waiver" under the new standard.[164] Specifically, the Third Circuit instructed that:

> Under *Morgan*, courts must apply the general waiver inquiry: they must ask whether a party has intentionally relinquished or abandoned a known right . . . [and] must focus on the actions of the party who held the right—not on prejudice to the opposing party—and consider the circumstances of each case.[165]

The panel did not address the merits of Hejamadi's arbitration waiver arguments.[166]

In Hejamadi's case, the actions of the party holding the right to compel arbitration, Midland, included "fil[ing] motions [in state court] to strike class allegations, dismiss its own claims, realign the parties, transfer to the Law Division, and remov[e] the case to federal court all without asking for arbitration in state court."[167] Accordingly, this Note posits that if the district court, on remand, holds Midland accountable for its litigation choices in state court, consumers may be able to leverage the guiding principles in *Morgan* in conjunction with *Hejamadi* to direct courts to consider debt buyers' litigation-related activities as dispositive factors showing that these entities acted inconsistently with the contractual obligation to arbitrate, thus waiving the right to compel arbitration.

Critically, after Hejamadi answered Midland's collection lawsuit and asserted a counterclaim, Midland sought first to "voluntarily withdraw its collection action," and then, when Hejamadi refused to consent, Midland "filed a motion to dismiss its own claims."[168] This Note has argued that debt buyers like Midland are essentially in the business of procuring default judgments.[169] One study found that 94.3% of debt buyers' collection lawsuits end in default judgment in favor of the debt buyer.[170] Therefore, *Hejamadi* illuminates Midland's preference, when confronted with an FDCPA claim, to abandon the underlying collection action altogether because it is better for

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164 *Hejamadi*, 2023 WL 5624185, at *3.

165 *Id.* (internal citations omitted).

166 *Id.*

167 Brief for Plaintiffs-Appellants, *Hejamadi*, 2022 WL 3369329, at *20 (No. 22-1846). The argument continues:

> Time and resources from both sides could have been saved if Midland Funding sought arbitration right away. But the actions of Midland Funding showed Hejamadi that Midland Funding was interested in pursuing this matter through court. Only after multiple motions were briefed and arguments were prepared did the Appellees seek to compel arbitration, a right that was clearly waived under the new guiding principles provided by Morgan.

Id.

168 Brief on Behalf of Defendants-Appellees, *Hejamadi*, 2022 WL 10056282, at *20 (No. 22-1846).

169 *See supra* Part I(A).

170 *See* DEBT DECEPTION, *supra* note 3, at 1.

their bottom line.[171] Invoking limited judicial resources in this way and turning to arbitration to squash unfavorable claims is antithetical to one of the very underpinnings of the federal policy favoring arbitration: to "encourage[e] the expeditious and inexpensive resolution of disputes through arbitration."[172]

IV. PROPOSAL

In light of *Morgan v. Sundance*, this Note proposes three distinct ways for advocates and litigants to advance arbitration waiver arguments and the interests of consumers more broadly when bringing FDCPA claims and working to hold debt buyers accountable. First, a centralized, constantly-updated, crowdsourced database containing the text of arbitration provisions will help disseminate knowledge and may prevent the need to bring arbitration waiver arguments altogether by educating and empowering consumers to locate and respond to opt-out clauses.[173] Second, advocates should continue relying on *Morgan*'s unequivocal prohibition of arbitration-specific waiver rules to press courts to revisit and rethink their arbitration waiver jurisprudence and, ideally, correct for the longstanding power imbalance between the parties.[174] Third, advocates, consumers, journalists, activists, and other stakeholders should continue to increase awareness of debt buyers' predatory litigation tactics that disproportionately impact communities of color.[175]

A. Centralized Repository of Arbitration Provisions

Disseminating knowledge is key to strengthening consumers' efforts to keep their FDCPA claims in court, enforce the statute as Congress intended,

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[171] *See supra* Part I(A).

[172] Hill v. Ricoh Americas Corp., 603 F.3d 766, 775 (10th Cir. 2010) (citing Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1488 (10th Cir. 1994)).

[173] For example, the CFPB maintains a credit card agreement database. *See Credit Card Agreement Database*, CONSUMER FIN. PROT. BUREAU (Aug. 23, 2023, 12:37 PM), https://www.consumerfinance.gov/credit-cards/agreements. The CFPB has proposed a public registry of terms and conditions in form contracts "that claim to waive or limit consumer rights and protections" including, *inter alia*, arbitration provisions. Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Rule to Establish Public Registry of Terms and Conditions in Form Contracts That Claim to Waive or Limit Consumer Rights and Protections (Jan. 11, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-establish-public-registry-of-terms-and-conditions-in-form-contracts-that-claim-to-waive-or-limit-consumer-rights-and-protections.

[174] *See, e.g.*, Gaudreau v. My Pillow, Inc., No. 6:21-cv-1899, 2022 WL 3098950, at *6 (M.D. Fla. July 1, 2022) (noting that "*Morgan* abrogated much–perhaps most–of the Eleventh Circuit's precedent on waiver of arbitration agreements," and, accordingly, "[i]n light of *Morgan*, this Court must start anew in developing a rule for waiver of arbitration agreements. Waiver is the intentional relinquishment or abandonment of a known right, whose analysis focuses on the actions of the person who held the right.") (internal quotations omitted).

[175] *See supra* Introduction.

and hold debt buyers accountable for their abusive collection practices.[176] Given the predominance of arbitration provisions—in credit card agreements, employment contracts, and terms of service, to name a few places—it is critical to have an up-to-date repository containing the language and terms of such provisions.[177] Companies typically amend their arbitration provisions following Supreme Court decisions on the topic.[178] In 2019, an empirical study found that arbitration provisions in consumer contracts "have become common, and more optimized for defeating customers' claims."[179] Already, there are arbitration provisions specific to maintaining a debt buyer's power to invoke judicial resources when advantageous and to duck out of court when faced with the prospect of an unfavorable disposition on claims like those arising under the FDCPA.[180] For example, Midland has invoked arbitration provisions such as (1) "We won't initiate arbitration to collect a debt from you unless you choose to arbitrate or assert a Claim against us. If you assert a Claim against us, we can choose to arbitrate,"[181] and (2) "[a]lternatively [to the foregoing binding arbitration provision], you and we may pursue a Claim within the jurisdiction of the Justice of the Peace Court in Delaware, or the equivalent court in your home jurisdiction (each a 'Small Claims Court'), provided that the action remains in that court."[182]

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[176] *See* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern.

> To be clear, you don't have to sign anything—or even click "I agree" on a website—to be bound by arbitration. The clause can appear on packaging or be buried deep in the warranties, user manuals, [or] a website's terms of use. Placing the clause there, says Myriam Gilles, [a law professor], is "intended to obscure the immensity of the rights being forfeited."

Id.

[177] *See* Miller, *supra* note 38, at 797 ("[C]ompanies have begun exploiting even more creative ways of binding consumers to their [contractual] terms. . . [C]onsumer form contracts are posed to become even more ubiquitous in the coming years, giving businesses even more ways to bind consumers to arbitration and other pro-business terms.").

[178] *Id.* at 828.

> Businesses are not using these [arbitration] agreements to press every advantage that they can; instead they are crafting agreements that let them kill off customer claims with class action waivers while shielding their agreements with innocuous or even pro-consumer terms that look good on paper but ultimately do almost nothing for customers.

Id.

[179] *Id.*

[180] *See infra* notes 181-82.

[181] Hejamadi v. Midland Funding LLC, No. 18-cv-13203, 2022 WL 970248, at *6 (D.N.J. Mar. 31, 2022), *vacated*, No. 22-1846, 2023 WL 5624185 (3rd Cir. Aug. 31, 2023), *remanded to* No. 18-cv-13203.

[182] Barbosa v. Midland Credit Management, Inc., No. 18-11997, 2019 WL 3781629, at *2 (D. Mass. July 2, 2019). Here, the court found that "the arbitration provision explicitly permits the parties to pursue claims in small claims court. *Id.* at *7.

Consumer rights institutions, groups, and advocates have experience collecting and disseminating data; the CFPB, for example, collects data on consumer complaints and collaborates with state and local governments to "protect as many consumers as possible from predatory lending, barriers to credit, and other consumer harms."[183] The CFPB model demonstrates that such databases are useful not only for regulatory authorities or policymakers, but also for consumers themselves by helping "to foster increased consumer awareness and eventual empowerment."[184] This is particularly applicable to arbitration provisions, including those in credit card agreements, because of opt-out clauses that allow consumers "an opportunity to opt-out of arbitration altogether if they provide notice to the business within a specified period of time."[185] One study found that, in 2018, approximately 40% of consumer contracts contained opt-out clauses, with 19.2% percent of those clauses found in credit card agreements.[186] Collecting data on arbitration provisions is a step toward educating and empowering consumers to locate and respond to opt-out clauses—a move that can ultimately protect them and their claims from being forced into the secrecy and silence of arbitration.[187]

B. Continue Pushing Morgan

A majority of courts once relied on arbitration-specific waiver rules such as prejudice and must now reconsider how to analyze arbitration waiver claims.[188] Advocates can use this unique opportunity to leverage *Morgan* and hold courts to the Supreme Court's command that "the FAA's policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules."[189] This Note suggests that reorienting courts to inquire only about the debt buyer's actions—instead of

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183 Stephanie Isser Goldblatt & Cheryl Parker Rose, *Using CFPB Complaint Data to Help Cities and Counties Protect the Public*, CONSUMER FIN. PROT. BUREAU BLOG (Nov. 18, 2022), https://www.consumerfinance.gov/about-us/blog/using-cfpb-complaint-data-to-help-cities-and-counties-protect-the-public.

184 *Id.*

185 Miller, *supra* note 38, at 822.

186 *Id.* at 823, n.128.

187 *See, e.g.*, Barbara Krasnoff, *How to opt out of Venmo's new arbitration clause*, THE VERGE (Apr. 25, 2022, 2:52 PM), https://www.theverge.com/23040916/venmo-arbitration-class-action-sue-how-to ("[Y]ou may decide that you want to opt out of Venmo's arbitration clause and retain your right to sue in court and/or to join a class action suit if necessary. . . [H]ere's the short version of what you need to do [to opt-out].").

188 *E.g.*, Gaudreau v. My Pillow, Inc., No. 6:21-cv-1899, 2022 WL 3098950, at *6 (M.D. Fla. July 1, 2022) ("*Morgan* abrogated much—perhaps most—of the Eleventh Circuit's precedent on waiver of arbitration agreements," and, accordingly, "[i]n light of *Morgan*, this Court must start anew in developing a rule for waiver of arbitration agreements. Waiver is the intentional relinquishment or abandonment of a known right, whose analysis focuses on the actions of the person who held the right.") (internal quotations omitted).

189 Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022) (internal quotations omitted).

the effects of those actions on consumers—can begin to correct for the longstanding power imbalance between the parties when a consumer asserts that a debt buyer waived its right to arbitration. Parties currently litigating motions to compel arbitration are met by courts reevaluating arbitration-specific waiver tests which are no longer good law under *Morgan*.[190] Accordingly, this area of the law is ripe for development.[191]

C. Increase Awareness

Scholarship, legal, and regulatory actions make clear that debt buyers like Midland rely on abusive litigation strategies and particularly seek default judgments.[192] Studies and reporting show in no uncertain terms that low-income consumers of color disproportionately bear the brunt of these litigation strategies.[193] A critical way to protect consumers is to increase awareness of this phenomenon, particularly amongst targeted groups.[194] Similarly, state court judges encounter an extensive amount of debt collection claims.[195] Accordingly, they should learn about the ways debt buyers take

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[190] *Compare* Soriano v. Experian Information Sols., Inc., No. 2:22-cv-197, 2022 WL 6734860, at *3 (M.D. Fla. Oct. 11, 2022) ("What remains of the Eleventh Circuit's waiver test [after *Morgan*] is best left for another day. Even applying the heightened substantial participation standard [developed in light of the federal policy favoring arbitration], the result is the same: Experian waived its right to arbitrate"), *with* Amargos v. Verified Nutrition, LLC, No. 22-cv-22111, 2023 WL 1331261, at *6 (finding the Eleventh Circuit's waiver test abrogated by *Morgan* and using a totality of the circumstances approach to grant Verified Nutrition's motion to compel arbitration).

[191] *Compare Soriano*, 2022 WL 6734860, at *3 ("What remains of the Eleventh Circuit's waiver test [after *Morgan*] is best left for another day. Even applying the heightened substantial participation standard [developed in light of the federal policy favoring arbitration], the result is the same: Experian waived its right to arbitrate"), *with Amargos* 2023 WL 1331261, at *6 (finding the Eleventh Circuit's waiver test abrogated by *Morgan* and using a totality of the circumstances approach to grant Verified Nutrition's motion to compel arbitration).

[192] *E.g.*, Stifler, *supra* note 16, at 91-92 (highlighting four main abusive practices: "(a) suing with insufficient evidence of debt; (b) collecting time-barred debt; (c) cutting corners in the legal process; and (d) relying on default judgments to win cases."); Press Release, Office of the New York State Attorney General, *supra* text accompanying note 31.

[193] *E.g.*, DISPARITIES IN DEBT, *supra* note 9, at 6 ("[C]ompared to white people, the debt held by people of color is: 1) more likely to be harmful; 2) more likely to involve the court system, and 3) more likely to have spillover non-financial consequences."); Kiel & Waldman, *supra* note 8.

[194] *See, e.g.*, Sogand Torani, Parisa Moradi Majd, Shahnam Sedigh Maroufi, Mohsen Dowlati & Rahm Ali Sheikhi, *The importance of education on disasters and emergencies: A review article*, 8 J. EDUC. & HEALTH PROMOTION 1, 1 (2019) ("[D]isaster education is a functional, operational, and cost-effective tool for risk management. . . [I]t is important for vulnerable people to learn about disasters. . . Trained people can better protect themselves and others.").

[195] CONF. OF CHIEF JUSTS., CONF. OF STATE CT. ADM'RS, RESOLUTION 4, IN SUPPORT OF RULES REGARDING DEFAULT JUDGMENTS IN DEBT COLLECTION CASES (2018), https://massa2j.org/wp-content/uploads/2018/09/Conference-of-Chief-Justices_Conference-of-State-Court-Administrators-Resolution-4.pdf (finding that "debt collection cases comprise the majority of many state court civil dockets" and urging state court judges and administrators "to consider enacting rules requiring plaintiffs in debt collection cases to file documentation demonstrating their legal entitlement to the amounts they

advantage of judicial resources and crowded dockets in order to justly adjudicate these claims that can have economically disastrous effects on consumers.[196] Second, consumers should have the opportunity to learn to identify and respond to opt-out clauses in order to protect their rights.[197] Third, consumers broadly, but especially the communities of color targeted by debt collection litigation, would benefit from learning about these practices given the critical fact that "thousands of cases [are] built on flimsy documentation."[198] Resources exist to help consumers participate in a debt-collection suit, but affected individuals must know what to look for.[199]

CONCLUSION

Corporations dominate state courts with debt collection claims—often built on meager evidence that does not withstand challenges[200]—for which they aggressively pursue default judgments.[201] These claims disproportionately target low-income people of color and result in serious economic harms like garnished wages.[202] Frequently, debt collection claims are litigated against consumers in violation of the FDCPA, and, in turn, harmed consumers may theoretically file suit in court against a debt collector

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seek to collect before entry of any default judgment where state legislation or court rules do not currently require the filling of such documentation").

196 PEW CHARITABLE TRS., *supra* note 14, at 18; *id.* at 19 (District Judge Chris Foy (Iowa Judicial District 2Ay) said:

> Quite honestly, I think it would be helpful for judges to have better data. All of us have this sense that we see a fair amount of these types of cases on a consistent basis, but I would be interested to see how many collection actions were filed in this district.

Id. at 1 ("In 2016, a committee of the Conference of Chief Justices, a national organization of state supreme court heads, issued a report recommending that courts enact rules to provide a more fair and just civil legal system, especially with respect to debt collection cases.").

197 *See supra* Part IV(A).

198 Danielle Douglas, *Taking on the Country's Biggest Debt Buyer*, WASH. POST (May 9, 2014), https://www.washingtonpost.com/business/economy/taking-on-the-countrys-biggest-debt-buyer/2014/05/09/fbd65a24-a94d-11e3-b61e-8051b8b52d06_story.html ("[Midland] has a reputation of buying soured credit card debt and heading straight to court to collect, a tactic that consumer lawyers say scares people into settling.").

199 *E.g.*, George Simons, *How to Beat a Midland Funding LLC Debt Lawsuit*, SOLOSUIT BLOG (July 12, 2023), https://www.solosuit.com/posts/beat-midland-funding-llc-debt-lawsuit. Developed by law students, SoloSuit "helps debtors answer the [debt collection] complaint they received in the mail." Lee Hale, *A Student Solution to Give Utah Debtors a Fighting Chance*, NPR (Feb. 24, 2018, 8:05 AM), https://www.npr.org/sections/ed/2018/02/24/585374399/a-student-solution-to-give-utah-debtors-a-fighting-chance.

200 *E.g.,* RUBBER STAMP JUSTICE, *supra* note 2, at 48 ("As one legal aid attorney in Pontiac, Michigan put it, 'The amount of the debt is an issue in *all* of the cases. Our clients say their credit card limit was $500 or so–so how do they owe $2,000? We have no idea where they get their numbers.'").

201 *See supra* Part I(A).

202 *See supra* Part I(A).

under the FDCPA.[203] Yet consumers' FDCPA claims are often relegated to arbitration pursuant to arbitration clauses in underlying credit card agreements.[204] When FDCPA claims are siphoned into the silence of arbitration, consumers cannot enforce the FDCPA and abusive debt collection litigation continues to proliferate and harm Black and Brown individuals and the working poor.[205] Until 2022, consumers typically failed in trying to keep their FDCPA claims in court because a strategy they employed—arguing that the debt collector waived its right to arbitration when they chose to initiate collection litigation in court—was subject to heightened legal standards that were arbitration-specific and judicially-created.[206]

In *Morgan v. Sundance*, the Supreme Court unanimously held that courts could not use arbitration-specific rules to adjudicate claims involving waiver of a contractual right.[207] Advocates are already leveraging *Morgan* at the federal appellate level to argue that courts should look to debt collectors' actions at the state court level as dispositive factors in finding that the debt collector acted inconsistently with its right to arbitrate given that it could have originally pursued the collection claim in arbitration.[208] This Note offers three ways to maximize the Court's opinion in *Morgan* in order to keep FDCPA claims in court and best serve consumers' interests.[209] First, consumers will benefit from a centralized, up-to-date repository of arbitration provisions given the prevalence of opt-out clauses which, when timely invoked, prohibit debt collectors from forcing a consumer's claim into arbitration.[210] Second, advocates can rely on *Morgan* to ensure courts do not impose arbitration-specific rules and standards on consumers arguing a debt collector waived its right to arbitrate.[211] Third, consumers, advocates, and interested parties more widely should continue to raise awareness of the massive and pervasive problem of debt collectors litigating claims in ways that harm communities of color and take advantage of judicial resources without having to answer for these actions in court.[212]

In discussing the power imbalance between individuals like Mr. Clifford Cain Jr. and debt buyers like Midland, Senator Elizabeth Warren, in

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[203] *See supra* Part I(B).
[204] *See supra* Part I(B).
[205] *See supra* Part I(B).
[206] *See supra* Part II.
[207] *See supra* Part III(B).
[208] *See supra* Part III(C).
[209] *See supra* Part IV.
[210] *See supra* Part IV(A).
[211] *See supra* Part IV(B).
[212] *See supra* Part IV(C).

her former capacity as a law professor, explained, "We're watching a fight between two players, one a skilled repeat gladiator, and one who's thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are."[213] When the stakes are this high, consumers must be able to protect and vindicate their statutory rights in a court of law.[214]

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[213] The Boston Globe Spotlight Team, *No Mercy for Consumers*, BOS. GLOBE (July 30, 2006), http://archive.boston.com/news/specials/debt/part1_main [https://perma.cc/788Y-RQ7N].

[214] Randall Ward, who "helps care for his 20-year-old son with Down syndrome and a granddaughter" and works as a manager at a Waffle House, had his wages garnished by Encore.

> The only way to make ends meet, [Ward] said, was to cancel health insurance for himself, his son, and his wife, "because I could not pay the bills if I didn't do it." Then [COVID-19] forced his restaurant to close for several weeks and his pay stopped altogether. The family was without income as he waited for his unemployment claim to go through. When, finally, he could go back to work, the garnishments returned. Encore has said in public statements that it looks to work with consumers, especially those who've been impacted by COVID-19. Ward said that was not his experience. "They're just ruthless about it," he said. "I would hate to see that happen to anybody."

Kiel & Ernsthausen, *supra* note 72.