No. 18-618

In the Supreme Court of the United States

DOLORES GUTIERREZ, ET AL.,
Petitioners,

v.

WELLS FARGO BANK, N.A.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant waives its arbitration rights against putative class members when it provides clear notice, from the outset of the litigation, that it reserves its right to seek arbitration once the court obtains jurisdiction over the putative class members, and moves to compel arbitration as soon as the court can grant such relief.

RULE 29.6 DISCLOSURE STATEMENT

Wells Fargo & Co. is the parent corporation of Respondent Wells Fargo Bank, N.A. Wells Fargo & Co. is a publicly held company that owns 10% or more of Wells Fargo Bank, N.A.'s stock. With the exception of Wells Fargo & Co., no other publicly held company owns 10% or more of Wells Fargo Bank, N.A.'s stock.

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INTRODUCTION

Petitioners present this case as an opportunity for the Court to decide whether "a defendant may 'lay in wait' to assert arbitration in the context of Rule 23 class action litigation." Pet. 6. But they do not identify any case in which a defendant was allowed to "lay in wait" and then compel arbitration, and the Eleventh Circuit did not allow that here. In holding that Wells Fargo did not waive its right to arbitrate against putative class members, the court of appeals stressed that, from the beginning of this litigation, Wells Fargo put the district court and petitioners "on notice of [its] arbitration rights against the unnamed Plaintiffs and its intent to invoke them." Pet. App. 12a.

Petitioners do not allege any split of authority, and each of the cases petitioners cite is consistent with the Eleventh Circuit's ruling here. In each case, the court applied a similar legal standard, under which a party waives its arbitration rights when it engages in conduct that is inconsistent with those rights and that conduct prejudices the opposing party. In the cases that found a waiver, the facts were considerably different from the facts here. Petitioners do not cite any case finding waiver where, as here, the defendant clearly reserved its right to seek arbitration against putative class members from the outset of the litigation, and then moved to compel arbitration as soon as the district court could grant such relief.

There is nothing unusual about different facts leading to different outcomes under a fact-intensive legal test, and that recurring situation does not warrant this Court's review. The petition should be denied.

STATEMENT

1. Petitioners, current and former customers of Wells Fargo and Wachovia, filed five putative class actions against the banks in 2008 and 2009.[1] The cases were originally filed in district courts in California, Florida, New Mexico, Washington, and Oregon, and (along with similar suits filed against other banks) were transferred for pretrial purposes to the Southern District of Florida by the Judicial Panel on Multidistrict Litigation. *See In re Checking Account Overdraft Litig.* (*Spears-Haymond I*), 780 F.3d 1031, 1034 (11th Cir. 2015). Each complaint challenges certain alleged practices of Wells Fargo and Wachovia relating to overdraft fees and seeks relief on behalf of a proposed class of Wells Fargo or Wachovia consumer checking account customers.

The named plaintiffs and putative class members each signed an account agreement when opening a checking account. Pet. App. 3a. Every version of the account agreement in effect during the relevant period provided for arbitration of any disputes concerning the customer's account. *Id.*; *see also id.* at 17a, 41a. By the terms of the agreement, arbitration must proceed on an individual basis. *Id.* at 3a. Neither Wells Fargo nor its customers may consolidate any disputes or arbitrate in a representative capacity. *Id.*

The named plaintiffs in these cases reside in states that—before this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)—prohibited

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[1] On January 1, 2009, Wells Fargo announced that its acquisition of Wachovia was completed on December 31, 2008. *See* Pet. App. 3a n.2, 42a n.2. Unless otherwise stated, both banks are referred to as "Wells Fargo."

enforcement of consumer arbitration agreements with class action waivers. Based on those laws, Wells Fargo did not file arbitration motions against the named plaintiffs because its arbitration clauses would have been declared unenforceable at the time. *See Spears-Haymond I*, 780 F.3d at 1034 n.2. Instead, Wells Fargo joined several banks in filing an omnibus motion to dismiss in December 2009, which the district court denied in March 2010. Pet. App. 4a & n.3.

The following month, the district court invited any defendant who had not moved to compel arbitration to "join in and be heard on the motions to compel arbitration" that some banks had filed. *Id.* at 13a. Wells Fargo confirmed that it was not filing arbitration motions against the named plaintiffs, but also stated clearly that it was reserving its right to enforce the arbitration obligations of putative class members (many of whom would be from states whose laws did not prohibit class waivers) when and if that issue became ripe. *Id.* at 4a (stating that Wells Fargo expressly "reserv[ed] its arbitration rights against any plaintiffs 'who [might] later join, individually or as putative class members, in this litigation'").

Because the putative class members had not yet joined the case, Wells Fargo explained, its "arbitration rights as to a nationwide class . . . [we]re not yet at issue." *Id.* at 11a. But the bank "wished to preserve those rights for when the matter became ripe." *Id.* Thus, Wells Fargo made clear that, "[t]o the extent such issues do arise in the future," it "does not waive . . . its right to compel arbitration . . . by not joining in the motions [then] pending before the Court." *Id.*

Wells Fargo later reiterated its arbitration rights as to the putative class members when answering the

complaints. In each answer, Wells Fargo raised the arbitration agreements as an affirmative defense, noting the "[a]bsent members of the putative classes have a contractual obligation to arbitrate any claims they have against Wells Fargo." *Id.* at 4a, 12a.

2. On April 29, 2011, two days after this Court's decision in *Concepcion*, Wells Fargo moved to enforce its arbitration agreements with the named plaintiffs, asserting that *Concepcion* fundamentally changed the law and made its arbitration agreements enforceable for the first time under the laws of the states governing those account agreements. The district court denied that motion, finding that Wells Fargo had waived its arbitration rights against the named plaintiffs by not filing the motion earlier, and the Eleventh Circuit affirmed. *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1275–77, 1280 (11th Cir. 2012).

In briefing its arbitration motion against the named plaintiffs, Wells Fargo repeatedly and explicitly noted that the bank's arbitration rights regarding unnamed class members were not yet ripe and would not become ripe until the class certification stage. *See, e.g.*, Motion to Dismiss or Stay in Favor of Arbitration at 10 n.3, *In re Checking Account Overdraft Litig.*, No. 1:09-md-02036-JLK (S.D. Fla. Apr. 29, 2011), ECF No. 1384. In its Eleventh Circuit brief, Wells Fargo again reiterated that its arbitration rights against the unnamed class members were not yet ripe. Brief for Defendant-Appellant at 11–12, *Garcia*, 699 F.3d 1273 (No. 11-16029).

3. Following the court of appeals' decision, the named plaintiffs moved to certify the class. Wells Fargo opposed class certification on numerous grounds, including by invoking its arbitration rights

against the putative class members: Wells Fargo contended that all of its customers had enforceable arbitration provisions and therefore would have to be excluded from the class, leaving too few "class members to make a class action viable." Pet. App. 5a–6a.

At the same time, Wells Fargo filed conditional motions to compel arbitration with the putative class members. The motions explained that Wells Fargo intended to compel arbitration with the putative class members as soon as the court had jurisdiction over them:

> While the Absent Class Members are not yet part of this litigation, and are therefore not currently subject to this Court's jurisdiction, this will change if this Court certifies one or more classes in response to plaintiffs' pending motion for class certification. Wells Fargo accordingly makes this arbitration motion at this time so that if the Court does certify one or more classes in these cases, it can address the arbitration obligation of the Absent Class Members at the first possible moment.

Id. at 6a & n.5.

The district court denied Wells Fargo's conditional motions to compel in April 2013, without ruling on class certification. *Spears-Haymond I*, 780 F.3d at 1036.

Wells Fargo appealed, and the Eleventh Circuit vacated the district court's order. *Id.* at 1036–39. The Eleventh Circuit held that the district court "lacked jurisdiction to rule on the arbitration obligations of the unnamed putative class members." *Id.* at 1039.

Until the court certified a class, no justiciable controversy existed between the putative class members and Wells Fargo. *Id.* at 1037. In so holding, the court of appeals noted that, "[i]n essence," Wells Fargo's conditional motions had "inform[ed] the [district] court in advance that, should the court decide to certify a class, Wells Fargo intended to move to compel arbitration with all the unnamed class members." *Id.* at 1035.

4. Following the Eleventh Circuit's decision in *Spears-Haymond I*, the district court granted the named plaintiffs' motion to certify a class. "Immediately thereafter, Wells Fargo [again] moved to compel arbitration as to the *unnamed* class members." Pet. App. 7a. The district court denied the motion, concluding that Wells Fargo had waived its right to seek arbitration with the unnamed class members through its "pre-certification litigation efforts." *Id.*

5. Wells Fargo appealed, and the Eleventh Circuit again vacated the district court's order. *Id.* at 7a, 15a.

The court of appeals relied on longstanding circuit precedent, which required it to "conduct a two-part inquiry to determine whether a party has waived its arbitration rights." *Id.* at 7a–8a. First, the court considered whether "'under the totality of the circumstances, the party has acted inconsistently with the arbitration right.'" *Id.* at 8a (quoting *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315–16 (11th Cir. 2002)). "A key factor in deciding this is whether a party has 'substantially invoke[d] the litigation machinery prior to demanding arbitration.'" *Id.* (quoting *S & H Contractors v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990)). If the party acted inconsistently with the arbitration right, then the court next "consider[s] whether the party's conduct 'has in

some way prejudiced the other party.'" *Id.* (quoting *Ivax*, 286 F.3d at 1316). In determining prejudice, the court "'may consider the length of delay in demanding the arbitration and the expense incurred by that party from participating in the litigation process.'" *Id.* (quoting *S & H Contractors*, 906 F.2d at 1514).

Applying this settled law to the facts of this case, the Eleventh Circuit held that "Wells Fargo did not act inconsistently with its arbitration rights as to the unnamed Plaintiffs." *Id.* at 10a. The court of appeals' decision in *Garcia* had not decided the issue, because whether Wells Fargo could enforce its arbitration rights against the unnamed class members was a different question from whether it had waived its right to arbitrate with the named plaintiffs. *Id.* at 10a & n.9. And as the court of appeals explained, Wells Fargo's "conduct with respect to the unnamed Plaintiffs differed starkly from its conduct as to the named Plaintiffs." *Id.* at 10a. Whereas Wells Fargo did not initially seek arbitration against the named plaintiffs, the bank expressly preserved, in both its response to the scheduling order and its answers, the right to compel arbitration with any putative class members as soon as that issue became ripe. *Id.* at 10a–12a.

The court of appeals further explained that Wells Fargo's failure to seek arbitration with the unnamed class members prior to class certification did not manifest any inconsistency with its arbitration rights. Until the district court certified a class, it would have been impossible in practice to compel arbitration with speculative plaintiffs and jurisdictionally impossible for the court to rule on such a motion. *Id.* at 12a–15a.

"Fairly read, these actions had the effect of putting both the [district court] and Plaintiffs on notice of

Wells Fargo's arbitration rights against the unnamed Plaintiffs and its intent to invoke them" "well before any discovery had been conducted." *Id.* at 11a–12a.

The court of appeals denied petitioners' request for rehearing and rehearing *en banc*. *Id.* at 62a–64a.

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review. There is no split of authority. Each decision petitioners cite applies a similar legal test to draw the same common sense distinction: Unlike a party who waits years to raise the prospect of arbitration, a party who gives notice of its arbitration rights against putative class members early in a class or collective action does not waive those rights merely by waiting until the court has jurisdiction over the class members to move to compel arbitration with them. With no split of authority, petitioners simply take issue with the court of appeals' resolution of the fact-intensive waiver inquiry, but the Eleventh Circuit did not err in holding that Wells Fargo had not waived its arbitration rights.

I. THE DECISION BELOW DOES NOT IMPLICATE ANY SPLIT AMONG THE CIRCUITS.

The decision below does not conflict with the decision of any other court of appeals, and petitioners do not argue otherwise. Petitioners urge the Court to take this case to address whether a party may "lay in wait" before exercising its arbitration rights, but that issue is not presented here. None of the decisions cited by petitioners demonstrate disagreement among lower courts. Those cases all applied similar legal tests and simply reached a result different from the decision below based on the different facts before them.

A. Petitioners contend that "the decision below presents an important but unanswered question of federal law." Pet. 5. Petitioners frame that question as "whether a defendant may 'lay in wait' to assert arbitration in the context of Rule 23 class action litigation." *Id.* at 6.

Petitioners fail to demonstrate that this case presents that question. The Eleventh Circuit did not permit Wells Fargo to "lay in wait" and spring its arbitration demand on petitioners and the district court as a last-minute effort to undo class certification. To the contrary, the Eleventh Circuit made clear that it would not "accommodate a defendant who elects to forego arbitration when it believes that the outcome in litigation will be favorable to it, proceeds with extensive discovery and court proceedings, and then suddenly changes course and pursues arbitration when its prospects of victory in litigation dim." Pet. App. 8a. Far from approving a "lay in wait" strategy, the court of appeals held that Wells Fargo had not waived its arbitration rights because its "actions had the effect of putting both the Court and Plaintiffs on notice of Wells Fargo's arbitration rights against the unnamed Plaintiffs and its intent to invoke them" "well before any discovery" had begun. *Id.* at 11a–12a.

B. Without actually alleging a circuit split, petitioners suggest that the Eleventh Circuit's opinion is at odds with prior decisions from three circuits and two intermediate state courts. Pet. 7–9. But there is no conflict. There is no difference in the legal tests applied in these cases. The courts in petitioners' cases reached an outcome different from the court below because their cases involved significantly different facts.

Application of a fact-bound legal test will lead predictably to different outcomes on different facts. That is hardly a reason for this Court to grant review.

Petitioners fail to show any conflict between the decision below and the Fourth Circuit's decision in *Degidio v. Crazy Horse Saloon & Restaurant Inc.*, 880 F.3d 135 (4th Cir. 2018). Pet. 7. Like the Eleventh Circuit here, the Fourth Circuit explained that "[a] litigant may waive its right to invoke the [FAA] by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Degidio*, 880 F.3d at 140. In this collective action under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the defendant waived its arbitration rights because it waited three years, including nine months after the last plaintiff opted into the case, to move to compel arbitration with those opt-in plaintiffs. *Id.* at 140–41. In those nine months, the defendant "continued to pursue a merits-based litigation strategy"—pressing dispositive motions, seeking to certify questions of state law, and serving merits discovery on the very opt-in plaintiffs against whom it would later move to compel arbitration. *Id.* at 142. In holding that the defendant waived its arbitration rights, the Fourth Circuit explained that the defendant should have notified the district court of its intention to arbitrate with the opt-in plaintiffs at an "earlier stage of [the] litigation." *Id.* at 141.

Petitioners similarly fail to show any conflict between the decision below and the Sixth Circuit's unpublished decision in *Gunn v. NPC International, Inc.*, 625 F. App'x 261 (6th Cir. 2015). Pet. 8. The Sixth Circuit also recognized that "[a] party may waive the right to arbitration by engaging in a course

of conduct completely inconsistent with reliance on an arbitration agreement or delaying assertion of the right to such an extent that the opposing party incurred actual prejudice." *Gunn*, 625 F. App'x at 263–64. In *Gunn*, the defendant "waited almost fifteen months before raising the arbitration issue in any of the five" putative collective actions at issue. *Id.* at 264. By that time, it had "filed several motions (some dispositive) without ever mentioning the arbitration agreement," *id.* at 265, and roughly 200 more plaintiffs had consented to join the case, *id.* at 267. The defendant waived its arbitration rights, the Sixth Circuit explained, because its silence through all of that was inconsistent with preserving them. *Id.* at 264–67.

Petitioners also cite, but do not discuss, the Tenth Circuit's decision in *In re Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation*, 790 F.3d 1112 (10th Cir. 2015). Pet. 8. That decision clearly undercuts petitioners' argument, because the Tenth Circuit contrasted the defendant's actions in that case with Wells Fargo's conduct here, and suggested that it would not have found waiver had the defendant taken the same steps as Wells Fargo. *Cox*, 790 F.3d at 1120 n.2. Unlike Wells Fargo, the defendant in *Cox* never raised arbitration as a defense to class certification. *Id.* Instead, it waited two years and through months of challenging the court's certification ruling before even mentioning arbitration. *Id.* at 1115–17. And when it finally moved to compel arbitration, the defendant also moved for summary judgment—hoping for another shot at prevailing on the merits. Each of these choices, the Tenth Circuit held, was sufficient to waive the right to arbitrate. *Id.* at 1120 & n.2.

Finally, petitioners cite two intermediate state court decisions that cannot provide a basis for granting certiorari. Pet. 9. Each was decided under state, not federal, law by an intermediate state court, not a court of last resort. *See Tennyson v. Santa Fe Dealership Acquisition II, Inc.*, 364 P.3d 1273, 1275–77 (N.M. Ct. App. 2015); *Elliott v. KB Home N.C., Inc.*, 752 S.E.2d 694, 697–98 (N.C. Ct. App. 2013).

These cases also are entirely consistent with the decision below. In *Tennyson*, the defendant made no mention of arbitration until, years into the litigation, it lost on class certification. 364 P.3d at 1274–75. Analogizing to the Tenth Circuit's decision in *Cox*, the court held that the failure to raise the prospect of arbitration with the putative class members before class certification waived the matter. *Id.* at 1278–80. Similarly, in *Elliott*, the court found waiver where the defendant did not assert its right to arbitrate against putative class members when it opposed class certification, but instead raised the issue when it sought to appeal the class certification order. 752 S.E.2d at 696–97. Once again, raising arbitration only to get a second bite at class certification was "inconsistent with [the right to] arbitrat[e]" and "prejudic[ial]" to the opposing party. *Id.* at 698; *see also id.* at 702–03.

In sum, petitioners have not identified any split for this Court to resolve—not in the legal test that governs waiver of arbitration rights, and not in the way in which courts apply that test to the facts of a particular case. The decisions petitioners cite are consistent with each other and with the decision below. That alone is reason enough to deny the petition.

II. THE DECISION BELOW IS CORRECT.

Unable to identify a circuit split, petitioners are left to criticize the Eleventh Circuit's ruling and suggest that it will harm plaintiffs and defendants in future litigation. Pet. 6–7. Those criticisms are unpersuasive. The Eleventh Circuit's decision is correct and will not adversely affect parties in the future.

A. Petitioners do not object to the legal standard applied by the Eleventh Circuit. Nor could they. The two-part inquiry used in this case—which asks whether the party seeking to compel arbitration has acted inconsistently with that right, and thereby prejudiced the other party—has long been applied in the Eleventh Circuit and elsewhere. *See* Part I, *supra*.

Petitioners instead take issue with how the court of appeals applied that settled law to the facts of this case. According to petitioners, the Eleventh Circuit erred because, instead of holding that Wells Fargo had taken actions inconsistent with its arbitration rights, the court of appeals "condoned" Wells Fargo's "lay in wait" strategy of litigating for years before invoking its arbitration rights. Pet. 1, 7.

Contrary to petitioners' assertions, the court of appeals correctly held that Wells Fargo had not acted inconsistently with its arbitration rights against the putative class members. Substantial evidence supports that ruling. Wells Fargo provided notice that it was reserving its arbitration rights as to the absent class members from the outset. *See* pp. 3–4, *supra*. Even as Wells Fargo initially elected not to pursue arbitration with the named plaintiffs, it informed them and the district court that Wells Fargo was reserving its arbitration rights as to the putative class members.

Pet. App. 10a–12a. Lest there be any doubt as to its position, Wells Fargo pleaded arbitration as an affirmative defense in each of its answers. *Id.* at 4a, 12a.

The Eleventh Circuit correctly concluded that these representations, made before any discovery, provided sufficient notice that Wells Fargo was not waiving its arbitration rights as to the putative class members. *Id.* at 11a–12a. But Wells Fargo did not stop there. At the class certification stage, Wells Fargo argued that its arbitration agreements deprived the putative class of the required numerosity and filed conditional motions to compel arbitration in the event the court certified a class. *Id.* at 5a–6a. In short, Wells Fargo did everything the defendants in petitioners' cases did not, and it avoided doing the one thing they did: waiting for years to even mention the prospect of arbitration.[2]

B. Petitioners suggest that the decision below creates uncertainty for defendants because they need "clear direction" as to how they can preserve their arbitration rights. Pet. 6. Petitioners' expression of concern for class-action defendants rings hollow. In any event, the decision below provides clear direction: A defendant may preserve its arbitration rights by

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[2] Both the Fourth and Tenth Circuits made clear that they would have viewed the waiver issue differently had the defendants in those cases taken the same steps as Wells Fargo. *See Degidio*, 880 F.3d at 141 (noting that defendant should have "informed the district court of its intention to compel arbitration at this earlier stage of litigation"); *Cox*, 790 F.3d at 1119 (had defendant at least "mention[ed]" its right to "compel arbitration of absent class members" before class certification, that "would have fundamentally changed the course of the litigation, ensured a more expedient and efficient resolution of the trial, and prevented [defendant's] improper gamesmanship" (emphasis omitted)).

giving notice of those rights to the court and named plaintiffs, both at the beginning and throughout the litigation, so that that all are aware that those rights will arise if and when a class is certified.

Petitioners also contend that the decision harms putative class members because, "[h]ad there been an early assertion of arbitration, those putative class members could have pursued their claims in arbitration at a time when memories and records of the dispute were still fresh." Pet. 7. But nothing prevented putative class members from pursuing arbitration had they so desired. And based on Wells Fargo's representation in the pleadings in this case, putative class members were on notice from early in the litigation that Wells Fargo had not waived its arbitration rights as to them. Petitioners' concerns for putative class members are thus misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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