No. _____

In the
Supreme Court of the United States

PRINCIPAL INVESTMENTS, INC., et al.,

Petitioners,

v.

CASANDRA HARRISON, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given "the presumption . . . that the arbitrator should decide 'allegations of waiver,'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), does a court violate the Federal Arbitration Act (FAA) by presuming that allegations of waiver based upon a party's pre-arbitration litigation conduct should be decided by the court, not the arbitrator?

2. In light of the holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the . . . conflicting rule is displaced by the FAA," does the FAA preempt a state's waiver doctrine that categorically prohibits arbitration of abuse-of-process claims arising from prior litigation?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners are Principal Investments, Inc. d/b/a Rapid Cash; Granite Financial Services, Inc. d/b/a Rapid Cash; FMMR Investments, Inc. d/b/a Rapid Cash; Prime Group, Inc. d/b/a Rapid Cash; and Advance Group, Inc. d/b/a Rapid Cash, defendants below. Principal Investments, Inc., FMMR Investments, Inc., and Advance Group, Inc. are all owned by Speedy Cash Intermediate Holdings Corporation, which is a wholly owned subsidiary of Speedy Cash Holdings Corporation. (Granite Investment Services, Inc. and Prime Group, Inc., now dissolved, were owned until their dissolution by Speedy Cash Intermediate Holdings Corporation.) No publicly held company owns 10% or more of any petitioner's stock.

Respondents are Casandra Harrison, Concepcion Quintino, and Mary Dungan, individually and on behalf of all persons similarly situated, plaintiffs below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Principal Investments, Inc. d/b/a Rapid Cash; Granite Financial Services, Inc. d/b/a Rapid Cash; FMMR Investments, Inc. d/b/a Rapid Cash; Prime Group, Inc. d/b/a Rapid Cash; and Advance Group, Inc. d/b/a Rapid Cash (together, "Rapid Cash"), seek a writ of certiorari to review the decision of the Nevada Supreme Court in this case.

INTRODUCTION

This petition invites this Court to resolve a longstanding struggle over the division of labor between courts and arbitrators under the Federal Arbitration Act (FAA). Despite the rule in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), that arbitrators decide whether a party has waived its right to arbitration, appellate decisions are deeply split on whether the FAA nonetheless allows a presumption that *courts* decide all waivers that are based on a party's pre-arbitration litigation conduct.

The Nevada Supreme Court explicitly recognized the disagreement among courts, with some courts retreating from the rule in *Howsam*, but it chose to deepen the split with *Howsam*. When this Court recently re-affirmed the role of arbitrators in deciding questions of waiver, at least one court took this as a signal to reexamine the cases leaving litigation-conduct waiver for courts. The Nevada Supreme Court,

however, rejected that notion, confirming that without further guidance on this issue, arbitration agreements will be unevenly enforced across the country.

This case also demonstrates how states use the waiver doctrine as a pretext for eliminating arbitration of certain causes of actions, such as abuse-of-process claims. Because other states may follow the Nevada Supreme Court's lead to require a judicial forum for entire categories of claims, this Court should grant certiorari to head off that tactic.

OPINIONS BELOW

The Nevada Supreme Court's opinion in Case No. 59837 is reported at 366 P.3d 688 and is reproduced at App. 1. The Nevada Supreme Court's separate order eleven days later denying a petition for writ of mandamus in Case No. 61581 is unreported and is reproduced at App. 32.

JURISDICTION

The Nevada Supreme Court issued its opinion on January 14, 2016. Justice Kennedy extended the time to file this petition for certiorari through May 13. This Court has jurisdiction under 28 U.S.C. § 1257(a) because a state court's "failure to [compel arbitration] is subject to immediate review." *KPMG LLP v. Cocchi*,

132 S. Ct. 23, 26 (2011); *see also Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, governs arbitration agreements contained in contracts evidencing transactions in interstate commerce. Section 2 of the FAA requires courts to uphold such agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "body of federal substantive law" interpreting this section applies in state courts. *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (quoting *Southland Corp.*, 465 U.S. at 12).

STATEMENT OF THE CASE

This case involves the enforceability of an arbitration agreement under the FAA. Respondents are individuals who borrowed money from petitioners ("Rapid Cash") and entered into loan agreements with arbitration provisions governed by the FAA. App. 3, 8.

Rapid Cash Pursues Collection in Small-Claims Court

When respondents as borrowers did not repay their loans, the lenders, petitioners Rapid Cash, filed

collection actions and obtained default judgments in Las Vegas Justice Court, a small-claims court of limited jurisdiction. App. 3.

Respondents Claim Improper Service

Unbeknownst to Rapid Cash, its process server had filed false affidavits of service in unrelated cases for other lenders. App. 3-4. Respondents alleged that Rapid Cash's process server also did not make proper service in Rapid Cash's actions against respondents, App. 4, although no court has yet determined that factual issue.

Respondents File a Class Action in District Court

Instead of working with Rapid Cash or moving the small-claims court to set aside the default judgments, respondents sued Rapid Cash in state district court, the general-jurisdiction court. App. 4. They asserted class claims for fraud on the court, abuse of process, negligent retention, negligence, civil conspiracy, and violation of Nevada's fair-debt-collection laws. App. 4. Far from showing a willingness to repay their loans, respondents asked for a "return" of the loan principal, interest, and fees, along with other equitable remedies, declaratory relief, statutory penalties, and punitive damages. App. 4.

Rapid Cash Moves to Arbitrate the Class Claims

Rapid Cash promptly moved to compel arbitration based on the arbitration provisions in respondents' loan agreements, which were expressly governed by the FAA. App. 5, 8.

In entering into their loan agreements, two respondents had contracted to allow any party to elect arbitration of a "Claim," a term that "is to be given the broadest possible meaning" and includes torts and equitable claims "that arise from or relate in any way to . . . collection," as well as disputes about "the validity, enforceability or scope" of the arbitration provision. App. 5-6. That agreement also expressly precluded waiver by litigation conduct, so even after litigation is ongoing, either party can elect to arbitrate any new claim. App. 6.

The third putative class representative had a contract that requires first mediation, then arbitration of all claims—which includes "claims that arise out of . . . collection"—*except* claims that can be brought in small-claims court. App. 6-7. Under that agreement, too, the term "claims" expressly includes disputes about "the validity, scope and/or applicability" of the arbitration provision. App. 7.

The District Court Denies Relief

The district court denied Rapid Cash's motions to arbitrate. App. 8, 28, 33. The court held that the lenders' "filing of false affidavits of service, securing of

default judgments, and garnishing of wages" in small-claims collection actions waived the right to arbitrate respondents' new class claims. App. 30. According to the court, permitting arbitration would subvert a public policy to maintain judicial control over court proceedings. App. 30-31.

The Nevada Supreme Court Affirms

The Nevada Supreme Court affirmed the denial of arbitration. App. 25. It first held that the question of Rapid Cash's waiver was for the district court, not the arbitrator. App. 16. While it expressly recognized a split among appellate courts on the issue, the court took the position that an issue of "litigation-conduct waiver," unlike other kinds of waiver, is presumptively for a court to decide. App. 16. And the court held that the arbitration agreements here could not overcome the presumption without specifically delegating waiver by litigation conduct to the arbitrator. App. 18-19.

The court also found that Rapid Cash had waived its right to arbitration under the FAA, notwithstanding the no-waiver clause. App. 22-23. It reasoned that requiring arbitration of an abuse-of-process allegation would be unfair. App. 22-23.

In a separate concurrence, despite that the majority decision was based on the FAA, Justice Saitta suggested that the majority correctly found a waiver as a matter of Nevada law. App. 26-27. The concurring justice did not think Nevada law was in any way

restricted and that the majority had gone astray in citing a case, *Fidelity National Corp. v. Blakely*, 305 F. Supp. 2d 639 (S.D. Miss. 2003), that applied a standard under federal law, which "directly contradicts" the waiver finding under state law. App. 26-27.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE LONGSTANDING SPLIT OVER WHETHER WAIVER BY LITIGATION CONDUCT IS A QUESTION FOR THE COURT OR THE ARBITRATOR

This Court should grant certiorari to clarify the FAA's division of labor between courts and arbitrators. This Court has held that whether a party has waived the right to arbitration should be determined by an arbitrator. The lower appellate courts are split, however, on whether litigation conduct creates a different kind of waiver that can only be decided by a court. This case presents the perfect vehicle for resolving that conflict.

A. Questions of Waiver Are Presumptively for the Arbitrator

Before a court can answer any question about an arbitration agreement, it has to decide whether the parties intended a court or an arbitrator to answer the question. The parties can make the assignment

explicit in their agreement. Otherwise, federal law supplies a default assignment. *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014).

This Court spelled out that default division of labor in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). A court can decide "questions of arbitrability," such as the validity or applicability of an arbitration clause. *Id.* at 84. On the other hand, an arbitrator should decide so-called gateway procedural questions, such as whether a right to arbitration has been properly invoked. *Id.* at 84-85. Those questions for the arbitrator expressly include "allegations of waiver, delay, or a like defense to arbitrability." *Id.* at 84 (brackets omitted) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

In *Howsam*, that meant that an arbitrator, rather than the court, should decide whether requesting arbitration past a contractual time limit constituted a waiver. *Id.* at 85. More recently, in *BG Group, PLC v. Republic of Argentina*, this Court reaffirmed the *Howsam* framework by letting the arbitration panel decide whether disregarding a pre-arbitration requirement to attempt litigation forfeits the right to arbitrate. 134 S. Ct. at 1207. While the court of appeals in *Republic of Argentina v. BG Grp., PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) had assumed that the parties expected a court to decide a procedural issue related to litigation, this Court disagreed. The division of labor does not turn on whether an issue is related to litigation; instead, it turns on whether the issue

concerns the *existence* of "a contractual duty to arbitrate" (for the court to decide) or the *circumstances* under which that duty is triggered (for the arbitrator). *BG Grp.*, 134 S. Ct. at 1207.

That principle explains why post-contract waiver is a question for the arbitrator. Conduct that would constitute a waiver does not negate the existence of a duty to arbitrate; it is just a circumstance that prevents enforcement of that duty for a particular claim. Such a circumstance "grow[s] out of the dispute and bear[s] on its final disposition." *Howsam*, 537 U.S. at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964)) (internal quotation marks omitted). To keep courts from prejudging the outcome of a potentially arbitrable dispute, the impact of a circumstance that might constitute waiver "is presumptively not for the judge, but for an arbitrator, to decide." *Id.*

B. There Is a Deep and Recurring Split over Whether Courts or Arbitrators Should Decide the Question of Waiver by Litigation Conduct

In the fourteen years since *Howsam*, courts have divided over whether this Court's directive to let arbitrators decide waiver can also apply to a waiver based on a party's prior conduct in litigation. *See Scaffidi v. Fiserv, Inc.*, No. 05-C-1046, 2006 WL 2038348, at *4 (E.D. Wis. July 20, 2006) (noting that

"courts interpreting *Howsam* have split on the issue"); App. 13 (same).

1. Some Courts Read *Howsam* as Requiring the Arbitrator to Decide Whether a Waiver by Litigation Occurred

Relying on *Howsam*, some courts say that there is no reason a court, rather than an arbitrator, has to decide an allegation of waiver simply because the allegation relates to judicial proceedings.

For example, shortly after the *Howsam* decision, the Eighth Circuit invoked the then-new precedent to let the parties arbitrate the question whether prior litigation in Oklahoma state court waived the right to arbitrate the underlying dispute. *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003).[1] The D.C. Court of Appeals, too, agreed that *Howsam* required that the issue of waiver based on a party's "actively participating in litigation" be referred to the arbitrator. *Woodland Ltd. P'ship v. Wulff*, 868 A.2d 860, 865 (D.C. 2005); *accord Housh v. Dinovo Invs., Inc.*, No. Civ.A. 02-2562-KHV, 2003 WL

[1] Elsewhere the court says that the waiver argument was based on prior arbitration, which has led some courts to believe that "any prior court actions had been referred to, and resolved in, arbitration." *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3d Cir. 2007). While some courts have seized on this to say that *Transamerica* did not really involve litigation conduct, *see id.*, it is not at all clear that the Eighth Circuit—in using arbitration and litigation interchangeably—thought that made any difference.

1119526, at *9 (D. Kan. Mar. 7, 2003) (addressing the issue sua sponte).

More recently, the Second Circuit concluded the same thing in a case involving a bilateral investment treaty. *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011). There, a decade after Texaco agreed to be sued in Ecuador's courts, Texaco's successor, Chevron, initiated arbitration against Ecuador for unfairly interfering with that litigation. *Id.* at 389-90 & n.5. Ecuador moved for a stay of arbitration, arguing that Chevron's acquiescence to the litigation waived any right to arbitration. *Id.* at 391-92. Citing *Howsam*, the Second Circuit rejected Ecuador's argument, concluding that Chevron's alleged waiver by litigation was one of the "defenses to arbitrability" that the arbitrator can decide. *Id.* at 394.

The Kansas Court of Appeals also ruled that waiver by litigation conduct can be resolved by an arbitrator, expressly disavowing cases on the other side of the split. *Portfolio Recovery Assocs. v. Dixon*, 366 P.3d 245, 251 (Kan. Ct. App. 2016). Just three weeks after the Nevada Supreme Court concluded that this Court's decision in *BG Group* does not require reexamination of the post-*Howsam* cases distinguishing waiver by litigation conduct from other kinds of waiver, App. 14 n.4, the Kansas Court of Appeals disagreed. *Portfolio Recovery Assocs.*, 366 P.3d at 251. *BG Group*, the Kansas court noted, did not "carv[e] out an exception for questions related to litigation conduct" or cite favorably to any decision that did. *Id.*

Other courts reach similar results. *See RMES Commc'ns, Inc. v. Qwest Bus. Gov't Servs., Inc.*, No. 05-cv-02185-LTB-MJW, 2006 WL 1183173, at *4-5 (D. Colo. May 2, 2006) (noting that *Howsam* calls into question prior Tenth Circuit authority and disagreeing with circuits that try to distinguish *Howsam* to preserve prior cases law treating waiver by litigation conduct differently). *Cf. First Weber Grp., Inc. v. Synergy Real Estate Grp., LLC*, 860 N.W.2d 498, 514 (Wis. 2015) (relying on *Howsam* and *BG Group* in holding as a matter of state law that it was a question for the arbitrator whether failure to appeal a state court's decision denying attorney's fees from a previous arbitration barred a new arbitration for those fees).

2. Other Courts Decide Themselves All Questions of Waiver by Litigation Conduct

Despite this Court's pronouncements in *Howsam* and *BG Group* that waiver is a matter for the arbitrator, a significant number of appellate courts disagree that this directive applies to a question of waiver by litigation conduct.[2] Those courts say that if litigation

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[2] *See, e.g.*, *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) (noting that courts "have disagreed" on this issue); *Ehleiter*, 482 F.3d at 217-18, 221; *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. App'x 462, 464 (5th Cir. 2004); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008); *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1121 (9th Cir. 2008); *Grigsby & Assocs. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011); *Hong v. CJ CGV Am. Holdings, Inc.*, 222 Cal. App. 4th 240, 258 (2013); *Cassedy v. Hofmann*, 153 So. 3d 938, 942 (Fla.

conduct is involved, the presumption is actually reversed, such that a *court* will decide the matter unless the parties satisfy an "onerous standard" of showing "clear and unmistakable" evidence of an intent to arbitrate the waiver issue. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3d Cir. 2007).

The facts and reasoning in *Ehleiter* are typical of those that lead courts to create a special rule for litigation-conduct waiver. There, a defendant litigated a personal-injury action for four years before moving to compel arbitration. *Id.* at 210. The plaintiff cried waiver. *Id.* at 211. The Third Circuit read the *Howsam* presumption that arbitrators decide waiver as limited to "contractual conditions precedent to arbitration, such as the . . . time limit rule at issue in that case." *Id.* at 219. According to the Third Circuit in *Ehleiter*, *Howsam* did not

> upset the "traditional rule" that courts, not arbitrators, should decide the question of whether a party has waived its right to arbitrate by actively litigating the case in court.

Id. at 217-18. The *Ehleiter* court also noted that, while the *Howsam* court had cited favorably to the commentary to the Revised Uniform Arbitration Act,

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Dist. Ct. App. 2014); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551-52 (Ky. 2008); *Good Samaritan Coffee Co. v. LaRue Distrib., Inc.*, 748 N.W.2d 367, 375 (Neb. 2008); *Perry Homes v. Cull*, 258 S.W.3d 580, 587 (Tex. 2008); *River House Dev. Inc. v. Integrus Architecture, P.S.*, 272 P.3d 289, 296 (2012) (Wash. Ct. App. 2012).

a different section of that commentary said that "[w]aiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause." *Id.* at 218 (citing Revised Uniform Arbitration Act § 6 cmt. 5, 7 U.L.A. 16 (Supp. 2004)).

3. The Nevada Supreme Court Recognized that its Decision Deepened the Persistent Split

The Nevada Supreme Court acknowledged that the split is genuine. Citing some of the cases above, the court noted that "courts have divided on who decides litigation-conduct waiver." App. 13. Accordingly, the court recognized that no matter what it decided, it was making law in an area of "uncertainty in the lower courts." App. 12.

C. The Lack of Uniformity Is a Serious Problem

1. Review Is Necessary to Ensure the Uniform Application of the Federal Arbitration Act

This patchwork of decisions, often drawing bright-line rules based on the equities of individual cases, inhibits the "uniform nationwide application" of federal law. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989); *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013). And the problem is

greater for the FAA than other federal statutes because the disagreements are not limited to the federal courts of appeals:

> State courts rather than federal courts are most frequently called upon to apply the [FAA] . . . , including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.

Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 501 (2013) (vacating a decision of the Oklahoma Supreme Court that "failed to do so"); *accord Vaden*, 556 U.S. at 59 ("Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate."). A case in Nebraska, for example, will come to opposite conclusions regarding litigation-conduct waiver depending on whether the case is in state or federal court. *Compare Transamerica*, 328 F.3d at 466 (waiver is for the arbitrator), *with Good Samaritan Coffee Co.*, 748 N.W.2d at 375 (waiver is for the court).

Even those who think waiver by litigation conduct should be left entirely to courts admit that that question is "likely to remain unsettled until the Supreme Court clarifies what it meant by the phrase 'waiver, delay, or a like defense of arbitrability' in *Howsam*." Thomas J. Lilly, Jr., *Participation in Litigation as a Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory*, 92 Neb. L. Rev. 86, 99 (2013), *cited* at

App. 12. *See also* Neal R. Troum, *Policy Preferences and Enumerated Powers Under the Federal Arbitration Act*, 35 Am. J. Trial Advoc. 263, 283-84 n.104 (2011) (anticipating that "this is a question likely to be resolved by the Court in the future"); Catherine Woltering, Recent Development, Jack Ehleiter v. Grapetree Shores, Inc., 23 Ohio St. J. on Disp. Resol. 253, 263 (2008) (suggesting that "it seems inevitable that the U.S. Supreme Court will have to clarify what is the proper division of labor").

The *Howsam* court granted certiorari precisely because the courts of appeals had reached different conclusions about the division of labor between courts and arbitrators. 537 U.S. at 82. Although that division may seem like a minor issue, it "can make a critical difference" to the outcome of arbitrable disputes. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Because *Howsam* and *BG Group* have themselves "generated uncertainty in the lower courts," App. 12, there is a compelling need to restore the uniformity those decisions aimed to protect.

2. Uncertainty in the Application of Waiver Rules Encourages Arbitration of Minor Disputes that Would Be Better Left to Small-Claims Courts

Petitioner Rapid Cash prides itself on having fair arbitration agreements. While either party can choose

arbitration, it is not required for every small claim, which small-claims courts are suited to hear at a low cost to all parties. App. 5-7.

But if initiating these small-claims actions could jeopardize the right to arbitrate other, more substantial claims or even class actions filed in other courts, parties like Rapid Cash will have an incentive to demand arbitration in all cases, even those that are better suited for small-claims court. *Compare* App. 24-25, *with Cottonwood Fin., Ltd. v. Estes*, 810 N.W.2d 852, 861 (Wis. 2012) (holding that filing of small claims did not waive the right to arbitrate counterclaims that were converted to class action), *and Blakely*, 305 F. Supp. 2d at 642 (finding that collection action did not waive the right to arbitrate counterclaim). That would be costly for all parties.

D. By Exposing the Shortcomings of a Rule Favoring Courts, this Case Is a Good Vehicle to Resolve the Split

For advocates of the presumption that courts decide all questions of litigation-conduct waiver, the plain language of *Howsam* is hard to get around. Dissenting in *Cox v. Ocean View Hotel Corp.*, Judge O'Scannlain emphasized that this Court's precedents

> are absolutely clear that once the legal decision is made by the court that an arbitration clause is valid, all remaining issues are for the arbitrator.

> The Supreme Court in *Howsam* could not be clearer: "the presumption is that the arbitrator should decide allegation[s] of waiver, delay, or a like defense to arbitrability." 537 U.S. at 84 . . . (internal quotation marks and citation omitted). Thus, I find perplexing the majority's attempt to distinguish *Howsam*.

533 F.3d at 1126-27 (O'Scannlain, J., dissenting) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967); *Howsam*, 537 U.S. at 85; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1293-94 (9th Cir. 2006) (en banc)). *See also Clyde Bergemann, Inc. v. Sullivan, Higgins & Brion*, Civ. No. 08-162-KI, 2008 WL 4279632, at *1 (D. Or. Sept. 18, 2008) (agreeing with Judge O'Scannlain's criticism); Troum, *supra*, at 283 n.104 (lamenting that "courts have bent over backwards to distinguish the difficult-to-distinguish *Howsam* language"); 8 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner & O'Connor on Construction Law § 21:182 (2014) (noting that lower appellate courts have made "very little" of *Howsam*'s directive on waiver).

The problems extend beyond text, however. To resolve such an important, and contested, question, this Court should also look at the consequences of a national policy.

This case illustrates those consequences clearly. Certain courts, favoring a special rule for litigation-conduct waiver, have assumed that the court evaluating waiver will make more efficient and more accurate determinations than an arbitrator. *Marie*, 402 F.3d at 13. Held up to the circumstances of this case, though, the reasoning behind that blanket rule is actually rather threadbare. In cases like this, such a rule aggrandizes courts' power to decide waiver claims that are based on conduct the court never observed and that invite the court to prejudge the merits of the underlying complaint. That rule unnecessarily erodes arbitrators' authority under the FAA.

1. It Is Not Relevant, or Even True, that Courts Are Always Better Able to Decide a Question of Waiver that Is Based on Litigation Conduct

The Nevada Supreme Court acknowledges that "[l]itigation-conduct waiver questions commonly arise out of proceedings before the court being asked to compel arbitration." App. 15. This happens after a party has litigated an issue for a time but then, perhaps when things do not seem to be going well before the assigned judge, the party moves to arbitrate that same issue. *See Marie*, 402 F.3d at 13. That situation has led some courts to conclude that parties must expect courts to decide litigation-conduct waiver because a court has "greater expertise in recognizing and controlling abusive forum-shopping." *Grigsby*, 664 F.3d at 1354.

That "comparative expertise" argument is misguided in any case, but egregiously so in this case.

Courts' alleged expertise in finding waivers is irrelevant. The FAA was enacted to overcome courts' hostility towards arbitration and their distrust that arbitrators can resolve issues just as well as courts. *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 626-27 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991). True, *Howsam* stated that the parties likely expected the arbitrator to decide waiver under a procedural arbitration rule because an arbitrator is "comparatively better able to interpret and to apply" that rule. 537 U.S. at 85. But while it makes some sense to point out arbitration procedures that courts have no experience interpreting, parties to arbitration agreements regularly expect the arbitrator to decide issues that a court may have more experience interpreting. In fact, other quintessentially judicial doctrines, such as laches and res judicata, are reserved for the arbitrator. *See Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491-92 (1972) (laches); *Howsam*, 537 U.S. at 84 (same); *Klay v. United HealthGroup*, 376 F.3d 1092, 1108-09 (11th Cir. 2004) (abrogating, in light of *Howsam*, an earlier case that had treated res judicata as a matter for courts to

protect their jurisdiction). There is no reason to assume that parties to arbitration agreements expect an arbitrator to decide these other issues but expect a court to decide waiver. *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 43 (2012).

Worse, some have applied the rule that courts decide litigation-conduct waiver even when they have no advantage over an arbitrator. This case is a prime example, as the proceedings in the Las Vegas Justice Court, if there even were any actual judicial proceedings, did not take place before the state district judge who presided over the putative class action and who made the decision that arbitration had been waived in the lower court. App. 3-4, 8. There was no economy or efficiency inherent in having a judicial officer, who was a stranger to the action, decide the issues rather than a similarly disinterested arbitrator. *But see Marie*, 402 F.3d at 14 (holding that "[c]ourts are still well suited to determine the sort of forum-shopping and procedural issues" in EEOC litigation that the court never observed).

2. The Presumption that Courts Decide Litigation-Conduct Waiver Will Sometimes Require the Court to Prejudge the Merits of the Dispute

Allowing a party's prior litigation to serve as the dividing line between arbitrator and court responsibilities also disrupts the actual line this Court has

drawn. This Court has recognized that in some cases the decision whether a dispute can be arbitrated turns on the substantive claims in the case. *John Wiley & Sons, Inc.*, 376 U.S. at 557. At the same time, however, *courts* "have no business weighing the merits of the grievance." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960)). The solution, then, is to refer threshold questions that require a "weighing [of] the merits" to the arbitrator. *John Wiley & Sons, Inc.*, 376 U.S. at 558, 559.

Nothing in *Howsam* or *BG Group* exempts the threshold question of waiver from this principle. The principle is especially violated, however, by a rule that lets a court determine a waiver of arbitration even when the court has to assume the allegations in the complaint to be true in order to do so. In this case, the Nevada Supreme Court relied expressly on respondents' accusation that Rapid Cash committed a fraud on the small-claims court—the gravamen of the complaint—to support a procedural finding of waiver. App. 22-23.[3] By the court's own logic, an ultimate finding that Rapid Cash did nothing wrong would undercut the initial denial of arbitration. Like other threshold

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[3] Likewise, the district court's conclusion that "permitting the Rapid Cash defendants to enforce any portion of their long-ignored arbitration provisions would violate public policy" was based on the assumption that "Rapid Cash has utilized the Justice Court system repeatedly with the filing of false affidavits of service," an accusation that has yet to be adjudicated. App. 30-31.

issues that are inextricable from allegations in the underlying dispute, the preliminary waiver question should have been referred to the arbitrator.[4]

II. TO PROTECT THE FEDERAL ARBITRATION ACT, THIS COURT SHOULD PREVENT STATE COURTS FROM ELIMINATING ARBITRATION FOR PARTICULAR CAUSES OF ACTION

Even if it were proper for the Nevada Supreme Court to decide the waiver issue, its interpretation of the waiver doctrine eliminates an entire category of claims—abuse-of-process claims—from arbitration. This hostility towards arbitrating particular kinds of claims enacts a dangerous blueprint for state courts

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[4] Any factual assumptions the court makes would have to favor the party who advocates enforcement of arbitration, not the party resisting arbitration. "Any examination 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." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986) (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25). "[T]he facts must be viewed in light of the strong federal policy supporting international arbitration agreements." *Id.* (quoting *Shinto Shipping Co. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978)). So here, it was the borrowers as "the party opposing arbitration" who bore the "heavy burden of showing" waiver. *Wheeling Hosp. Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 586 (4th Cir. 2012) (discussing both waiver and default of right to compel arbitration under 9 U.S.C. § 3); *see also Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990).

seeking to undermine the FAA. This Court has repeatedly intervened to stop those evasions, and it should do so again here.

A. The FAA Preempts State Courts' Attempts to Disfavor Arbitration of Certain Kinds of Claims

While the FAA permits an arbitration agreement to be invalidated on generally applicable contract principles, that concept does not empower states to manipulate contract law to disfavor arbitration for entire categories of claims. In *AT&T Mobility LLC v. Concepcion*, this Court instructed that state legislatures cannot "prohibit[] outright the arbitration of a particular kind of claim"; so neither can state courts do this indirectly, through a rule that has "a disproportionate impact on arbitration agreements." 563 U.S. 333, 341-42 (2011). There, the California Supreme Court had applied its unconscionability doctrine to override arbitration agreements that prohibited class proceedings. *Id.* at 340. This Court held that requiring a class-based forum by judicial fiat rather than party consent is inconsistent with the FAA. *Id.* at 344, 348. The FAA's "savings clause"—which lets a court scrutinize an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract"—does not "suggest[] an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343 (citing 9 U.S.C. § 2).

As *Concepcion* demonstrated, § 2's preemptive power is equally applicable to a judge-made policy as it is to state laws that hamper arbitration of such claims as punitive damages, wage disputes, and claims brought under particular state statutes. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (citing *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp.*, 465 U.S. at 10).

When courts continued to create exceptions to the *Concepcion* principle, this Court promptly clarified: "State and federal courts must enforce the [FAA] . . . with respect to all arbitration agreements covered by that statute," and a "state court may not contradict or fail to implement the rule so established" by *Concepcion*. *Marmet Health*, 132 S. Ct. at 1202 (holding that the FAA preempted the West Virginia Supreme Court of Appeals' decision eliminating arbitration of personal-injury or wrongful-death claims against nursing homes as against public policy). *See also Ritz-Carlton Dev. Co. v. Narayan*, 136 S. Ct. 800 (2016) (summarily vacating the Hawai'i Supreme Court's refusal to compel arbitration of "ambiguous" arbitration agreements). This is true even if public policy aims to preserve a judicial forum to redress allegedly tortious or odious misconduct. *Marmet Health*, 132 S. Ct. at 1203. "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351.

B. The FAA Prohibits the Nevada Supreme Court's Ban on Arbitrating Abuse-of-Process Claims

The Nevada Supreme Court has done precisely what *Concepcion* and *Marmet Health* prohibit. By holding that only courts are competent to remedy a judgment procured by fraud, App. 22-23, the court effectively "prohibits outright the arbitration of" abuse-of-process claims. *See Concepcion*, 563 U.S. at 341. The court was clear that even though "the arbitration agreements specify that bringing one claim does not result in waiver of the right to arbitrate another," respondents' new claims *had* to be litigated so as not to "sanctify a fraud upon the court allegedly committed by the party who itself elected a litigation forum for its claim." App. 23. Such a rule, which elevates a state policy of judicial review for abuse-of-process claims over the federal policy of enforcing arbitration agreements as written, is preempted by the FAA. *See Marmet Health*, 132 S. Ct. at 1203; *Concepcion*, 563 U.S. at 341.

CONCLUSION

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

Respectfully submitted,

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May 13, 2016

132 Nev., Advance Opinion 2

IN THE SUPREME COURT OF
THE STATE OF NEVADA

PRINCIPAL INVESTMENTS, INC., D/B/A RAPID CASH; GRANITE FINANCIAL SERVICES, INC., D/B/A RAPID CASH; FMMR INVESTMENTS, INC., D/B/A RAPID CASH; PRIME GROUP, INC., D/B/A RAPID CASH; AND ADVANCE GROUP, INC., D/B/A Appellants, vs. CASSANDRA [sic] HARRISON; CONCEPCION QUINTINO; AND MARY DUNGAN, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, Respondents.	No. 59837 (Filed Jan. 14, 2016)

Appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Affirmed.

Lewis Roca Rothgerber, LLP, and Daniel F. Polsenberg, Joel D. Henriod, and Ryan T. O'Malley, Las Vegas; Gordon Silver and Mark S. Dzarnoski and William M. Noall, Las Vegas,

for Appellants.

Kemp, Jones & Coulthard, LLP, and J. Randall Jones, Jennifer C. Dorsey, and Carol L. Harris, Las Vegas; Legal Aid Center of Southern Nevada, Inc., and Dan L. Wulz, Venicia Considine, and Sophia A. Medina, Las Vegas,

for Respondents.

BEFORE THE COURT EN BANC.[1]

OPINION

By the Court, PICKERING, J.:

This is an appeal from an order denying a motion to compel arbitration. The district court held that the moving party waived its right to arbitrate by litigating collection claims against its borrowers to default judgment in justice court. We must decide whether the district court erred in addressing waiver, instead of referring the question to the arbitrator. We hold that litigation-conduct waiver is presumptively for the court to decide, unless the arbitration agreement clearly commits the question to the arbitrator, which the agreements here do not. On the merits, we uphold

[1] The Honorable Ron D. Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

the district court's finding of waiver and therefore affirm.

I.

A.

Appellant Rapid Cash is a payday loan company that provided short-term, high-interest loans to the named plaintiffs Mary Dungan, Cassandra Harrison, and Concepcion Quintino, among others.[2] The named plaintiffs and other borrowers did not repay their loans, prompting Rapid Cash, over a seven-year period, to file more than 16,000 individual collection actions in justice court in Clark County, Nevada. Rapid Cash hired Maurice Carroll, d/b/a On-Scene Mediations, as its process server. Relying on On-Scene's affidavits of service, Rapid Cash secured thousands of default judgments against the named plaintiffs and other borrowers who failed to appear and defend the collection lawsuits.

At some point, a justice of the peace noticed that On-Scene's affidavits attested to an improbably high number of same-day receipts and service of process, and initiated an investigation. The investigation revealed that Carroll and On-Scene had engaged in "sewer service"—the practice of accepting summonses and complaints for service, failing to serve them, then falsely swearing in court-filed affidavits that service

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[2] We refer to appellants collectively as "Rapid Cash," the name by which they are all alleged to do business.

had been made when it was not. Carroll and On-Scene were cited for serving process without a license, and a cease and desist order was entered against them. Ultimately, Carroll was charged with and convicted of 17 counts of forgery and offering false instruments.

Carroll's criminal convictions involved false affidavits of service for clients other than Rapid Cash. Nonetheless, Carroll and On-Scene were Rapid Cash's exclusive agent for service of process in southern Nevada, and the named plaintiffs sued Rapid Cash, On-Scene, and others in district court, alleging that Rapid Cash improperly obtained its default judgments against them and other similarly situated borrowers without their knowledge via On-Scene's "sewer service." The first amended complaint is styled as a class action and asserts claims for fraud upon the court, abuse of process, negligent hiring/supervision/retention, negligence, civil conspiracy, and violation of Nevada's fair debt collection laws. The relief requested includes declaratory relief deeming the justice court default judgments void and uncollectable; injunctive relief; disgorgement, restitution, or a constructive trust for funds already collected; forfeiture by Rapid Cash of all loan amounts; return of all principal, interest, charges, or fees associated with the loans; punitive damages and statutory penalties; and attorney fees and costs. The first amended complaint disavows claims for individual tort or consequential damages, stating:

> This Class action does not seek to, nor will it, actually litigate any additional claims for compensatory damage, which may include but

> not be limited to damage to credit reputation, fear, anxiety, mental and emotional distress, nor damages arising from wrongful garnishment or attachment, such as bank fees, bounced check fees, finance charges or interest on bills which would have otherwise been paid, and the like.

B.

Rapid Cash moved to compel arbitration based on the arbitration provisions in its loan agreements, which take one of two forms, depending on the date of the loan. The Dungan/Harrison form of agreement provides that either party may elect binding arbitration of any "Claim," and broadly defines "Claim" as follows:

> 2. DEFINITION OF "CLAIM." The term "Claim" means any claim, dispute or controversy between you and us (including "related parties" identified below) that arises from or relates in any way to Services you request or we provide, now, in the past or in the future; the Application (or any prior or future application); any agreement relating to Services ("Services Agreement"); any of our marketing, advertising, solicitations and conduct relating to your request for Services; our collection of any amounts you owe; our disclosure of or failure to protect any information about you; or the validity, enforceability or scope of this Arbitration Provision. "Claim" is to be given the broadest possible meaning and includes claims of every kind and nature, including but not limited to, initial claims, counterclaims,

> cross-claims and third-party claims, and claims based on any constitution, statute, regulation, ordinance, common law rule (including rules relating to contracts; negligence, fraud or other intentional wrongs) and equity, It includes disputes that seek relief of any type, including damages and/or injunctive, declaratory or other equitable relief.

The Dungan/Harrison form of agreement specifies that litigating one claim does not waive arbitration as to other claims:

> Even if all parties have elected to litigate a Claim in court, you or we may elect arbitration with respect to any Claim made by a new party or any new Claim asserted in that lawsuit, and nothing in that litigation shall constitute a waiver of any rights under this Arbitration Provision.

Quintino's form of agreement differs. It includes a preliminary "Mediation Agreement," requiring that before either party proceeds with arbitration or litigation, the party must submit all "Claims . . . to neutral, individual (and not class) mediation." If mediation does not resolve the dispute, then the "Arbitration Agreement" controls:

> If you and we are not able to resolve a Claim in mediation, then you and we agree that such Claim will be resolved by neutral, binding individual (and not class) arbitration. You and we may not initiate arbitration proceedings without first complying with the Mediation Agreement.

The Quintino form of agreement also defines "Claims" broadly:

> "Claims" means any and all claims, disputes or controversies that arise under common law, federal or state statute or regulation, or otherwise, and that we or our servicers or agents have against you or that you have against us, our servicers, agents, directors, officers and employees, "Claims" also includes any and all claims that arise out of (i) the validity, scope and/or applicability of this Mediation Agreement or the Arbitration Agreement appearing below, (ii) your application for a Loan, (iii) the Agreement, (iv) any prior agreement between you and us, including any prior loans we have made to you[,] or (v) our collection of any Loan. "Claims" also includes all claims asserted as a representative, private attorney general, member of a class or in any other representative capacity, and all counterclaims, cross-claims and third party claims.

The Quintino agreement specifies that either party may "bring a Claim in a small claims or the proper Las Vegas Justice Court, as long as the Claim is within the jurisdictional limits of that court," without submitting the claim to mediation or arbitration, but that "[a]ll Claims that cannot be brought in small claims court or Las Vegas Justice Court . . . must be resolved consistent with . . . the Arbitration Agreement."

Both forms of agreement state that they are "made pursuant to a transaction involving interstate commerce" and shall "be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as amended," or the "FAA." They also include class-action and class-arbitration waivers.

The district court denied Rapid Cash's motions to compel arbitration of the claims asserted in the original and first amended complaints. It held that Rapid Cash waived its right to an arbitral forum by bringing collection actions in justice court, employing Carroll and On-Scene as its agent for service of process, and obtaining default judgments allegedly based on On-Scene's falsified affidavits of service. Rapid Cash appeals. We have jurisdiction under NRS 38.247(1)(a) and 9 U.S.C. § 16(a)(1)(B) (2012), which allow interlocutory appeals from orders denying motions to compel arbitration, and affirm.

II.

A.

As the loan documents stipulate, the arbitration agreements evidence transactions involving commerce, so the Federal Arbitration Act (FAA) applies. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 121-22 (2015). Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision expresses "both a liberal

federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract."[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotations and internal citations omitted). Because arbitration is fundamentally a matter of contract, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

The right to enforce an agreement to arbitrate, like any contract right, can be waived. But 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." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Given the "strong presumption in favor of arbitration[,] . . . waiver of the right to arbitration is not to be lightly inferred."

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[3] Nevada has adopted the Uniform Arbitration Act of 2000 (UAA), *see* NRS 38.206, which expresses Nevada's similarly fundamental policy favoring the enforceability of arbitration agreements as written. *See* NRS 38.219(1); *Tallman*, 131 Nev., Adv. Op. 71, 359 P.3d at 119 ("As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration." (quoting *State ex rel. Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009))).

Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812, 242 F.3d 52, 57 (2d Cir. 2001) (internal quotations omitted); *accord Tallman*, 131 Nev., Adv. Op. 71, 359 P.3d at 123 (quoting *Clark Cty. v. Blanchard Constr. Co.*, 98 Nev. 488, 491, 653 P.2d 1217, 1219 (1982)). Under the FAA, "any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 229 (2d Cir. 2001) (quoting *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995)).

B.

We must decide whether Rapid Cash waived its right to arbitrate the named plaintiffs' equitable, common-law and statutory claims against them by its litigation activities in justice court. Before we can do so, we must address the threshold issue of who decides the question of waiver-by-litigation-conduct—the court or the arbitrator? The answer depends on presumptions the Supreme Court has developed to guide division-of-labor determinations under the FAA and the text of the arbitration agreements themselves. *See BG Grp. PLC v. Republic of Argentina*, 572 U.S. ___, ___, 134 S. Ct. 1198, 1206-07 (2014) (stating that since arbitration is a matter of contract, "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. . . . If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts

determine the parties' intent with the help of presumptions."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

Despite the FAA's robust pro-arbitration presumption, *Moses H. Cone*, 460 U.S. at 24-25, the Supreme Court has instructed that certain issues—the kind that "contracting parties would likely have expected a court to have decided"—are presumptively for the court, not the arbitrator, to resolve. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). These court-committed issues involve gateway questions of arbitrability, "such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " *BG Grp.*, 572 U.S. at ___, 134 S. Ct. at 1206 (quoting *Howsam*, 537 U.S. at 84). Because "courts presume that the parties intend courts, not arbitrators, to decide [gateway questions of] arbitrability," *id.*, these gateway questions are for the court to decide, unless the parties' agreement (or, possibly, conduct) provides "clear and unmistakable evidence" that they intended to commit the questions to the arbitrator in the first instance. *First Options*, 514 U.S. at 944 (internal quotation omitted). But the Supreme Court applies an exactly opposite set of rules to *procedural* gateway matters: "On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." *BG Grp.*, 572 U.S. at ___, 134 S. Ct.

at 1207. Procedural gateway matters "include the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Id.* (internal quotations omitted).

In *Howsam*, and again in *BG Group*, the Supreme Court characterized "waiver" as a procedural gateway question, not a gateway "question of arbitrability," stating that, under the FAA, the *arbitrator* presumptively "should decide 'allegation[s] of *waiver*, delay, or a like defense to arbitrability." 537 U.S. at 84 (emphasis added) (alteration in original) (quoting *Moses H. Cone*, 460 U.S. at 25); *BG Grp.*, 572 U.S at ___, 134 S. Ct. at 1207. These pronouncements have generated uncertainty in the lower courts as to who decides litigation-conduct waiver. *See* Thomas J. Lilly, Jr., *Participation in Litigation as a Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory*, 92 Neb. L. Rev. 86, 100-01 (2013). Before *Howsam*, most courts held that, under the FAA, litigation-conduct waiver challenges were for the court to resolve. *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 11-12 (1st Cir. 2005) (noting the First Circuit's "long history of deciding such waiver claims itself' and observing that "[t]his was in accord with the overwhelming weight of *pre-Howsam* authority, which held that waiver due to litigation conduct was generally for the court and not for the arbitrator"); *see Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 121 Nev. 84, 90, 110 P.3d 481, 485 (2005) (judicially addressing litigation-conduct waiver without questioning whether the arbitrator should have decided the

matter); *see also Tallman*, 131 Nev., Adv. Op. 71, 359 P.3d at 123 (upholding order rejecting litigation-conduct waiver claim but noting that all parties assumed "that waiver was for the court, not the arbitrator to decide"). After *Howsam*, courts have divided on who decides litigation-conduct waiver. *Compare Marie*, 402 F.3d at 14 ("We hold that the Supreme Court in *Howsam* . . . did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court."), *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3d Cir. 2007) ("[W]aiver of the right to arbitrate based on litigation conduct remains presumptively an issue for the court to decide [even] in the wake of *Howsam*."), *and Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011) ("[I]t is presumptively for the courts to adjudicate disputes about whether a party, by earlier litigating in court, has waived the right to arbitrate."), *with Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003) (summarily holding that *Howsam* mandates that the court refer all waiver challenges to the arbitrator, even litigation-conduct waiver).

Howsam considered a procedural rule of the contractually chosen arbitral forum, the National Association of Securities Dealers (NASD), which provided that "no dispute 'shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.'" *Howsam*, 537 U.S. at 81 (quoting NASD Code of Arbitration Procedure § 10304 (1984)). The "waiver"

Howsam, deemed the province of the arbitrator, not the court, thus did not grow out of litigation conduct but, rather, delay in initiating arbitration, a procedural matter the NASD rules controlled. The courts that have retained the traditional rule that litigation-conduct waivers are for the court to decide have distinguished *Howsam*, by limiting its waiver pronouncement to the context in which it arose, specifically, waiver "arising from non-compliance with contractual conditions precedent to arbitration." *Grigsby*, 664 F.3d at 1353 (internal quotation marks omitted). That *Howsam* presumed the arbitrator would decide the NASD time-limit bar makes sense: The NASD arbitrator was "comparatively better able to interpret and to apply" the NASD's procedural rule, so the parties would have expected that issue to go to the arbitrator as the decision-maker with the better comparative expertise. *Howsam*, 537 U.S. at 85.[4] But litigation-conduct "waiver implicates courts' authority to control *judicial* procedures or to resolve issues . . . arising from *judicial conduct*." *Ehleiter*, 482 F.3d at 219. Arbitrators are not comparatively better able than courts to interpret and

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[4] The Court's quotation of *Howsam*'s waiver language in *BG Group*, 572 U.S. at ___, 134 S. Ct. at 1207, is not inconsistent with the distinction *Grigsby* and other *post-Howsam* cases have drawn between waiver by litigation-conduct and waiver by failure to comply with procedural prerequisites to arbitration. In *BG Group*, the Supreme Court deemed a foreign sovereign's local litigation provision the province of the arbitrators because it constituted "a purely procedural requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute." *Id.* at ___, 134 S. Ct. at 1207.

to apply litigation-conduct waiver defenses, *see Grigsby*, 664 F.3d at 1354 (stating that a court is "the decisionmaker with greater expertise in recognizing and controlling abusive forum-shopping"), and, thus, it is reasonable to assume that "parties would expect the court to decide [litigation-conduct waiver] itself." *Ehleiter*, 482 F.3d at 219.

Litigation-conduct waiver questions commonly arise out of proceedings before the court being asked to compel arbitration. Having the court assess waiver not only comports with party expectations but also is more efficient than reconstructing the litigation history before the arbitrator and deferring the question to the arbitral forum, only to have the dispute return if the arbitrator finds waiver.

> Questions of litigation-conduct waiver are best resolved by a court that "has inherent power to control its docket and to prevent abuse in its proceedings (i.e. forum shopping)," which has "more expertise in recognizing such abuses, and in controlling . . . them," and which could most efficiently and economically decide the issue as "where the issue is waiver due to litigation activity, by its nature the possibility of litigation remains, and referring the question to an arbitrator would be an additional, unnecessary step."

See Am. Gen. Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 551-52 (Ky. 2008) (internal footnote omitted) (quoting David LeFevre, Note, *Whose Finding Is It Anyway?: The Division of Labor Between Courts and*

Arbitrators With Respect to Waiver, 2006 J. Disp. Resol. 305, 313-14 (2006)); *see* UAA of 2000, § 6, cmt. 5, 7 U.L.A., part 1A 28 (2009) (stating that litigation-conduct "[w]aiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause," and noting that [a]llowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract" and that "[i]t is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver").

We therefore hold, as the majority of courts have, that *Howsam*'s reference to "waiver, delay, or a like defense" being for the arbitrator encompasses "defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, [but] not . . . claims of waiver based on active litigation in court." *Ehleiter*, 482 F.3d at 219 (internal quotations omitted); *see Marie*, 402 F.3d at 14. A party to an arbitration agreement likely would expect a court to determine whether the opposing party's conduct in a judicial setting amounted to waiver of the right to arbitrate. Thus, even *post-Howsam*, litigation-conduct waiver remains a matter presumptively for the court to decide.

C.

We still must consider Rapid Cash's argument that its arbitration agreements provide for the arbitrator to decide litigation-conduct waiver, notwithstanding any presumption to the contrary. *See First Options*, 514 U.S. at 943 ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (internal citations omitted)). In this regard, the Dungan/Harrison form of agreement requires arbitration of "any claim, dispute or controversy . . . that arises from or relates in any way to . . . the *validity, enforceability or scope* of this Arbitration Provision," while the Quintino form of agreement requires the parties to arbitrate "any and all claims that arise out of . . . *the validity, scope and or applicability* of this . . . Arbitration Agreement." (Emphases added.)

Rapid Cash argues that the district court's finding of litigation-conduct waiver defeats the "enforceability" of its arbitration agreements and so, at minimum, Dungan's and Harrison's waiver challenge should have been referred to the arbitrator under *First Options* and its progeny. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (upholding district court's referral of substantive unconscionability defense to the arbitrator based on a delegation clause that sent to the arbitrator questions as to the "applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void

or voidable" (internal quotation omitted)). Rapid Cash argues that Quintino's agreement, too, delegates litigation-conduct waiver to the arbitrator, since Quintino's waiver challenge amounts to a defense to the "applicability" of her arbitration agreement. We do not agree.

"An issue that is presumptively for the court to decide will be referred to the arbitrator for determination only where the parties' arbitration agreement contains 'clear and unmistakable evidence' of such an intent." *Ehleiter*, 482 F.3d at 221 (quoting *First Options*, 514 U.S. at 944); *see also Rent-A-Center*, 561 U.S. at 70 n.1. The general language in both forms of Rapid Cash agreements falls short of the "clear and unmistakable evidence" required to overcome the presumption that litigation-conduct waiver is for the court to decide. The presumption that courts decide litigation-conduct waiver is rooted in presumed party intent and probable expectations. The agreements between Rapid Cash and its borrowers provide specifically for litigation of some claims in some courts without loss of the right to arbitrate other claims in other courts, yet are silent on the issue of who decides on which side of the line such later-asserted claims fall. A corollary of the *First Options* rule requiring "clear and unmistakable evidence" of contrary intent to overcome a division-of-labor presumption is the rule that "silence or ambiguity" is resolved against the party seeking to overcome the presumption. *First Options*, 514 U.S. at 944-45. Had Rapid Cash intended to delegate litigation-conduct waiver to the arbitrator, rather than the court, the

agreements could and should have been written to say that explicitly. Absent an explicit delegation, litigation-conduct waiver remains a matter for the court to resolve. *See Marie*, 402 F.3d at 15 (declining to interpret agreement delegating "arbitrability" determinations to the arbitrator as "evinc[ing] a clear and unmistakable intent to have waiver issues decided by the arbitrator" and holding that "[n]either party should be forced to arbitrate the issue of waiver by conduct without a clearer indication in the agreement that they have agreed to do so").[5]

Here, as in *Ehleiter*, "[l]itigants would expect the court, not an arbitrator, to decide the question of waiver based on litigation conduct, and the Agreement . . . does not manifest a contrary intent." 482 F.3d at 222. We thus "cannot interpret the Agreement's silence regarding who decides the waiver issue here 'as giving the arbitrators that power, for doing so . . . [would] force [an] unwilling part[y] to arbitrate a matter he reasonably would have thought a judge, not an arbitrator, would decide.'" *Id.* (alteration in original) (quoting *First Options*, 514 U.S. at 945).

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[5] *Rent-A-Center* is not to the contrary. In *Rent-A-Center*, the party opposing arbitration conceded that the text of the delegation clause—referring to the arbitrator claims that the arbitration agreement was "void or voidable" and so not enforceable or applicable—encompassed his substantive unconscionability challenge. *See Rent-A-Center*, 561 U.S. at 66 (internal quotation omitted). In this case, by contrast, the parties opposing arbitration hotly contest the delegation clauses in their agreements, which, unlike the *Rent-A-Center* clause, stop at "enforceability" and "applicability" without adding a description of what the term means.

D.

We turn to Rapid Cash's contention that the district court erred in finding it waived its right to arbitrate. Waiver is not a favored finding and should not be lightly inferred. *Coca-Cola Bottling*, 242 F.3d at 57; *Clark Cty.*, 98 Nev. at 491, 653 P.2d at 1219. "A party seeking to prove the waiver of a right to arbitrate must demonstrate these elements: knowledge of an existing right to compel arbitration; acts inconsistent with that existing right; and prejudice to the party opposing arbitration resulting from such inconsistent acts." 3 Thomas H. Oehmke, *Commercial Arbitration* § 50:28, at 28-29 (3d ed. Supp. 2015); *see Nev. Gold*, 121 Nev. at 90, 110 P.3d at 485.

Rapid Cash knew of its arbitration rights and acknowledges that it waived its right to arbitrate its collection claims by bringing them in justice court. Its point is that the claims the named plaintiffs have asserted against Rapid Cash in district court are separate and distinct from the collection claims Rapid Cash sued on in justice court. Especially since its arbitration agreements permit it to litigate a collection claim in justice court without losing the right to arbitrate other, distinct claims, Rapid Cash sees no inconsistency in enforcing arbitration of the named plaintiffs' claims despite its prior litigation in justice court. Rapid Cash also disputes whether the class representatives have made a sufficient showing of prejudice to justify a finding of waiver.

Consistent with the policy disfavoring waiver, caselaw teaches that "only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate." *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997); *see MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999); *Cottonwood Fin., Ltd. v. Estes*, 810 N.W.2d 852, 860-61 (Wis. Ct. App. 2012). The reasoning underlying these cases is that litigating one claim is not necessarily inconsistent with seeking to arbitrate another, separate claim and does not prejudice rights of the opposing party that the arbitration agreement protects. *See Distajo*, 107 F.3d at 133 ("Finding waiver where a party has previously litigated an unrelated yet arbitrable dispute would effectively abrogate an arbitration clause once a party had litigated *any* issue relating to the underlying contract containing the arbitration clause."). Thus, the franchisor in *Distajo* did not waive its right to arbitrate its franchisees' claims for breach of the franchise agreement by obtaining eviction orders against its franchisees in state court because the eviction actions did not prejudice rights secured by the arbitration agreement, as required to find waiver of arbitration rights under the FAA. 107 F.3d at 134 ("[P]rejudice as defined by our [waiver] cases refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue."). Similarly, the payday lender in *Cottonwood Financial* did not waive its right

to compel arbitration of its borrower's counterclaim alleging violation of the Wisconsin Consumer Act by bringing a collection action in small claims court; the arbitration agreement provided that a small claims action did not waive the right to compel arbitration of other claims and the borrower's counterclaim converted the case from a small to a large claims action, triggering the arbitration agreement. 810 N.W.2d at 860-61; *see Fid. Nat'l Corp. v. Blakely*, 305 F. Supp. 2d 639, 642 (S.D. Miss. 2003) (holding lender's state-court collection action did not waive its right to seek arbitration of counterclaim asserting tort claims associated with the transaction).

This case differs from the cases just cited in one crucial respect: The claims the named plaintiffs have asserted in district court arise out of, and are integrally related to, the litigation Rapid Cash conducted in justice court. By initiating a collection action in justice court, Rapid Cash waived its right to arbitrate to the extent of inviting its borrower to appear and defend on the merits of that claim. The entry of default judgment based on a falsified affidavit of service denied the defendant borrower that invited opportunity to appear and defend. Allowing the borrower to litigate its claim to set aside the judgment and be heard on the merits comports with the waiver Rapid Cash initiated. If the judgment Rapid Cash obtained was the product of fraud or criminal misconduct and is unenforceable for that reason, it would be unfairly prejudicial to the judgment debtor to require arbitration of claims seeking to set that judgment aside, to enjoin its enforcement, and

otherwise to remediate its improper entry. We recognize that the arbitration agreements specify that bringing one claim does not result in waiver of the right to arbitrate another, but a no-waiver clause can itself be waived, *see Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964), and should not be applied to sanctify a fraud upon the court allegedly committed by the party who itself elected a litigation forum for its claim. *Cf. S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1998) (declining to enforce a "no waiver" clause where to do so would hamper a judge's authority to control the proceedings and correct any abuse in them); *Gen. Elec. Capital Corp. v. Rio-Mass Tech, Inc.*, 136 So. 3d 698, 703 (Fla. Dist. Ct. App. 2014) (holding that an "antiwaiver or 'no waiver' provision is not itself determinative and does not operate as a complete bar to finding a waiver of the right to arbitration").

E.

Rapid Cash urges us to differentiate among the claims the named plaintiffs have brought, arguing that the named plaintiffs have an adequate remedy under Rule 60(c) of the Nevada Justice Court Rules of Civil Procedure, which provides:

> When a default judgment shall have been taken against any party who was not personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, and who has not entered a general appearance in the action, the court, after

> notice to the adverse party, upon motion made within six months after the date of service of written notice of entry of such judgment may vacate such judgment and allow the party or the party's legal representatives to answer to the merits of the original action,

and that all other claims should be dismissed or sent to arbitration. Rapid Cash did not make this argument to the district court before that court entered its order denying Rapid Cash's second motion to compel arbitration, and thus, this argument is not properly before us on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").[6] More to the point, while we do not pass upon the validity of any of the named plaintiffs' claims and we recognize that the FAA "requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985), we do not accept Rapid Cash's view of their separability for waiver purposes. The named plaintiffs' claims all concern, at their core, the validity of the default judgments Rapid Cash obtained against them in

[6] A separate proceeding regarding this issue whereby Rapid Cash seeks original writ relief from the district court's orders partially granting class certification and declining to dismiss certain claims for relief is pending before this court as *Principal Investments, Inc. v. Eighth Judicial District Court*, Docket No. 61581.

justice court, as to which issue the district court correctly concluded that Rapid Cash waived its right to an arbitral forum.

We therefore affirm.

/s/ Pickering, J.
Pickering

We concur:

/s/ Hardesty, J.
Hardesty

/s/ Douglas, J.
Douglas

/s/ Cherry, J.
Cherry

/s/ Gibbons, J.
Gibbons

SAITTA, J., concurring:

In large part, I agree with the majority's opinion. However, I disagree with the majority's inclusion as dicta of two cases, *Cottonwood Financial, Ltd. v. Estes*, 810 N.W.2d 852 (Wis. Ct. App. 2012), and *Fidelity National Corp. v. Blakely*, 305 F. Supp. 2d 639 (S.D. Miss. 2003). The *Cottonwood* court based its decision on its interpretation of the arbitration clause in that case and did not perform an analysis of whether the "same

legal and factual issues" were at issue in the lender's collection action as the borrower's counterclaim. *Compare Cottonwood Financial*, 810 N.W.2d at 860-61, with Majority Opinion at 17-18 (holding that "'only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate.'" (quoting *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 133 (2d Cir. 1997))). Therefore, I believe that *Cottonwood* is inapposite to the majority's analysis under the standard it set out in its opinion.

In the case of *Blakely*, I respectfully note that the holding in that case directly contradicts the majority's holding in the current case. *Compare Blakely*, 305 F. Supp. 2d at 642 (holding lender's state court collection action *did not waive* its right to seek arbitration of counterclaim asserting tort claims associated with the transaction), with Majority Opinion at 20-21 (holding that lender's state-court collection action *waived* its right to seek arbitration of claims associated with the transaction). Therefore, I am puzzled by its inclusion in the majority's opinion.

Lastly, I note that the above caselaw originates from the Wisconsin Court of Appeals and a federal district court in Mississippi. Thus, beyond the issue of their applicability to the current case, I question their

persuasiveness as authority in Nevada. Therefore, although I concur with most of the majority's opinion, I do not join with them as to the use of those two cases as dicta.

/s/ Saitta, J.
Saitta

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DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiff, vs.	Case No. A624982 Dept. XI **ORDER DENYING MOTION TO COMPEL ARBITRATION OF THE FIRST AMENDED COMPLAINT** (Filed Nov. 30, 2011)

PRINCIPAL INVESTMENTS, INC. d/b/a/ RAPID CASH; GRANITE FINANCIAL SERVICES, INC. d/b/a RAPID CASH; FMMR INVESTMENTS, INC. d/b/a RAPID CASH; PRIME GROUP, INC. d/b/a RAPID CASH; and ADVANCED GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive,

Defendants.

Defendants PRINCIPAL INVESTMENTS, INC. d/b/a/ RAPID CASH; GRANITE FINANCIAL SERVICES, INC. d/b/a RAPID CASH; FMMR INVESTMENTS, INC. d/b/a RAPID CASH; PRIME GROUP, INC. d/b/a RAPID CASH; and ADVANCED GROUP, INC. d/b/a RAPID CASH (hereafter "Rapid Cash") brought this "Motion to Compel Arbitration of First Amended Complaint and Stay All Proceedings" (the "Motion") on for hearing before this Court on October 25, 2011. The Class appeared by and through Class Counsel, J. Randall Jones, Esq., Kemp, Jones and Coulthard, LLP, and Dan L. Wulz, Esq., Legal Aid Center of

Southern Nevada, Inc.; the Rapid Cash defendants appeared by counsel Mark S. Dzarnoski, Esq., Gordon & Silver, Ltd. The Court, having reviewed the Motion, the Class's Opposition, Defendants' Reply, the file, and the pleadings on file herein, and having heard and considered the arguments of the parties, hereby FINDS and ORDERS as follows:

The Motion is **DENIED**. Despite an arguable jurisdictional issue, the filing of the First Amended Complaint raises some separate issues that allow Rapid Cash to file and the Court to adjudicate the instant motion.

The Court finds that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011), is not dispositive of this case. The decision by the United States Supreme Court in the Concepcion case would not have countenanced the arbitration provision in this case being applied to these particular circumstances where Rapid Cash has utilized the Justice Court system repeatedly with the filing of false affidavits of service, securing of default judgments, and garnishing of wages. To do so would violate the public policy of the State of Nevada. This Court denied a previous motion by Rapid Cash to compel arbitration of the Class Members' claims, and the Court deemed Rapid Cash' arbitration clause unenforceable not under a state-wide policy declaring such clauses unenforceable but because Rapid Cash's own actions resulted in a 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. The Court continues to find that Rapid Cash's conduct in its collection efforts constitutes a waiver of the right to elect arbitration of the claims in this action. Rapid Cash waived its ability to compel arbitration because, *inter alia*, it knew of its right to arbitrate, acted inconsistently with that right in filing thousands of justice court cases against the Class members, and prejudiced the Class members by its inconsistent acts in taking default judgments and pursuing collections. In making that prior determination, and again in issuing this decision and order, this Court has placed, and continues to place, the Rapid Cash contracts on equal footing with other contracts to reach this case-specific conclusion that Rapid Cash's own conduct invalidated and/or resulted in the unenforceability of its arbitration clauses, as *Concepcion* expressly permits. The Court further finds that the Class members' claims fall outside the scope of the arbitration agreement.

IT IS SO ORDERED.

DATED this 30th day of November, 2011.

/s/ Elizabeth Gonzalez
DISTRICT COURT JUDGE

Prepared and submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiffs,	CASE NO. A624982 DEPT. XI **ORDER DENYING MOTION TO COMPEL ARBITRATION** (Filed Nov. 29, 2010)

vs.

PRINCIPAL INVESTMENTS, INC. d/b/a RAPID CASH; GRANITE FINANCIAL SERVICES, INC. d/b/a RAPID CASH; FMMR INVESTMENTS, INC. d/b/a RAPID CASH; PRIME GROUP, INC. d/b/a RAPID CASH; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a ON SCENE MEDIATIONS; VILISIA COLEMAN, and DOES I through X, inclusive,

Defendants.

Now on this 12th day of October, 2010, comes on for hearing "Motion To Compel Arbitration and Stay Proceedings" (the "Motion") filed by Defendants, Principal Investments, Inc. d/b/a Rapid Cash; Granite Financial Services, Inc. d/b/a Rapid Cash; FMMR Investments, Inc., d/b/a Rapid Cash; Prime Group, Inc., d/b/a Rapid Cash, and Advance Group, Inc.; d/b/a Rapid Cash (hereafter "Rapid Cash"). Plaintiffs appeared by counsel, J. Randall Jones, Esq., Jennifer C. Dorsey, Esq., Kemp, Jones and Coulthard, LLC, and Dan L. Wulz, Esq., Legal Aid Center of Southern Nevada, Inc. Defendants, Rapid Cash, appeared by counsel Mark S. Dzarnoski, Esq., Gordon Silver, and Martin Bryce, Ballard Spar [sic].

The Court, having reviewed the Motion, Plaintiff's Opposition, Defendants' Reply, the file, and the pleadings on file herein, and having considered the arguments of the parties, hereby FINDS and ORDERS as follows:

The Motion is denied. The Court finds that the Movants waived their right to demand arbitration in that Defendants knew of their right to arbitrate, acted inconsistently with that right in filing thousands of justice court cases against the putative Class members, and prejudiced the putative Class members by their inconsistent acts in taking default judgments [and pursuing collection]. The Court further finds that it is against public policy to allow litigation, even if it is in the Small Claims Court, and then require arbitration of those claims [_____EGG_____]

which arise from the alleged tortious and fraudulent conduct of defendants and its agents in those collections activities.

IT IS SO ORDERED.

DATED this 29th day of November, 2010

/s/ Elizabeth Gonzalez
DISTRICT COURT JUDGE

Prepared and submitted by:

GORDON SILVER

/s/ Mark S. Dzarnoski

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IN THE SUPREME COURT OF
THE STATE OF NEVADA

PRINCIPAL INVESTMENTS, INC., D/B/A RAPID CASH; GRANITE FINANCIAL SERVICES, INC., D/B/A RAPID CASH; FMMR INVESTMENTS, INC., D/B/A RAPID CASH; PRIME GROUP, INC., D/B/A RAPID CASH; AND ADVANCE GROUP, INC., D/B/A RAPID CASH, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, Respondents, and CASSANDRA HARRISON; CONCEPCION QUINTINO; AND MARY DUNGAN, Real Parties in Interest.	No. 61581

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

(Filed Jan. 25, 2016)

This is an original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss and granting class certification. Having considered the petition and supporting documents, we are not persuaded that petitioner has demonstrated that our extraordinary discretionary intervention is warranted. NRS 34.160; NRS 34.320; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 228, 88 P.3d 840, 841, 844 (2004); *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). Accordingly, we

ORDER the petition DENIED.[1]

/s/ Hardesty, J
Hardesty

/s/ Douglas, J
Douglas

/s/ Cherry, J
Cherry

/s/ Saitta, J
Saitta

[1] The Honorable Ron D. Parraguirre, Justice, did not participate in the decision of this matter.

/s/ Gibbons, J
Gibbons

/s/ Pickering, J
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge
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DISTRICT COURT

CLARK COUNTY, NEVADA

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Plaintiffs, vs. PRINCIPAL INVESTMENTS, INC., d/b/a RAPID CASH; GRANITE FINANCIAL SERVICES, INC., d/b/a RAPID CASH; FMMR INVESTMENTS, INC. d/b/a RAPID CASH; PRIME GROUP, INC. d/b/a RAPID CASH; ADVANCE GROUP, INC. d/b/a RAPID CASH; MAURICE CARROLL, individually and d/b/a	Case No. A624982 Dept. No. XI

ON SCENE MEDIATIONS; VILISIA COLEMAN, and Does 1 through X, inclusive,

Defendants.

ORDER (1) DENYING DISMISSAL, DECERTIFICATION AND ARBITRATION AND (2) GRANTING STAY PENDING APPEAL

(Filed July 20, 2012)

1. The Court DENIES the Rapid Cash Defendants' "Motion to Dismiss Claims Seeking Relief From Justice Court Judgments," which requested that the Court dismiss claims, decertify the class, and compel arbitration.

2. The Court GRANTS a stay of all proceedings in this Court pending conclusion of the appeals in this matter currently pending in the Nevada Supreme Court.

DATED this 19th day of July, 2012.

By: /s/ Elizabeth G. Gonzalez
DISTRICT COURT JUDGE

Respectfully submitted by:

LEWIS AND ROCA LLP

By: /s/ Daniel F. Polsenberg

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DISTRICT COURT
CLARK COUNTY, NEVADA

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan, individually and on behalf of all persons similarly situated, Plaintiff(s) vs Principal Investments, Inc. d/b/a Rapid Cash Granite Financial Services, Inc. d/b/a Rapid Cash; FMMR Investments, Inc., d/b/a Rapid Cash; Prime Group, Inc., d/b/a Rapid Cash; Advance Group, Inc., d/b/a Rapid Cash; Maurice Carroll, individually and d/b/a On Scene Mediations; W.A.M. Rentals, LLC and d/b/a On Scene Mediations; Vilisia Coleman, and DOES I through X, inclusive Defendant(s).	**Case No.** 10 A 624982 **Dept. No.** XI

ORDER GRANTING CLASS CERTIFICATION AND APPOINTING CLASS COUNSEL

(Filed Sep. 29, 2011)

Now on this 21st day of October, 2010, comes on for hearing Plaintiffs' "Motion To Certify Class" (the

"Motion"). Plaintiffs appeared by putative Class Representatives Casandra Harrison and Mary Dungan, and by counsel, Jennifer C. Dorsey, Esq., Kemp, Jones and Coulthard, LLC, and Dan L. Wulz, Esq., Legal Aid Center of Southern Nevada, Inc. Defendants, Principal Investments, Inc. d/b/a Rapid Cash; Granite Financial Services, Inc. d/b/a Rapid Cash; FMMR Investments, Inc., d/b/a Rapid Cash; Prime Group, Inc., d/b/a Rapid Cash, and Advance Group, Inc., d/b/a Rapid Cash (hereafter "Rapid Cash"), appeared by counsel Mark S. Dzarnoski, Esq., Gordon Silver, and Daniel F. Polsenberg, Esq., Lewis and Roca.

The Court, having reviewed the Motion, Defendants' Opposition, Plaintiffs' Reply, the file, and the pleadings on file herein, and having considered the arguments of counsel hereby FINDS, CONCLUDES, and ORDERS as follows:

1. The pre-dispute resolution provisions of the underlying payday loan contracts are unenforceable for the reasons that Defendants have waived those provisions and enforcement would be against public policy, as this Court ruled with respect to the forced arbitration provision.

2. The class-action-ban portion of the arbitration clause, to the extent present in any underlying payday loan contract of a Class Representative or Class member, is likewise unenforceable for the reasons that Defendants have waived those provisions and enforcement would be against public policy. Given the claims involving lack of service of process, this class action

provides the only means by which a Class member with no knowledge of the underlying Justice Court suit can assert rights and secure a remedy, and, for those Class members who might eventually become aware of the underlying Justice Court suits upon garnishment or otherwise, this class action provides the only practical and effective means to vindicate rights and secure a remedy given the size of the claims involved.

3. In analyzing whether a class should be certified, the Court should accept the allegations of the complaint as true. *Meyer v. District Court*, 110 Nev. 1357, 1363-64, 885 P.2d 622 (1994). The Court finds pursuant to NRCP 23 that:

a. The Class is so numerous that joinder of all members is impracticable, as in all probability there are hundreds if not thousands of class members;

b. There are questions of law or fact common to the Class, in that the Class Representatives have alleged general corporate policies as the focus of the litigation including the On Scene Mediations policy and practice of providing falsified affidavits of service to its employers and/or principals, and a Rapid Cash policy and practice of using an unlicensed process server, and either condoning sewer service or willfully and recklessly disregarding highly suspicious claims of superhuman service-of-process feats. With respect to questions of law, another common question of mixed fact and law is whether Rapid Cash may be held accountable for the acts of its employee or agent, On

Scene Mediations.[1] Rapid Cash fails to demonstrate how these claims lack the common nucleus of facts or legal theory required to satisfy this prong of the Class certification analysis;

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[1] The First Amended Complaint at paragraph no. 69 provides a laundry list of common questions: "The common questions of law or fact include, but are not limited to, the following: (a) whether Rapid Cash obtained void default judgments based on false affidavits of service in cases too numerous to join together; (b) whether Rapid Cash is responsible for the acts of its employee and/or agent On Scene Mediations; (c) whether, in hiring and supervising its employee and/or agent On Scene Mediations to fulfill its JCRCP 4(a) responsibility to serve process, Rapid Cash engaged in a fraud upon the Court; (d) whether, in hiring and supervising its employee and/or agent On Scene Mediations to fulfill its JCRCP 4(a) responsibility to serve process, Rapid Cash engaged in abuse of process; (e) whether, in hiring and supervising its employee and/or agent On Scene Mediations to fulfill its JCRCP 4(a) responsibility to serve process, Rapid Cash was negligent; (f) whether, in hiring and supervising its employee and/or agent On Scene Mediations to fulfill its JCRCP 4(a) responsibility to serve process, Rapid Cash engaged in a civil conspiracy; (g) whether in hiring and supervising its employee and/or agent, On Scene Mediations, to fulfill its JCRCP 4(a) responsibility to serve process, Rapid Cash violated NRS 604A.415 in failing to collect a debt in a "fair and lawful manner;" (h) whether, at some point during its employment of On Scene Mediations, Rapid Cash became aware of or was willfully blind to and recklessly disregarded the fact that Rapid Cash was filing false returns of service in its lawsuits against the Class such that it might be responsible for punitive damages; and (i) whether the Class has a remedy for Defendants' actions as described and, if so, the nature of that remedy. The Court finds that these are among the questions of law common to the class members.

c. The claims or defenses of the representative parties are typical of the claims or defenses of the Class, and

d. The representative parties will fairly and adequately protect the interests of the Class.

4. The Court finds that class certification under NRCP 23(b)(2) (the party opposing the class has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole) is appropriate.

5. The Court hereby certifies a class action pursuant to NRCP 23(b)(2) as to the injunctive and equitable issues raised in the sixth (Independent Action in Equity for Fraud Upon the Court) and seventh (Abuse of Process) causes of action. The certified Class consists of:

> All customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence of service of process was an affidavit signed by a representative of On Scene Mediations and who claim not to have been served.

6. The Court also finds that the prosecution of separate actions would create a risk of inconsistent or varying adjudications, making this case suitable for certification as a class action under NRCP 23(b)(1).

7. The complexity of the issues involved, the size of the individual Class member's claims, and the limited resources of the Class members would clearly make it impracticable for all individual members of the Class to individually seek legal redress for the actions of Rapid Cash as alleged, making a class action superior to other available methods for the fair and efficient adjudication of the controversy.

8. The Court also finds that the questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, making this case suitable for certification as a class action under NRCP 23(b)(3). There would appear to be little interest of members of the Class in individually controlling the prosecution of separate actions. There is no evidence of the filing of any litigation concerning the controversy by any member of the Class. There is a high desirability in concentrating the litigation of the claims in the Eighth Judicial District Court. The Court foresees no unusual difficulties to be encountered in management of this class action, and a class action is the best available means by which the Class Representatives and all Class members may seek redress for the harm caused by Rapid Cash as alleged. This action would facilitate an orderly and expeditious resolution of the Class's claims, and will foster economies of time, effort, and expense.

9. Notice by First Class Mail. Notice, in a form to be approved by the Court, shall be sent by first class mail to all customers of Rapid Cash offices in Clark County, Nevada, against whom Rapid Cash obtained default judgments in the Justice Courts of Clark County, Nevada, and for which the only evidence of service of process was an affidavit signed by a representative of On Scene Mediations ("Potential Class Members").

a. Opt Out Form: Mailed notice shall include an opt-out form allowing a Potential Class Member to opt out of this class action. Potential Class Members who timely return the Opt Out Form shall be deemed not to be members of this class and will be excluded from participation in this litigation.

b. I Was/Was not Served Post card: Mailed notice shall also be accompanied by a form directing the Potential Class Members to return the form checking a box to indicate whether they received service of process. Potential Class Members who return the form with the box checked indicating that they received service of process shall be deemed to have opted out of this Class and will be excluded from participation in this litigation; all other Potential Class Members who have not opted out of or otherwise excluded themselves from the class (i.e., those who either return the form with the box checked indicating that they did not receive service of process, or those who do not return the form at all) shall be deemed members member [sic] of this Class until further notice.

c. Mailed notice shall be completed by a date to be established by the Court upon approval of notice.

10. Notice by Publication Notice of this Class Action, in the form attached hereto as Exhibit B shall be provided by publication in the following newspapers: Las Vegas Review Journal in English and El Mundo in Spanish. The Published Notice shall be at least one-quarter of a page large, and shall be published for six consecutive weeks.

11. The cost of the Notices shall be borne and paid for by Rapid Cash; Rapid Cash may employ Rust Consulting as the Class Action Administrator to coordinate and provide the Notices.

12. Rapid Cash shall provide Class Counsel with the list of class members and addresses at the same time it provides that information to the Class Action Administrator or any other person or company it employs to produce and mail the notices.

13. The Court appoints Cassandra Harrison, Eugene Varcados, Concepcion Quinto, and Mary Dungan as the Class Representatives.

14. The Court also appoints Dan Wulz and Venicia Considine of the Legal Aid Center of Southern Nevada, Inc., and J. Randall Jones and Jennifer C. Dorsey of Kemp, Jones & Coulthard, LLP, as Class Counsel.

15. A status check on matters related to the information that can be obtained from the records of Rapid Cash and the status of the notice process shall be held on November 10, 2011 at 9 am.

16. Rust Consulting shall provide the Court and Counsel a report on the identification of opt outs prior to the status conference and at the conclusion of the notice period.

IT IS SO ORDERED.

DATED this 28th day of September, 2011.

/s/ Elizabeth Gonzalez
Elizabeth Gonzalez,
District Court Judge

Certificate of Service

I hereby certify that on or about the date filed, this document was copied through email, or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper party as follows:

Mark S. Dzarnoski, Esq. (Gordon Silver)

J. Randall Jones, Esq. (Kemp, Jones & Coulthard)

Dan L. Wulz, Esq. (Legal Aid Center of Southern Nevada)

/s/ Dan Kutinac
Dan Kutinac