No. 15-1399

In The
Supreme Court of the United States

PRINCIPAL INVESTMENTS, INC., et al.,

Petitioners,

v.

CASSANDRA HARRISON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was it proper for a court, rather than an arbitrator, to determine the gateway question of arbitrability—whether petitioners' prior litigation conduct in filing tens of thousands of collection lawsuits against their customers waived a contractual right to enforce an arbitration clause—when the arbitration agreement contains no clear and unmistakable delegation of that decision-making duty?

2. Does the holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), that "[w]hen a state law prohibits outright the arbitration of a particular type of claim, the . . . conflicting rule is displaced by the FAA," apply when the Nevada Supreme Court did not enforce or establish a general rule prohibiting any particular type of claim from being arbitrated?

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INTRODUCTION

First and foremost there is no split, much less a deep one, among courts on whether the court or an arbitrator should decide gateway questions of arbitrability such as litigation-conduct waiver. Courts deciding this narrow issue have followed this Court's decisions and held that, when the parties' agreement lacks clear and unmistakable language to the contrary, litigation-conduct waiver is an issue of arbitrability presumptively for the courts to decide. The lack of a legitimate split in authority weighs in favor of this Court declining to exercise its discretion and denying petitioners' writ request.

Second, the Nevada Supreme Court did not apply or create a general rule that abuse-of-process claims—or any other type of claim—can never be subject to arbitration. Other states cannot follow a general rule that does not exist in Nevada, so petitioners' argument that other states may follow a non-existent rule does not create a basis for this Court's review. Pet. 23-24.

Finally, even if courts were split on whether litigation-conduct waiver is generally for courts or arbitrators to decide, the unique factual circumstances of this case make it an unsuitable vehicle for this Court to revisit the issue. Unlike any case cited by petitioners, the district court and Nevada Supreme Court found litigation-conduct waiver in this case based on petitioners obtaining thousands of default judgments in justice court without any evidence of them ever invoking the applicable arbitration clauses. App. 3, 31 &

35. Because most cases involving litigation-conduct waiver relate to prior litigation in the same action, this unique case would make a poor choice for resolving any perceived split among the courts.

STATEMENT OF THE CASE

This case involves petitioners' waiver of the right to compel arbitration—if any ever existed—of the certified class members' claims related to thousands of default judgments that petitioners obtained in justice court based on allegedly fraudulent affidavits of service.

Rapid Cash Obtains Thousands of Default Judgments in Justice Court

Over the seven-year period preceding this action, Rapid Cash filed more than 16,000 individual collection actions against its customers in the justice courts located in Clark County, Nevada.[1] App. 3. Relying on a single process server, Maurice Carroll d/b/a On-Scene Mediations, Rapid Cash obtained thousands of default judgments against respondents and the absent class members, all of whom failed to appear and defend the collection lawsuits. App. 3. An investigation of On-Scene initiated by a justice of the peace—after she noticed an extremely high number of same-day receipts

[1] Contrary to representations in their petition, petitioners filed the actions in justice court—a distinct and jurisdictionally higher court than small-claims court.

and service of process—confirmed that On-Scene routinely failed to serve process and then submitted false affidavits that service had been made. App. 3. The investigation culminated in a cease and desist order entered against On-Scene and Carroll's criminal conviction on 17 counts of forgery and offering false instruments. App. 4.[2] Rapid Cash has produced no evidence that it ever sought to enforce the arbitration clause in its loan agreements until after respondents filed this class action.

Respondents File this Class Action

After being garnished on default judgments they were not aware of, respondents filed this now-certified class action seeking relief from all of Rapid Cash's fraudulently obtained default judgments in justice court. For years, Rapid Cash has steadfastly refused to voluntarily vacate any of the default judgments where On-Scene and/or Maurice Carroll provided affidavits of service.

The District Court Denies Arbitration

Rapid Cash moved to compel arbitration on three separate occasions, and the district court denied all three motions. The district court interpreted the two arbitration clauses contained in respondents' loan

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[2] On-Scene Mediations, the process server used by Rapid Cash, had only two other clients during this time period. Carroll's criminal conviction involved evidence from his work for Richland Holdings, one of his two non-Rapid Cash clients.

agreements and made two distinct determinations: (1) that respondents' individual and class claims fall outside the scope of the arbitration agreements, App. 31, and (2) that the arbitration clauses were "unenforceable *not under a state-wide policy* declaring such clauses unenforceable but because Rapid Cash's own actions resulted in waiver of its arbitration rights and permitting the Rapid Cash defendants to enforce any portion of their long-ignored arbitration provisions would violate public policy." App. 30-31 (emphasis added). In reaching its conclusions, the district court expressly considered *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, and found it inapplicable based on its vastly different facts. App. 30. Of note, nowhere does Rapid Cash claim an arbitrator possesses jurisdiction or authority to provide the relief respondents seek: the setting aside of potentially thousands of default judgments entered in justice courts throughout Clark County, Nevada.

The Nevada Supreme Court Affirms

In affirming the district court's refusal to compel arbitration under the unique facts of this case, the Nevada Supreme Court authored a well-reasoned opinion and sided with all United States circuit courts and state courts of last resort by holding that *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), which involved a procedural prerequisite to arbitration, does not require that arbitrators decide litigation-conduct waiver. App. 16. The court reasoned that parties to an arbitration agreement that does not expressly provide

for an arbitrator to decide litigation-conduct waiver, as is the case here,[3] "would expect a court to determine whether the opposing party's conduct in a judicial setting amounted to waiver of the right to arbitrate." App. 16. The Nevada Supreme Court affirmed the district court's finding of litigation-conduct waiver based on Rapid Cash's conduct—not a statewide policy against arbitration. App. 17-23.

REASONS FOR DENYING THE WRIT

No deep split regarding litigation-conduct waiver exists, as petitioners claim, because this Court has decided the proper division of labor between the court and the arbitrator as it pertains to threshold issues, *see Howsam*, 537 U.S. 79, and lower courts have broadly agreed that, under *Howsam*, litigation waiver issues are for courts to decide. Furthermore, the Nevada Supreme Court did not hold that abuse-of-process claims can never be subject to arbitration so there is no potential violation of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333. Finally, this case is not an effective vehicle to determine any bright line rule as the facts are atypical of most litigation-conduct waiver cases.

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[3] The petition does not seek review of the Nevada Supreme Court's determination that the arbitration clauses do not contain "the 'clear and unmistakable evidence' required to overcome the presumption that litigation-conduct waiver is for the court to decide." App. 18; *see* Pet. i (Question Presented no. 1).

I. COURTS HAVE UNIFORMLY APPLIED THE LONGSTANDING RULE THAT GATEWAY QUESTIONS OF ARBITRABILITY, SUCH AS LITIGATION-CONDUCT WAIVER, ARE PRESUMPTIVELY FOR COURTS TO DECIDE.

This Court's decisions plainly provide that certain issues are presumptively for the courts to decide while other issues are for arbitrators to decide. Consistent with this Court's decisions, every United States court of appeals and state court of last resort has either ruled that whether a party has waived its right to arbitrate by engaging in inconsistent *litigation* conduct is a threshold issue of arbitrability for courts to decide or simply proceeded to decide the litigation-conduct waiver issue without questioning the propriety of doing so. The Nevada Supreme Court's decision in this matter is consistent with all applicable federal and state authority in holding that courts, not arbitrators, decide the gateway arbitrability issue of litigation-conduct waiver.

A. The *Howsam* and *BG Group* Decisions Charge Courts with Deciding Gateway Issues of Arbitrability and Arbitrators with Deciding Procedural Gateway Issues.

This Court's decisions in *Howsam* and *BG Group* already provide clear direction for the proper division of labor between the courts and arbitrators when interpreting arbitration clauses that are silent on the subject of who should determine threshold issues of arbitration. *See BG Group, PLC v. Republic of Argentina*,

134 S. Ct. 1198, 1202 (2014); *Howsam*, 537 U.S. at 83-84.

Gateway "question[s] of arbitrability"—such as disputes about whether a party is bound by an arbitration clause or whether a particular dispute is within the scope of an agreement to arbitrate—are presumptively reserved for the courts to decide. *Howsam*, 537 U.S. at 83-84. These questions of arbitrability are "issue[s] for judicial determination unless the parties clearly and unmistakably provide otherwise." *Id.* at 83 (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Questions of arbitrability encompass all issues "where the contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so . . . ." *Howsam*, 537 U.S. at 83.

This Court more recently confirmed the party-expectation presumption as the measure of whether the court or an arbitrator must decide a particular gateway issue. *See BG Group*, 134 S. Ct. at 1206-07 (quoting *Howsam*, 537 U.S. at 84, 86). This expectation test "aligns (1) decisionmaker with (2) comparative expertise" to "help better secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Howsam*, 537 U.S. at 85. The Court's stated purpose for this division-of-labor between who decides arbitrability versus procedural issues is to "avoid[ ] the risk of forcing parties to arbitrate a matter that they may well

have not agreed to arbitrate." *Id.* at 83-84; *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 456 (2003) (quoting *First Options*, 514 U.S. at 945). The *Howsam* court cited four specific examples of arbitrability questions, all of which relate to the enforceability of the contractual arbitration clause or the scope of claims covered by the arbitration clause. *Howsam*, 537 U.S. at 84.

On the other hand, procedural gateway issues such as the "meaning and application of procedural preconditions for the use of arbitration" are presumptively for the arbitrator to decide. *BG Group*, 134 S. Ct. at 1202; *see Howsam*, 537 U.S. at 84-85. These procedural issues typically involve questions of "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty at all." *BG Group*, 134 S. Ct. at 1202 (emphasis in original). *Howsam* and *BG Group* identify some of these procedural "when" questions, including waiver, delay, time limits, notice, laches, estoppel, "and other conditions precedent to an obligation to arbitrate. . . ." *Howsam*, 537 U.S. at 84-85 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983);[4] citing Revised Uniform Arbitration Act of 2000 § 6, comment 2, 7 U.L.A., at 13);

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[4] In their petition, petitioners rely exclusively on *Howsam*'s use of "waiver" as quoted from the *Moses H. Cone* decision to claim all types of waiver are presumptively for the arbitrator to decide. Pet. 7-9. But neither *Howsam* nor *Moses H. Cone* nor the eight cases cited in the *Moses H. Cone* decision on the issue of waiver hold that the arbitrator should decide litigation-conduct waiver questions. *See Moses H. Cone*, 460 U.S. at 25, n.31.

see BG Group, 134 S. Ct. at 1202. Courts have repeatedly interpreted the "waiver" references in *Howsam* and *BG Group* in the context in which they were written: "*Howsam*'s reference to 'waiver, delay, or a like defense' being for the arbitrator encompasses 'defenses arising from noncompliance with the contractual conditions precedent to arbitration . . . [but] not . . . claims of waiver based on active litigation." App. 16 (quoting *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 219 (3d Cir. 2007)). Both *Howsam* and *BG Group* involved procedural gateway issues rather than issues of arbitrability, and neither one addressed a claim of waiver of arbitration by litigation conduct.

B. Courts Have Consistently Followed the Directives in *Howsam* and *BG Group* By Deciding Litigation-Conduct Waiver, a Gateway Issue of Arbitrability.

Every United States circuit court of appeals and state court of last resort to squarely consider whether the court or an arbitrator should decide litigation-conduct waiver, including the Nevada Supreme Court, has reached the same conclusion: that litigation-conduct waiver is a gateway question of arbitrability for the courts to decide. Just weeks ago, the Ninth Circuit issued an in-depth decision discussing this exact issue. *See Martin v. Yasuda*, ___ F.3d ___ (9th Cir. 2016). The *Martin* court interpreted *Howsam* and its progeny in precisely the same way as the Nevada Supreme Court did here and determined that litigation-conduct waiver is a gateway question of arbitrability

presumptively for the court to decide. *See id.* at *4-5 (citing *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121 (9th Cir. 2008)).

Martin explained that "[e]very circuit that has addressed this issue—whether a district court or an arbitrator should decide if a party waived its right to arbitrate through litigation conducted before the district court—has reached the same conclusion" that it is presumptively for the courts to decide litigation-conduct waiver. *Id.* at *4 (citing *Marie v. Allied Home Mort. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005); *Ehleiter*, 482 F.3d at 217-18, 221; *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008); *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011)); *see also Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App'x 462, 464 (5th Cir. 2004) (holding parties would expect courts to decide litigation-conduct waiver). The Ninth Circuit also acknowledged the Supreme Courts of Colorado, Nebraska, Texas, and Alabama have held that courts decide the issue of litigation-conduct waiver. *Id.* (citing *Hong et al. v. CJ CGV Am. Holdings, Inc. et al.*, 166 Cal.Rptr.3d 100, 111-14 (Cal. Ct. App. 2013) (collecting cases)).

C. None of the So-Called "Split" Decisions Support Rapid Cash's Position on Litigation-Conduct Waiver.

Petitioners rely on surface-level review and minimal analysis of certain cases to claim a split exists between the courts on whether litigation-conduct waiver

is a gateway issue of arbitrability or of procedure. This claimed split of authority is the main theme of the petition. But a closer examination of the allegedly split decisions reveals that no such split exists under the Rules of this Court. *See* Rule of the Supreme Court of the United States 10(a)-(c).

Petitioners cite only two decisions from United States courts of appeals, neither of which stands for the proposition that an arbitrator should decide litigation-conduct waiver. Pet. 10-11. Petitioners rely principally on a distinguishable Eighth Circuit case that has never been applied by courts *within* the Eighth Circuit to preclude courts from deciding litigation-conduct waiver. Pet. 10 (discussing *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003)). The facts of the *Transamerica* decision make it inapposite, particularly because it involved a claim of waiver through actions in an earlier arbitration rather than litigation conduct. *See Transamerica*, 328 F.3d at 463; *see also Parler v. KFC Corp.*, 529 F.Supp.2d 1009, 1013 (D. Minn. 2008) (discussing *Transamerica*). The *Transamerica* court's decision makes sense because the parties' dispute had been pending before a three-member arbitration panel for more than one year before the district court action was filed. *See Transamerica*, 328 F.3d at 463. Under such circumstances, an arbitrator appears better suited to decide what kind of conduct before an arbitrator would constitute a waiver, which is an issue that does not involve the courts' authority over or control of a party's use or misuse of the judicial process.

At least two district courts in the District of Minnesota have thoroughly distinguished *Transamerica*, declined to apply it as petitioners suggest, and instead held that the court should decide litigation-conduct waiver—a gateway issue of arbitrability, not procedure. *See Webster Grading, Inc. v. Granite Re, Inc.*, 879 F.Supp.2d 1013, 1018-19 (D. Minn. 2012) (noting *Howsam* requires arbitrator to decide waiver of procedural prerequisites, not litigation-conduct waiver); *Parler*, 529 F.Supp.2d at 1012-14 (discussing extensively why *Howsam* supports a presumption that courts decide *litigation-conduct* waiver). And even more compelling, the Eighth Circuit has repeatedly ignored *Transamerica* for the proposition that petitioners advance here—that arbitrators should decide litigation-conduct waiver—and decided the litigation-conduct waiver issue itself. *See ABF Freight Sys., Inc. v. Int'l Broth. of Teamsters*, 728 F.3d 853, 862-65 (8th Cir. 2013); *Hooper v. Advance Am., Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917 (8th Cir. 2009); *see also McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 957-58, n.3 (8th Cir. 2009) (adopting waiver reasoning from *Marie*, 402 F.3d 1, deciding litigation-conduct waiver, and declining to revisit *Transamerica*).

Also distinguishable, the Second Circuit's decision in *Republic of Ecuador v. Chevron Corp.*, involved allegations of estoppel and waiver arising from a party's prior agreement to accept jurisdiction of a foreign court over a matter, not a claim of litigation-conduct waiver. *See* 638 F.3d 384 (2d Cir. 2011). Further, the Second Circuit found "clear and unmistakable evidence" that

the parties intended these issues to be decided by the arbitral panel in the first instance. *Id.* at 394 (citing *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002)). That decision has no application here, where Rapid Cash does not seek review of the Nevada courts' ruling that the arbitration clauses contain no clear and unmistakable evidence of an agreement to delegate to an arbitrator the power to decide arbitrability issues.

Petitioners rely on other allegedly conflicting decisions from United States district courts and a state intermediate court of appeals to gin up a split that does not exist. Pet. 9-12 (citing *Scaffidi v. Fiserv, Inc.*, No. 05-C-1046, 2006 WL 2038348 (E.D. Wis. July 20, 2006); *Housh v. Dinovo Invs., Inc.*, No. Civ.A. 02-2562-KHV, 2003 WL 1119526 (D. Kan. Mar. 7, 2003); *Portfolio Recovery Assocs. v. Dixon*, 366 P.3d 245 (Kan. Ct. App. 2016) (not a state court of last resort);[5] *RMES Commc'ns, Inc. v. Qwest Bus. Gov't Servs., Inc.*, No. 05-cv-02185-LTB-MJW, 2006 WL 1183173 (D. Colo. May 2, 2005)). Under Rule 10, none of these decisions—even if in conflict with the Nevada Supreme Court's decision in this case—provides a sufficient basis for accepting Rapid Cash's petition. To the extent they misapply the

[5] The *Dixon* court's discussion of waiver is arguably dicta because the court determined that unresolved factual issues needed to be decided by the district court before reaching the litigation-conduct waiver issues. *See Dixon*, 366 P.3d at 251-52 (acknowledging entire waiver discussion based on "assumption that the arbitration agreement is both binding on the parties and intended for waiver-of-arbitration issues to be decided through arbitration").

rules established by *Howsam* and *BG Group*, these decisions could have been rectified by the respective United States courts of appeals and state courts of last resort. Pursuant to Rule 10, this Court should ignore these lower-level decisions in determining whether to exercise its discretion to consider this petition.

The only other cases petitioners cite in their attempt to show an alleged split have little to no factual resemblance to the litigation-conduct waiver issues here. Pet. 10, 12. Four critical facts in *Woodland Ltd. P'ship v. Wulff*, 868 A.2d 860 (D.C. 2005), prevent its applicability here: (1) litigation-conduct waiver was raised for the first time on appeal, preventing the development of a factual record below, *see id.* at n.1, (2) the court found the arbitration clause clearly and unmistakably required an arbitrator to decide *all types* of waiver issues rather than applying the *Howsam* presumptions, *see id.* at 865, (3) the party seeking arbitration alleged procedural defects in the waiver argument under the applicable arbitration rules (e.g., timing), *see id.*, and (4) the defending party's right to arbitrate did not arise until after litigation commenced, *see id.* at 862-63. Here, unlike *Woodland*, respondents raised litigation-conduct waiver at the district court level, the Nevada Supreme Court affirmed the district court's finding that the arbitration agreements do not contain clear and unmistakable language requiring an arbitrator to decide litigation-conduct waiver, petitioners allege no procedural defects in respondents' litigation-conduct waiver position under the applicable arbitration rules, and petitioners' claimed right to arbitrate

claims with respondents and the class members arose long before petitioners sought and obtained thousands of default judgments in justice court. Further, *Woodland* fails to demonstrate any deviation from *Howsam*, particularly because the court did not apply the *Howsam* presumptions and instead relied on the parties' express agreement to arbitrate all waiver issues.

The other case, *First Weber Grp., Inc. v. Synergy Real Estate Grp., LLC*, 860 N.W.2d 498 (Wis. 2015), like *Woodland*, involves dramatically different facts and findings than exist here. The *First Weber* parties arbitrated their entire dispute to conclusion before the prevailing party filed a second arbitration request and a subsequent court action to try to recover fees and costs related to the original arbitration. *See id.* at 501-02. The lower court considered and denied a motion to compel arbitration based on untimeliness, a decidedly procedural issue. *See id.* at 502. The Wisconsin Supreme Court reversed because, under *Howsam* and *BG Group*, timeliness and estoppel are procedural defenses to arbitration that courts must allow arbitrators to decide. *See id.* at 502-03. Just as in *Howsam* and *BG Group*, the issue of litigation-conduct waiver was not before the *First Weber* court.

A comprehensive review of the decisions behind petitioners' claimed split demonstrates a complete lack of division between relevant courts as it relates to the narrow question of whether the court should decide litigation-conduct waiver. The relevant lower courts, including the Nevada Supreme Court, are in complete

unison with *Howsam* and *BG Group* in deciding gateway issues of arbitrability, such as litigation-conduct waiver, and allowing arbitrators to decide procedural gateway questions (e.g., time limits, procedural waiver, estoppel, laches).

D. The Nevada Supreme Court Adopted the Reasoning of All Other Courts Considering the Discrete Issue of Litigation-Conduct Waiver.

The Nevada Supreme Court reached the same conclusion as the *Martin* court and all other federal courts of appeals and state courts of last resort to decide this narrow issue. Its analysis and reasoning meticulously track and apply this Court's division-of-labor rules established by *Howsam* and *BG Group*. App. 10-17. The Nevada Supreme Court made all of the necessary findings and conclusions to support its decision under this Court's prior decisions, specifically: (1) the agreements at issue here do not contain "clear and unmistakable evidence" of the parties' intent to have an arbitrator decide the question of litigation-conduct waiver, App. 18-19, (2) in the absence of such evidence, threshold questions of arbitrability are presumptively for the courts to decide because the parties likely expect the courts, rather than arbitrators, to decide these non-procedural gateway issues, App. 11 (citing *Howsam* and *BG Group*), while questions involving procedural preconditions to arbitration, such as "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate," are presumptively for

arbitrators to decide because the parties likely expect arbitrators to decide these issues, App. 11-12 (quoting *BG Group*), (3) litigation-conduct waiver is a threshold question of arbitrability—not procedure—for two distinct reasons: because it goes to whether the parties must submit their dispute to arbitration at all, App. 11, and because it involves a question the parties "likely would expect a court to determine" rather than an arbitrator, App. 16, and (4) for these reasons, the district court correctly decided the threshold arbitrability issue of litigation-conduct waiver based on Rapid Cash's prior prolific litigation conduct against the class members, App. 20-23.

The Nevada Supreme Court's decision complies with this Court's decisions because it is grounded in the factual findings that Rapid Cash and respondents would have expected a court, not an arbitrator, to decide whether Rapid Cash's conduct in filing more than 16,000 actions in justice court and obtaining thousands of default judgments—without once initiating arbitration—constituted litigation-conduct waiver. Petitioners cite no legitimate basis for reviewing or disturbing the Nevada Supreme Court's legally sound and factually supported decision in this case.

1. Consistent with *Howsam*, the Nevada Supreme Court Determined the Courts to be Particularly Well-Qualified to Determine Waiver by Litigation Conduct in Their Judicial Forum.

This Court has stated the law assumes an expectation that aligning "(1) [a] decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Howsam*, 537 U.S. at 85. Consistent with these principles, a court should decide issues of waiver based on litigation conduct in the judicial forum. *See Marie*, 402 F.3d at 13. On the flip side, this Court concluded that arbitrators should decide how to apply specific arbitration rules because they are "comparatively more expert about the meaning of their own rule, are comparatively better able [than courts] to interpret and apply it." *Howsam*, 537 U.S. at 85.

Following *Howsam*'s decisionmaker principle, the comparative expertise of courts in analyzing a party's previous litigation conduct in the judicial forum makes them better equipped to determine litigation-conduct waiver. *See Marie*, 402 F.3d at 13. In addition to the expertise of courts in assessing conduct within the judicial forum, the need of courts to retain their power to control judicial proceedings and correct abuses of them also supports the conclusion that courts, not arbitrators, should decide issues of waiver by litigation conduct:

> Where the alleged waiver arises out of conduct within the very same litigation in which the party attempts to compel arbitration or stay proceedings, then the district court has power to control the course of proceedings before it and to correct abuses of those proceedings. Also, the comparative expertise considerations stressed in *Howsam* and *Green Tree* argue for judges to decide this issue. Judges are well-trained to recognize abusive forum shopping. As well, the inquiry heavily implicates "*judicial* procedures," which *Green Tree* suggests should be an important factor in presuming that an issue is for the court.

Id. (emphasis in original) (citations omitted).

This concern about protecting the court systems is a legitimate consideration that is commonplace throughout much of the jurisprudence of waiver based on litigation conduct. *See Hooper*, 589 F.3d at 922 (stating party cannot use a "heads I win, tails you lose" strategy by initiating litigation that does not go in its favor in judicial forum and then later moving to compel arbitration); *Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 161 (2d Cir. 2010) (finding litigant cannot use arbitration to abort a suit that did not go as planned in the courts); *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012) ("to allow the 'no waiver' clause to preclude a finding of waiver would permit parties to waste scarce judicial time and effort and hamper judges' authority to control the course of the proceedings" and allow parties to "test the water

before taking the swim"); *Reid Burton Const. Inc. v. Carpenters Dist. Council of S. Colo.*, 535 F.2d 598, 603 (10th Cir. 1976) (holding that while certain equitable defenses are heard by arbitrator, courts retain decisional authority over equitable defenses arising from litigation conduct in the courts because to "hold otherwise would unnecessarily hamper a court's control of its proceedings").

The Nevada Supreme Court correctly concluded it was within the court's authority to decide waiver by litigation conduct. Applying the logic of *Howsam* and *Green Tree*, the Nevada Supreme Court confirmed the court was better situated than an arbitrator to determine whether Rapid Cash's filing and obtaining judgments in more than 16,000 justice court cases within the Nevada court system constituted litigation-conduct waiver. Accordingly, the court was the proper decisionmaker to determine Rapid Cash's waiver by litigation conduct.

2. Neither the Nevada Supreme Court nor the District Court Prejudged the Merits of the Dispute to Support Their Conclusions.

Petitioners mischaracterize the Nevada Supreme Court and district court decisions to claim those courts prejudged the merits of this case. Pet. 21-23. But those courts founded their litigation-conduct waiver decisions on the parties' allegations and admissions, not any consideration of the merits. Respondents allege

that Rapid Cash filed actions against them in justice court, filed fraudulent affidavits of service, obtained invalid default judgments, and then unlawfully garnished respondents' paychecks and bank accounts. App. 4. All of this was allegedly done without any prior notice to respondents and in lieu of arbitration. In its Answer, filed on January 4, 2012, Rapid Cash admitted (1) it filed justice court actions against respondents and/or other class members and (2) its process server, Maurice Carroll—now a convicted felon on 17 counts of forgery and offering false instruments, submitted affidavits claiming to have received and effectuated service upon respondents on the same day. App. 3-4. These admitted facts are not in dispute.

To the extent Rapid Cash did not admit respondents' allegations, the Nevada Supreme Court's decision expressly acknowledges that they are allegations, App. 4, and consistently refers to them as possibilities rather than facts. App. 8 (reciting district court decision that Rapid Cash obtained "default judgments *allegedly* based on On-Scene's falsified affidavits of service." (emphasis added)); App. 22 (stating "*If* the judgment Rapid Cash obtained was the product of fraud or criminal misconduct . . . ." (emphasis added)). The Nevada Supreme Court found the claims asserted by respondents to be "integrally related to, the litigation Rapid Cash conducted in justice court" and also stated a party cannot invoke a no-waiver clause "to sanctify a fraud upon the court *allegedly* committed by the party who itself elected a litigation forum for its claim." App. 22-23 (emphasis added). The Nevada

Supreme Court based its decision on the allegations and Rapid Cash's admitted conduct, not the merit of the allegations. App. 24 (stating "we do not pass upon the validity of any of the named plaintiffs' claims").

The district court's decisions are no different. While petitioners selectively quote a subsequent district court order, Pet. 22, n.3, that order simply affirms an earlier order where the district court recognized the "*claims* . . . arise from the *alleged* tortious and fraudulent conduct of defendants and its agents in those collections activities." App. 35 (emphasis added).

Because neither court prejudged the merits to reach its conclusions, this Court should disregard petitioners' arguments on the potential harms of judicial conduct that did not occur here.

II. THE NEVADA SUPREME COURT DID NOT ISSUE OR ENFORCE A POLICY DISFAVORING ARBITRATION FOR PARTICULAR CAUSES OF ACTION.

The Nevada Supreme Court did not, as petitioners assert, create a broad policy of disfavoring arbitration of any particular type of claim. Pet. 23-26. Instead, both the district court and the Nevada Supreme Court based their decisions on the arbitration clauses and Rapid Cash's specific conduct in obtaining thousands of default judgments in justice court without ever seeking to arbitrate. App. 22-23 & 30. In *Concepcion*, 563 U.S. 333, and *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the state courts declined

to compel arbitration based on general state policies against arbitrating particular types of claims. But the Nevada Supreme Court did not base its decision on or create a policy position disfavoring arbitration of abuse-of-process claims, and thus its decision is nothing like *Concepcion* or *Marmet*. The court based its waiver decision on Rapid Cash's specific conduct prior to attempting to compel arbitration, stating "Rapid Cash waived its right to arbitrate to the extent of inviting its borrower to appear and defend on the merits of that claim." App. 22.

The Nevada Supreme Court did not directly or indirectly prohibit arbitrating abuse-of-process claims, but rather found that in the instant case Rapid Cash waived its right to arbitrate these claims because it had initiated litigation in the past which related to the same legal and factual issues as respondents' individual and class claims.

III. THE NEVADA SUPREME COURT'S WELL-REASONED DECISION APPLYING *HOWSAM* TO UNIQUE FACTS MAKES THIS CASE A POOR CHOICE FOR RECONSIDERING LITIGATION-CONDUCT WAIVER.

Petitioners provide no valid reason why this case would make a good vehicle for this Court to reconsider whether litigation-conduct waiver is a gateway issue of arbitrability. First, this Court's *Howsam* and *BG Group* decisions have created no bona fide confusion on

the issue. Every relevant court considering the issue has reached the same conclusion: that litigation-conduct waiver relates to arbitrability rather than a procedural precondition to arbitration. *See supra*, Sections I.B-I.C.

Second, the Nevada Supreme Court decided the narrow litigation-conduct waiver issue consistently with all the weight of precedent after carefully considering the controlling law and specific facts related to Rapid Cash's conduct. App. 1-25. And Rapid Cash does not challenge the Nevada Supreme Court's decision that the arbitration agreements do not contain clear and unmistakable evidence of any intent by the parties to have an arbitrator decide issues of waiver by litigation conduct.

Third, Rapid Cash does not argue the unusual facts of this case—denial of arbitration after using a now-convicted felon to obtain allegedly fraudulent default judgments in justice court against hundreds or even thousands of indigent individuals—have ever been or are likely to be repeated anywhere else in this country. A decision on these bizarre facts would have extremely limited application in other cases because most litigation-conduct waiver disputes arise when a party seeks to compel arbitration in the same forum where it has been litigating. *See Martin*, ___ F.3d ___, at *4. Where, as here, a party has systematically used the state courts to obtain thousands of judgments, and then seeks to compel arbitration of claims to set aside those judgments by an arbitral tribunal that would

have no authority to grant such relief, the courts' interest in and expertise in protecting the integrity of their processes by determining the litigation-conduct waiver issue are at their zenith.

Fourth, Rapid Cash's speculation about how this isolated case from Nevada might impact debt-collection practices in Nevada or elsewhere should be of no significance to this Court. Pet. 16-17. The issue has little, if any, nationwide importance to justify use of this Court's limited and valuable time.

And finally, Justice Thomas has repeatedly stated that he "remain[s] of the view that the Federal Arbitration Act . . . does not apply to proceedings in state courts" and "does not require state courts to order arbitration." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 297 (1995) (Thomas, J., dissenting) (stating view that FAA is "wholly inapplicable to [state] courts."). Given the continuing disagreement on this Court over whether the FAA even applies in state courts, a state court case would be a poor choice for resolving any significant issue arising under the FAA (even if this case presented such an issue).

CONCLUSION

For the foregoing reasons, Rapid Cash's petition for a writ of certiorari should be denied.

Respectfully submitted,

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