No. 13-1274

In The
Supreme Court of the United States

MICHELLE RICHARDS,

Petitioner,

v.

ERNST & YOUNG LLP,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that Ernst & Young LLP did not waive its right to arbitrate where, as the court of appeals determined, Petitioner suffered no prejudice and where Ernst & Young moved promptly to compel arbitration after this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), rendered its arbitration agreement enforceable.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Ernst & Young LLP states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

STATEMENT OF THE CASE

The petition for certiorari arises from the court of appeals' decision, based on the facts of this case, that Respondent Ernst & Young LLP's participation in pre-trial litigation of Petitioner Michelle Richards's lawsuit, before Ernst & Young moved to compel arbitration, did not waive its right to arbitrate.

A. Factual Background.

1. In August 2001, Richards began working for Ernst & Young in California. Ninth Circuit Excerpts of Record ("ER") 168.

2. Richards agreed to arbitrate "[a]ll claims, controversies or other disputes" that might arise between herself and Ernst & Young pursuant to Ernst & Young's Common Ground Dispute Resolution Program. Pet. App. 34a. Richards does not dispute that the claims she asserts in this case fall within that agreement, thereby requiring their resolution in arbitration.

The agreement also precludes the arbitration of claims as a class. Pet. App. 42a.

B. Procedural Background.

1. On June 19, 2008, Richards filed a putative class action against Ernst & Young in state court, asserting claims for overtime wages and other penalties under California law. ER 184-91. Ernst & Young removed Richards's lawsuit to federal court. ER 116. At no time did Richards seek to arbitrate her claims pursuant to her agreement to arbitrate.

2. On April 20, 2009, the district court consolidated Richards's lawsuit "for class certification purposes only" with two other pending cases: *Ho/Fernandez v. Ernst & Young LLP* (Case No. C-05-04867, filed September 27, 2005) and *Landon v. Ernst & Young LLP* (Case No. C-08-02853, filed February 21, 2008). ER 115, 176-79. The plaintiffs in each of these cases asserted claims on behalf of classes of individuals who also worked for Ernst & Young in California.[1] ER 14-15.

3. On February 24, 2010, the district court granted Ernst & Young's motion for summary judgment on two limited issues: (1) Richards could not pursue injunctive relief because a former employee does not have standing to seek injunctive relief; and (2) Richards's claims for violations of California's meal and rest break laws would be dismissed "without prejudice" because those issues were pending before the California Supreme Court. ER 171-75.

4. On August 20, 2010, plaintiffs in the consolidated cases moved for class certification. ER 153.

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[1] Richards includes *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013), a separate case filed by a New York employee, in her statement of the case. Pet. 12. In *Sutherland*, the district court refused to enforce the arbitration agreement's class action waiver, but the Second Circuit reversed based on this Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). 726 F.3d at 292.

5. On April 27, 2011, while the class certification motion was pending, this Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), holding that California's long-standing rule against the enforcement of arbitration agreements containing class action waivers "interferes with fundamental attributes of arbitration" and, thus, is preempted by the FAA, *id.* at 1748, 1753.

Shortly after *Concepcion*, on June 24, 2011, before the district court had made any decision on plaintiffs' certification motion or ruled on the merits of Richards's claims, Ernst & Young filed a motion to dismiss, or in the alternative, to stay the cases consolidated for class certification purposes and compel arbitration pursuant to the FAA. ER 87. Ernst & Young explained that before *Concepcion*, "it would have been futile for Ernst & Young to seek to compel arbitration" because agreements (like Richards's) precluding class claims were invalid under California law, but "when the Supreme Court decided *Concepcion* . . . enforcing [the plaintiffs'] agreement became possible." ER 93.

6. On September 20, 2011, the district court denied plaintiffs' class certification motion and certified a narrower class of employees with Richards as the sole class representative. Pet. App. 22a. Simultaneously, the district court denied Ernst & Young's motion to compel arbitration, ruling that Ernst & Young had waived its right to arbitrate. *Id.* at 23a-26a.

Ernst & Young filed a motion for reconsideration, which the district court denied on October 19, 2011.[2] Pet. App. 29a.

7. Ernst & Young timely appealed the order denying its motion to compel arbitration and, on August 21, 2013, the Ninth Circuit reversed in a two-page *per curiam* opinion.[3] Pet. App. 3a.

The court of appeals held that Richards failed to meet the "'heavy burden of proof'" required to establish a waiver of the right to arbitrate. Pet. App. 6a (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)). In particular, the court of appeals rejected Richards's two principal arguments that she had been prejudiced by Ernst & Young's pre-trial litigation actions before it sought to arbitrate. Pet. App. 6a-7a.

First, the court of appeals rejected Richards's contention that by litigating her claims "on the merits," Ernst & Young had caused her prejudice should her claims proceed in arbitration. Pet. App. 6a. The court of appeals held that neither of the rulings Richards relied on—the dismissal of her injunctive relief claim for lack of standing, or the dismissal of her meal and rest break claims "without

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[2] Petitioner incorrectly contends that two district court judges (Judges Fogel and Whyte) made factual findings on waiver. Pet. 14. Judge Whyte denied reconsideration of Judge Fogel's waiver ruling without making separate findings. Pet. App. 31a.

[3] The Ninth Circuit amended this opinion on December 9, 2013. The amendments were "not substantive," but rather "for the purposes of clarification." Pet. App. 2a.

prejudice"—was "on the merits." *Id.* (citing cases). The court of appeals further determined that neither caused Richards prejudice, because (1) she never could have obtained, let alone benefited from, injunctive relief because she no longer works at Ernst & Young and (2) she remained free to reassert her meal and rest break claims in arbitration because their dismissal was "without prejudice." *Id.*

Second, the court of appeals considered the discovery Ernst & Young had conducted before moving to compel arbitration. The court of appeals concluded that the discovery did not cause Richards prejudice because, according to the parties' agreement, Ernst & Young was entitled to take the same discovery in arbitration.[4] Pet. App. 6a; *see id.* at 42a-43a. As for Richards's argument that conducting that discovery in litigation (as opposed to in arbitration) caused her additional expense, the court of appeals held that any additional costs could not have been Ernst & Young's fault because it was Richards who made the decision to litigate instead of arbitrate. Pet. App. 7a.

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[4] Richards's contention that the court of appeals "incorrectly" ruled that she did not challenge whether information gained in discovery could have also been gained in arbitration is without merit. Pet. 11, 16. Richards has never specified any difference between the discovery available and pursued in litigation and that available in arbitration. Under the parties' arbitration agreement, Ernst & Young is entitled to take Richards's deposition, depose additional fact witnesses, and take reasonable written and expert discovery, just as it did in litigation. Pet. App. 42a-43a.

8. The Ninth Circuit denied Richards's petition for rehearing. Pet. App. 10a-11a.

REASONS FOR DENYING THE PETITION

Petitioner Richards asks this Court to announce a bright-line rule (or multiple ones) regarding when, as a matter of law, participating in litigation waives the right to arbitrate. *E.g.*, Pet. 5-6. But Richards ignores that the Ninth Circuit—*like every other court of appeals*—analyzes waiver of the right to arbitrate under the totality of the circumstances, considering whether the specific facts of a case support a waiver.

In the *per curiam* decision below, the Ninth Circuit examined the facts of this case—including the full extent of the parties' pre-trial litigation—and concluded that Ernst & Young did not waive its right to arbitrate. Richards's challenge to that decision—along with her factbound assertion, rejected below, that the pre-trial litigation here was "extensive," Pet. 11—is no more than a thinly veiled plea for error correction.

There is no conflict among the courts of appeals' approach to waiver that warrants this Court's review. Although there are varying formulations of the waiver inquiry, all courts of appeals consider the totality of the circumstances (including prejudice), and their analysis is far more similar than it is divergent. That is doubly true in a case where, like here, a defendant has argued that an earlier motion to compel arbitration would have been futile. Whether a particular case results in a finding of waiver turns far more on the particular facts of the case than on any legal rule that Richards seeks here. And even Richards acknowledges that the Ninth

Circuit's decision to apply federal law rather than state law does not conflict with the decision of any other court of appeals; indeed, it is fully consistent with this Court's precedents interpreting the FAA.

This case presents a poor vehicle to resolve the questions presented for a further reason: a separate and independent ground supports the Ninth Circuit's determination that Ernst & Young did not waive its right to arbitrate. Ernst & Young could not have acted inconsistently with its right to arbitrate, or with any intent to forego that right, by seeking to compel arbitration only after *Concepcion*, because any earlier motion to compel arbitration would have been futile.

Accordingly, this case does not warrant this Court's review.

I. ALL COURTS OF APPEALS DECIDE WHETHER A PARTY HAS WAIVED ITS RIGHT TO ARBITRATE BY EXAMINING THE SPECIFIC CIRCUMSTANCES OF THE CASE—JUST AS THE NINTH CIRCUIT DID HERE.

All courts of appeals use a totality-of-the-circumstances approach when deciding claims of waiver of the right to arbitrate—not bright-line tests. *See, e.g, In re Tyco Int'l Ltd. Secs. Litig.*, 422 F.3d 41, 46 (1st Cir. 2005) ("emphasiz[ing] that there is no bright-line rule for a waiver of arbitral rights, and each case is to be judged on its particular facts"); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) ("An inquiry into whether an arbitration right has been waived is factually specific and not susceptible to bright line

rules.") (quotations omitted); *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d 109, 118 (3d Cir. 2012) ("[T]he waiver determination must be based on the circumstances and context of the particular case.") (quotations omitted); *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 590 (4th Cir. 2012) (explaining there is no bright-line rule for determining prejudice due to litigation conduct inconsistent with the right to arbitrate, but instead the court "[takes] into account all . . . factors"); *In re Mirant Corp. (Castex)*, 613 F.3d 584, 589 (5th Cir. 2010) ("In this Circuit, a bright-line rule is inappropriate for deciding whether a party has waived its right to arbitration. Rather, our precedent establishes that '[t]he question of what constitutes a waiver of the right of arbitration depends on the facts of each case'") (citations omitted); *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713, 719 (6th Cir. 2012) (holding that multiple facts should be "considered together" when analyzing whether a party waived its right to arbitrate); *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 (7th Cir. 2011) (inferring a waiver of the right to arbitrate from parties' litigation conduct requires a "totality-of-the-circumstances analysis"); *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 922 (8th Cir. 2009) (to determine whether a waiver of the right to arbitrate occurred "[d]istrict courts should continue to consider the totality of the circumstances"); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 719-22 (9th Cir. 2012) (deciding waiver based on "specific circumstances" of case, rather than any bright-line rule); *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 773 (10th Cir. 2010)

(listing factors but emphasizing those factors are "not intended to suggest a mechanical process in which each factor is assessed and the side with the greater number of favorable factors prevails" nor are the factors exclusive, rather "factors reflect certain principles that should guide courts in determining whether it is appropriate to deem that a party has waived its right to demand arbitration"); *Ivax Corp. v. B. Braun of America, Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002) (analyzing waiver of the right to arbitrate "under the totality of the circumstances"); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) ("The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right.").

Whether a waiver of the right to arbitrate can be inferred from litigation activity thus depends on the particular facts and circumstances of each case. However they formulate the specific factors of their totality-of-the-circumstances waiver analysis, all courts of appeals consider (as the Ninth Circuit did here) the moving party's pre-trial litigation conduct—including whether there has already been litigation on the merits and the extent of motion practice and discovery—to decide whether that activity waived the right to arbitrate.

Some courts, as the Ninth Circuit did below, consider the extent of that activity in analyzing whether the party opposing arbitration would suffer "prejudice" should the resolution of the dispute move to arbitration. *E.g.*, *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 451 (3d Cir. 2011) (considering the extent of the moving party's litigation in determining

prejudice); *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 702 (4th Cir. 2012) (same); *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480-82 (5th Cir. 2009) (same); *see also Thyssen*, 310 F.3d at 105 (recognizing possibility of prejudice "when a party loses a motion on the merits [in litigation] and then attempts, in effect, to relitigate the issue by invoking arbitration").

Other courts consider the extent of the same litigation activity but characterize the issue as whether that activity was "inconsistent with" the right to arbitrate. *E.g.*, *Kawasaki*, 660 F.3d at 994 (factors for determining whether party acts inconsistently with the right to arbitrate include lack of diligence, delay, discovery, participation in litigation); *Hurley v. Deutsche Bank Trust Co. Americas*, 610 F.3d 334, 338-40 (6th Cir. 2010) (factors for determining whether party acts inconsistently with the right to arbitrate include delay and participation in litigation).

Courts have recognized the "overlap" in the waiver analysis because "[s]ubstantially invoking the litigation machinery [instead of arbitration] qualifies as the kind of prejudice . . . that is the essence of waiver." *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986) (quotations omitted); *see also Hooper*, 589 F.3d at 923 n.7 (recognizing "overlap" in analysis). But whether called "prejudice" or "inconsistency," the courts are considering the same litigation activity to determine whether that activity constitutes a waiver of the right to arbitrate.

Consistent with that uniform approach, the Ninth Circuit, when deciding whether a party has

waived its right to arbitrate by participating in litigation, examines the specific factual circumstances of the case, "in light of the strong federal policy favoring enforcement of arbitration agreements." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Here, the Ninth Circuit analyzed the undisputed facts regarding the litigation that had occurred before Ernst & Young filed its motion to compel arbitration and concluded on those facts that the pre-trial litigation did not amount to a waiver of Ernst & Young's right to arbitrate. *Id.*

Richards's repeated assertion that the litigation in this case was "extensive," and thus should have resulted in a waiver of Ernst & Young's right to arbitrate (Pet. 11, 15-16), has already been considered and rejected by the Ninth Circuit. The Ninth Circuit examined the totality of the parties' litigation—including *all actions* taken by Ernst & Young before moving to compel arbitration—and concluded that such activity could not have prejudiced Richards and did not support a waiver of Ernst & Young's right to arbitrate.[5] Pet. App. 6a-7a. Richards's challenge to the Ninth Circuit's waiver

[5] In addition, much of the activity Richards relies on in support of her contention that there was "extensive litigation" here occurred in other cases, not in *Richards*. Pet. 11 (citing motions and discovery in *Ho/Fernandez*). Richards could not have been prejudiced by actions taken as to plaintiffs in a separate action. Richards made the same arguments below, Respondent's Br. 38, and they were rejected, Pet. App. 6a-7a.

decision is really just a plea for this Court to make a different determination on those facts.

Indeed, the factbound nature of Richards's challenge is underscored by her contention that the decision below conflicts with prior Ninth Circuit decisions involving purportedly similar facts. *See* Pet. 15 & n.8. Such alleged intra-circuit inconsistency does not warrant this Court's review. *See Wisniewski v. United States,* 353 U.S. 901, 902 (1957).

II. THERE IS NO CONFLICT WARRANTING THIS COURT'S INTERVENTION.

A. The Courts Are Not Meaningfully Split On Whether Prejudice Is Required In The Waiver Inquiry.

Richards asks this Court to resolve an issue that, she contends, has divided the courts of appeals: whether prejudice is required to establish a waiver of the right to arbitrate under the FAA. Pet. 17-18. Richards, however, misstates the prevailing waiver standards and overstates the impact of any differences among them. Richards's alleged conflict on whether prejudice is *always* required or just *may* be considered does not warrant this Court's review.

1. No Conflict Exists Over The Relevance Of Prejudice.

Richards contends that five circuits do not require a showing of prejudice to effect a waiver of the right to arbitrate. Pet. 17 & n.10 (citing the Fifth, Sixth, Seventh, Tenth, and D.C. Circuits). That is incorrect.

The Fifth and Sixth Circuits—like the First, Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits—require a showing of prejudice to prove a waiver of the right to arbitrate. *In re Mirant Corp.*, 613 F.3d at 588 (5th Cir.) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.") (quotations omitted); *Johnson Assocs.*, 680 F.3d at 717, 719 (6th Cir.) (a party may waive its right to arbitrate by "(1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying its assertion to such an extent that the opposing party incurs actual prejudice" and characterizing prejudice as "the second part of the waiver inquiry"); *see also In Re Tyco Int'l Ltd. Secs. Litig.*, 422 F.3d at 44 (1st Cir.) (requiring showing of prejudice); *accord Louisiana Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010); *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d at 117 (3d Cir.); *Rota-McLarty*, 700 F.3d at 702 (4th Cir.); *Erdman Co. v. Phoenix Land & Acquisition*, 650 F.3d 1115, 1119 (8th Cir. 2011); *Fisher*, 791 F.2d at 694 (9th Cir.); *Ivax Corp.*, 286 F.3d at 1315-16 (11th Cir.).

The Tenth Circuit includes prejudice as one of its six non-exclusive factors to be considered in its totality-of-the-circumstances waiver analysis and agrees with other circuits "on the importance of showing prejudice as an element of waiver." *Hill*, 603 F.3d at 774-75; *see also Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) ("The key question is whether [the party opposing arbitration] suffered substantial prejudice

by the delay in seeking arbitration."). Trial courts applying the Tenth Circuit's waiver rule consistently find waiver only where the party opposing arbitration has shown prejudice.[6]

Only the Seventh and D.C. Circuits have stated that there *may* be a waiver of the right to arbitrate absent a showing of prejudice. *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987). But even in these courts, prejudice plays a significant role in the analysis depending on the particular circumstances of the case.

The Seventh Circuit infers a waiver of the right to arbitrate where it determines that, "considering the totality of the circumstances, a party acted inconsistently with the right to arbitrate." *Kawasaki*, 660 F.3d at 994. The Seventh Circuit considers the allegedly defaulting party's "diligence or the lack thereof"; the extent to which "the allegedly defaulting party participated in litigation, substantially delayed its request for arbitration, or participated in

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[6] *See, e.g., Robinson v. Food Service of Belton, Inc.*, 415 F. Supp. 2d 1221, 1226 (D. Kan. 2005) (waiver where there was prejudice); *Unified School Dist. #503 v. R.E. Smith Constr. Co.*, No. 07–2423–GLR, 2008 WL 2152198, *7 (D. Kan. May 21, 2008) (same); *Aldana v. Citifinancial, Inc.*, No. 09–cv–00976–MSK–CBS, 2010 WL 582183, *3 (D. Colo. Feb. 12, 2010) (no waiver where there was no prejudice); *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1302 (N.D. Okla. 2003) (same).

discovery"; and *prejudice*. *Id.* While the court "do[es] not require a showing of prejudice to find waiver, it is a relevant factor in the totality-of-the-circumstances analysis." *Id.* For example, the Seventh Circuit has recognized that where, as here, there were doubts as to the enforceability of an agreement to arbitrate, prejudice "should weigh heavily in the decision." *Cabinetree*, 50 F.3d at 391; *see also Kawasaki*, 660 F.3d at 998 (because defendant's actions "were wholly consistent with" the intent to arbitrate, "there was no conduct constituting waiver which could have prejudiced" the other party).

Similarly, the D.C. Circuit examines the record to determine whether "the defaulting party has acted inconsistently with the arbitration right." *Nat'l Found.*, 821 F.2d at 774. In "conducting this inherently fact-bound analysis," the D.C. Circuit takes "account of the 'totality of the circumstances,' including any potential prejudice to the non-moving party." *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922 (D.C. Cir. 2011); *Nat'l Found.*, 821 F.2d at 775 (considering whether there was "active participation in a lawsuit" by the moving party, the extent to which the party has "invoked the litigation machinery," and prejudice to the non-moving party). The D.C. Circuit recently stated that when a party participates in litigation without seeking arbitration at the earliest opportunity it will apply a presumption of waiver. *Zuckerman Spaeder*, 646 F.3d at 923. The defendant may rebut that presumption and prevail on a later motion to compel arbitration, "provided his delay did not *prejudice* his opponent or the court." *Id.* (emphasis added).

Richards ascribes far greater significance to the differences in these varying formulations of the waiver inquiry than their application warrants. As discussed above (pages 9-10, *supra*), all the courts of appeals—including the Seventh and D.C. Circuits—consider the same litigation activity in determining waiver. In light of that fact, Richards's concerns regarding the potential for forum-shopping or inconsistent results among the courts of appeals (*e.g.*, Pet. 7) ring hollow. The ultimate goal of the waiver inquiry in all courts is the same: preventing a defendant from getting "'a second bite at the very questions presented to the court for disposition,'" and protecting "'the policy that arbitration may not be used as a strategy to manipulate the legal process.'" *Gutierrez*, 704 F.3d at 721 (quoting *Nat'l Found.*, 821 F.2d at 776). The waiver analysis in every court of appeals serves this shared goal.

2. Any Alleged Conflict On Prejudice Is Not Implicated In This Case.

In any event, any alleged conflict on whether prejudice is *always* required for waiver is not implicated in this case. On the particular facts of this case, *every* court of appeals would have considered prejudice in deciding whether Ernst & Young had waived its right to arbitrate.

As just discussed, the Seventh and D.C. Circuits have made clear that prejudice is pivotal where a dispute exists as to whether the claims were arbitrable or the agreement enforceable while the parties proceeded in litigation. *See* pp. 14-15, *supra*. Because Ernst & Young asserted, as a defense to waiver, that any earlier motion to compel arbitration

would have been futile under then-prevailing California law, both of those courts would have considered whether Richards had shown prejudice here. Indeed, Richards cannot point to any court of appeals that would eschew consideration of prejudice in determining on these facts whether the parties may proceed in arbitration or whether that right has been waived.[7]

Because, as the Ninth Circuit ruled, Richards did not demonstrate prejudice on this record, Richards failed to prove Ernst & Young waived its right to arbitrate—regardless what formulation of the waiver analysis applies. Accordingly, this case does not provide an appropriate vehicle to resolve any alleged conflict on the prejudice requirement.

B. The Courts Are Not Split As To What Constitutes "*Per Se*" Prejudice Or Waiver As A Matter Of Law.

Richards also alleges a panoply of splits in the courts of appeals regarding what specific litigation activity constitutes "*per se* prejudice" or a waiver of the right to arbitrate *as a matter of law*. Pet. 18-23. What Richards seeks to define as "circuit splits," however, are simply the result of the courts of appeals deciding waiver of the right to arbitrate according to the specific facts and circumstances of

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[7] The particular facts here thus distinguish this case from *Citibank, N.A. v. Stok & Assocs., P.A.*, 387 F. App'x 921 (11th Cir. 2010), *cert. granted*, 131 S. Ct. 1556, *and dismissed*, 131 S. Ct. 2955 (2011). In *Stok*, the moving party did not argue that the reason it delayed seeking arbitration was that any earlier motion to compel arbitration would have been futile.

each case. *See* Part I, *supra* (discussing totality-of-circumstances analysis applied by *every* court of appeals). Because the determination of prejudice and waiver is driven by facts, rather than conflicting legal rules, there are no conflicts for this Court to resolve.

First, there is no merit to Richards's contention of a split as to whether dispositive motions are "*per se* prejudice." Pet. 18. Cases on which Richards relies (Pet. 18-19 n.11) demonstrate that courts consider the filing of a dispositive motion as one factor among many in their analysis of whether a litigant has waived the right to arbitrate. *See, e.g.*, *Jones Motor Co., Inc. v. Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire*, 671 F.2d 38, 44 (1st Cir. 1982) (waiver where party "engaged in considerable discovery" and moved to compel arbitration only after district court decided summary judgment motion); *Hurley*, 610 F.3d at 339 (waiver where party filed multiple motions to dismiss, for summary judgment, and to change venue and "did not attempt to enforce their arbitration rights until after the district court entered an unfavorable decision"); *Ritzel Commc'ns, Inc. v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 969-71 (8th Cir. 1993) (waiver where moving party seeking arbitration filed motion to dismiss or to sever cross-claims at trial and delayed appeal of arbitration issue until after trial on the merits); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc.*, 969 F.2d 585, 589-91 (7th Cir. 1992) (waiver where moving party acted inconsistently with right to arbitrate by filing a merits-based motion for summary judgment, along with engaging in discovery

that would not be available in arbitration and causing delay and expense).

Richards's discussion of Fourth Circuit authority, *see* Pet. 19-21, is illustrative. That court has expressly recognized that "[w]hether a party was required to respond to dispositive motions may factor into [its] prejudice analysis," but has "'counsel[ed] against adopting a bright line rule that the mere filing of a dispositive motion on the merits is inherently prejudicial.'" *Rota-McLarty*, 700 F.3d at 704 n.15 (quoting *Wheeling Hosp., Inc.*, 683 F.3d at 590). *Compare Wheeling*, 683 F.3d at 589-91 (no prejudice even where party moving for arbitration "engaged in some activity inconsistent with the intent to arbitrate" including filing a dispositive motion on the merits) *with Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) (prejudice where party opposing arbitration was compelled to prepare for trial twice, respond to four dispositive motions, and had judgment entered against it on several claims).

Second, Richards argues that the courts of appeals are in conflict over the "significance" of the failure to raise an affirmative defense of arbitration in the answer. Pet. 21-22. The cases Richards relies upon do not demonstrate any such conflict; all courts of appeals agree that a failure to raise arbitration as an affirmative defense does not amount to a *per se* waiver of the right to arbitrate but rather is just one factor to consider. In *Thyssen* (Pet. 22), for example, the Second Circuit held that, "[w]hile not pleading arbitration in the answer can be used as evidence towards finding of waiver, there is no *per se* rule that arbitration must be pleaded in the answer in order to

avoid waiver." 310 F.3d at 105-06; *see also Hill*, 603 F.3d at 771 (Pet. 22) (holding defendant not required to raise arbitration as affirmative defense to avoid a waiver).

R.H. Cochran & Associates, Inc. v. Sheet Metal Workers Int'l Ass'n Local Union No. 33, 335 F. App'x 516, 519 (6th Cir. 2009) (Pet. 21) is inapposite. It considers whether waiver (not the right to arbitrate) must be raised as an affirmative defense and concluded, in any event, that failing to raise that defense in the answer was insignificant. And in *Zuckerman Spaeder*, the D.C. Circuit held merely that a defendant presumptively waives its right to arbitrate by failing to seek arbitration at the first available opportunity. 646 F.3d at 923. The defendant can rebut that presumption by explaining why it did not move earlier and thus prevail on a later motion to compel arbitration, "provided his delay did not prejudice his opponent or the court." *Id.* No other court of appeals has considered the presumption, and no court in the D.C. Circuit has yet applied it.

Third, Richards fails to show any "conflict on whether delay and expense equal prejudice." Pet. 22-23. It is well settled that the courts of appeals—including the Ninth Circuit—consider whether the moving party's delay in asserting its right to arbitrate and the expenses incurred in pre-trial litigation have prejudiced the party opposing arbitration as two factors among many. *See, e.g.*, *Cabinetree*, 50 F.3d at 391 ("delay [is not] automatically a source of prejudice."); *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997) ("Incurring legal expenses inherent in

litigation, without more, is insufficient evidence of prejudice to justify a finding of waiver."). The courts, however, understandably have refused to adopt any bright-line rules regarding how much time or expense will result in prejudice and thus support a finding of waiver. *See, e.g.*, *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991) ("neither a particular time frame nor dollar amount automatically results in [prejudice]—but it is instead determined contextually, by examining the extent of the delay, the degree of litigation that has preceded the invocation of arbitration, the resulting burdens and expenses, and the other surrounding circumstances").[8]

Contrary to Richards's contention (Pet. 22-23), the Ninth Circuit did not conclude that delay and expense were "not relevant." Rather, the Ninth Circuit simply determined, on the facts of this case, that the time and expense of pre-trial litigation did not cause Richards prejudice. Pet. App. 6a-7a. Specifically, the court rejected Richards's contention that she was prejudiced by the discovery that had occurred (and the resulting time and expense),

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[8] Richards's reliance on the Second Circuit's decision in *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir. 1995) (Pet. 22), fails to establish any conflict regarding delay and expense. *Leadertex* considered whether pre-trial delay and expense supported a waiver of the right to arbitrate and concluded that, while the discovery in litigation did not cause prejudice, the delay had harmed plaintiff's business and thus supported waiver on the facts of that case. And any intra-circuit tension among the Second Circuit decisions does not support this Court's review. *See Wisniewski,* 353 U.S. at 902.

because the same discovery would have been available and pursued in arbitration and because any "extra expense" was attributable to Richards's forum-choice (in violation of her mandatory agreement to arbitrate). Pet. App. 7a; *accord Leadertex*, 67 F.3d at 26 (concluding pre-trial discovery did not prejudice plaintiff where same discovery would have occurred in arbitration and no "extraordinary expense" incurred in response to discovery); *Rota-McLarty*, 700 F.3d at 704 (concluding delay and expense of months of pre-trial discovery insufficient to demonstrate prejudice where no evidence that discovery in litigation would not have also occurred in arbitration).

C. The Courts Are Not Split Regarding What Law Applies.

Richards also asks this Court to decide, in the first instance, that a waiver defense to the enforcement of an agreement to arbitrate should be decided under state law rather than federal law. This question provides no grounds for review.

As an initial matter, Richards did not challenge the application of federal law (either in the district court or in the Ninth Circuit), or urge the Ninth Circuit to apply state law contractual principles. That fact alone counsels against this Court's consideration. *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003).

Richards acknowledges the lack of any circuit conflict in both the question she presents for review (Pet. i) and throughout her petition (*id.* at 5, 27). For good reason: the federal courts uniformly consider

waiver of the right to arbitrate under federal law standards.[9]

That unform rule does not conflict with any decision of this Court. Although the FAA mandates the enforcement of arbitration agreements, it provides that a party may lose its right to compel arbitration if it is "*in default* in proceeding with such arbitration." 9 U.S.C. § 3 (emphasis added); *see also* 9 U.S.C. § 4 (mandating judicial enforcement of arbitration agreements so long as "the making of the agreement for arbitration or the failure to comply therewith is not in issue"). The meaning of when a party is "in default" under the FAA is unquestionably a matter of federal law. This Court has instructed that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24; s*ee also id.* at 26 n.32 ("[The Arbitration Act] creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate . . ."); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (issue of arbitrability

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[9] *E.g.*, *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 n.3 (1st Cir. 2003); *Graphic Scanning Corp. v. Yampol*, 850 F.2d 131, 133 (2d Cir. 1988); *In re Pharmacy Benefit Managers Antitrust Litig.*, 700 F.3d at 116; *Rota-McLarty*, 700 F.3d at 702; *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 327 (5th Cir. 1999); *Hurley*, 610 F.3d at 338; *Kawasaki*, 660 F.3d at 994; *Erdman*, 650 F.3d at 1117; *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002); *Hill*, 603 F.3d at 770-71; *S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990); *Zuckerman Spaeder,* 646 F.3d at 922.

is "a question of substantive federal law"); *Western Air Lines, Inc. v. Board of Equalization of State of S.D.*, 480 U.S. 123, 129-30 (1987) (explaining that "absent a clear indication to the contrary, the meaning of words in a federal statute is a question of federal law").

Nor does the "savings clause" in Section 2 of the FAA compel the application of state law to the waiver analysis. Pet. 27. Section 2 declares that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity." 9 U.S.C. § 2. Although Section 2 "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quotations omitted), "default" is not a "generally applicable contract defense" but a defense derived from the FAA itself. The decisions of this Court that Richards relies on (Pet. 24-25) are thus inapplicable, because they hold only that state law governs "issues concerning the validity, revocability, and enforceability of contracts generally," not the interpretation of when a party is "in default" on its right to arbitrate under the FAA.[10] *E.g.*, *Perry v.*

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[10] Richards also ascribes too much significance to the varying use of the terms "waiver," "default," and "forfeiture" by the courts of appeals. Pet. 28 & n.14. Regardless of their terminology, federal courts, even those (like the Ninth Circuit below) that use the term "waiver," recognize that the FAA and federal law control the resolution of this issue. *See* footnote 9, *supra*.

Thomas, 482 U.S. 483, 492 n.9 (1987); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Moreover, as this Court explained in *Moses H. Cohn*, the FAA "establishes that, *as a matter of federal law*, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 460 U.S. at 24-25 (emphasis added).

Finally, Richards's proposed adoption of state law—subjecting waiver analysis to the potentially differing rules of fifty different jurisdictions—would undermine the very uniformity she purports to promote by seeking this Court's review.

III. AN INDEPENDENT GROUND SUPPORTS THE COURT OF APPEALS' DECISION.

The Ninth Circuit's decision that Ernst & Young did not waive its right to arbitrate is supported by an independent ground: any earlier motion to compel arbitration would have been futile. That further militates against review.

Where there was no right to arbitrate—because an arbitration agreement was unenforceable under then-existing law and, thus, an earlier motion to compel would have been "futile"—failing to seek to compel arbitration is not "inconsistent with" the right to arbitrate and "there could have been no waiver." *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986); *accord Fisher*, 791 F.2d at 694; *Peterson v. Shearson/Am. Exp., Inc.*, 849 F.2d 464, 466 (10th Cir. 1988); *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986),

abrogation on other grounds recognized by Feldspar Trucking Co. v. Greater Atlanta Shippers Ass'n, 849 F.2d 1389, 1391 n.2 (11th Cir. 1988); *Ackerberg v. Johnson*, 892 F.2d 1328, 1333 (8th Cir. 1989).

Ernst & Young's arbitration agreement was unenforceable at the time Richards filed her lawsuit in 2008 because California law prohibited arbitration agreements with class action waivers. *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The agreement at issue did not become even arguably enforceable until April 27, 2011, when this Court in *Concepcion* invalidated California's *Discover Bank* rule as preempted by the FAA and held that arbitration agreements with class waivers are enforceable. *Concepcion*, 131 S. Ct. at 1753; *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1157-58 (9th Cir. 2012) (explaining that, until *Concepcion*, the Ninth Circuit had held that the FAA did "not preempt state unconscionability law pertaining to class-action waivers in arbitration clauses") (citing *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852 (9th Cir. 2009)). After *Concepcion*, Ernst & Young promptly moved to compel arbitration. ER 87. Any earlier motion would have been futile. Accordingly, Ernst & Young did not act inconsistently with its right to arbitrate by defending against Richards's claims in

court and seeking to compel arbitration only after *Concepcion* revived that right.[11]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[11] Although the Ninth Circuit did not reach the issue, Ernst & Young argued on appeal that the district court's contrary conclusion on futility (Pet. App. 25a-27a) was erroneous for two principal reasons. First, the district court applied faulty choice-of-law analysis to decide there was a "colorable argument" that the agreement's New York choice-of-law provision would have been applied to allow enforcement of an arbitration agreement that was in clear contravention of California law. Pet. App. 26a. As Ernst & Young explained, the California district court sitting in diversity was bound to apply California choice-of-law rules, and under those rules the district court would have applied California's *Discover Bank/Gentry* rule to invalidate the agreement. Opening Br. 24-29; Reply Br. 11-17. Second, the district court erred in relying on the fact that Ernst & Young had not sought to enforce its arbitration rights against two employees who filed earlier actions. Pet. App. 25a. Any actions Ernst & Young took in other lawsuits have no bearing on whether it waived its right to enforce it s agreement with Richards. In any event, at the time those employees filed their claims, California law was similarly hostile to class waiver provisions. Opening Br. 30-34.

Respectfully submitted,

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