15-466

No.

In the Supreme Court of the United States

COX COMMUNICATIONS, INC.,
PETITIONER,
v.
RICHARD HEALY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a putative class action, a defendant waives its right to compel arbitration of the claims of absent class members by not filing its motion to compel arbitration of those class members until after the court has obtained jurisdiction over them by certifying a class.

2. Whether, as the D.C. Circuit has held and the Tenth Circuit suggested below, a defendant waives its right to compel arbitration by filing a motion for summary judgment simultaneously with a motion to compel arbitration or, as the Fifth Circuit has held, a defendant may file alternative motions to compel arbitration or for judgment on the merits.

3. Whether a reduction in the size of a class constitutes prejudice to plaintiffs sufficient to support a waiver of the defendant's arbitration rights with respect to absent class members.

RULE 29.6 STATEMENT

Cox Communications, Inc. ("Cox") is owned by Cox Enterprises, Inc. and Cox DNS, Inc. Cox DNS, Inc. is a wholly owned subsidiary of Cox Enterprises, Inc. No other publicly held corporation owns 10% or more of Cox Communications' stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Cox Communications, Inc., respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App. 1a-16a) is available at 790 F.3d 1112. The order of the district court denying Cox's motion to compel arbitration (App. 17a-23a) is unreported, but available at 2014 WL 3567629.

JURISDICTION

The Court of Appeals entered judgment on June 24, 2015, after denying Cox's timely petition for rehearing. App. 24a-25a. This Court has jurisdiction under 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 2, 4, are reproduced at App. 26a-27a.

INTRODUCTION

The Federal Arbitration Act ("FAA") declares that arbitration agreements are "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. That language was passed specifically to correct a perceived "judicial hostility to arbitration," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668-69 (2012), and "reflects the overarching principle that arbitration is a matter of contract," and requires courts to "'rigorously enforce' arbitration agreements

according to their terms," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citation omitted). While courts can refuse to order arbitration based on "generally applicable contract defenses," like fraud and waiver, they cannot interpret or apply such defenses in ways "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citation and quotation marks omitted). And "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).

In several recent decisions, this Court has granted review and reversed decisions that applied substantive or procedural rules in a way that uniquely disfavored arbitration. The Tenth Circuit's decision in this case is cut from the same cloth. There are three principal issues, all of which merit review and reversal.

First, the Tenth Circuit held that in this putative class action defendant and petitioner Cox, Communications, Inc., ("Cox") waived its right to compel arbitration against absent class members by litigating against the individual named plaintiff, Respondent Richard Healy, before any class was certified. Cox has always understood that by litigating against Mr. Healy, it was waiving its arbitration rights against Mr. Healy. But the Tenth Circuit's holding that Cox thereby waived those rights against members of a putative class, when a class had not been certified and those persons were not even before the court, has

no basis in any generally applicable waiver doctrine in the law of contracts or procedure. Prior to class certification, the absent class members had not asserted any legal claim against Cox, were not subject to the district court's jurisdiction, and could not have been compelled to arbitrate. Under ordinary principles, a contract breach (like filing a lawsuit despite an arbitration promise) cannot be waived before it happens, and legal rights cannot be waived before they can be asserted. The Tenth Circuit suggests that Cox nonetheless had a duty to "mention," during the class certification briefing, what its intentions about arbitration would be if a class were certified. The Court of Appeals invented that rule from whole cloth, and it applies only to arbitration. It also makes no sense. The only justification the Court of Appeals offered was that removing the class members with arbitration clauses might affect whether the proposed class satisfied the numerosity requirement of Rule 23. But because more than 20,000 proposed class members did not have arbitration clauses, Cox had no plausible basis to assert that numerosity argument.

Second, the Tenth Circuit suggested in the alternative that Cox separately waived its arbitration rights by moving for summary judgment at the same time it moved to compel arbitration against the absent class members, who had just been joined to the litigation three weeks previously. If taken seriously, that holding deepens a clear split between the D.C. Circuit and Fifth Circuit, and is inconsistent with the principles the Tenth Circuit invoked to justify it. Courts do sometimes find waiver when a defendant files a substantive motion and strategically waits to see how it is resolved before moving to compel arbitration.

But by filing both motions simultaneously, the defendant leaves the order of decision up to the court. It cannot possibly be a strategic manipulation of the litigation process to allow the district court to decide motions in whatever order the court prefers. And here Cox had no choice—since the deadline the court itself set for dispositive motions was expiring that day.

Third, the Tenth Circuit held that waiver was appropriate because Cox's failure to "mention" arbitration earlier supposedly prejudiced Mr. Healy and the district court. This Court granted certiorari four years ago to resolve the entrenched circuit split about whether prejudice is necessary to a finding of waiver, but had to dismiss the case when the parties settled. In the course of addressing the prejudice issue in this case, this Court would necessarily resolve the split. And on the merits, the Tenth Circuit's reasoning essentially eliminates any prejudice requirement in the class action context.

These issues arise frequently, and merit review or summary reversal by this Court.

STATEMENT OF THE CASE

A. Factual Background

In 2009, a handful of Cox cable subscribers filed a series of putative class actions alleging that Cox violated the antitrust laws by unlawfully tying the sale of "premium cable" services to the lease of a set-top cable box. The Judicial Panel on Multidistrict Litigation transferred the cases to the Western District of Oklahoma, Case No. 09-ML-2048-C (the "2009 MDL"). Transfer Order, ECF No. 1. On August 24, 2009, the plaintiffs in the 2009 MDL filed a consolidated amended complaint that sought relief on

behalf of a single nationwide class of three million Cox premium cable subscribers. Am. Compl., ECF No. 17. The district court eventually ruled that the plaintiffs could not proceed as a nationwide class and denied their motion for class certification. Mem. and Op., ECF No. 264. Subsequently, counsel for the plaintiffs stopped prosecuting the 2009 MDL and the court formally stayed it. Stipulated Case Management Order, ECF No. 297.

In the spring of 2012, the same counsel filed new complaints in various courts around the country, each new action seeking to certify a class for a specific geographic region. Once again, the Judicial Panel on Multidistrict Litigation transferred the cases to the Western District of Oklahoma. Court of Appeals Joint Appendix ("CAJA") 17. This case concerns the first-filed of the new round of complaints—a putative class action complaint brought by Richard Healy in the Western District of Oklahoma. CAJA 40-67.

After amending his complaint several times, Healy eventually sought to represent in his class action all Cox "Premium Cable" subscribers in the Oklahoma City Market since February 1, 2005, who had at any point paid certain monthly rental fees for a set-top cable box. Mem. in Supp. of Mot. for Class Certification 1, ECF No. 60. According to Healy, the proposed class would include "well over 100,000" current and former subscribers, *id.* at 12, and recent developments in this case indicate that, in fact, that class may be as large as 550,000. After the district court denied Cox's motion to dismiss, the parties agreed to use Healy's complaint as a "bellwether," and to stay all of other putative class actions. App. 3a.

Many of Healy's potential class members, however, have agreed to resolve any and all "claims or disputes" with Cox through arbitration, not class litigation in federal court. Of the roughly 160,000 current Cox subscribers who would be included in Healy's proposed class, *see* Mem. in Supp. of Mot. for Class Certification 12, ECF No. 60, for example, some 40,000 had agreed in their cable-television subscriber agreements "to arbitrate—rather than litigate in court—any and all claims or disputes between [them and Cox] that ar[o]se out of or in any way relate[d] to: (1) [the subscriber] Agreement; (2) services that Cox provide[d] to [them] in connection th[e] Agreement; (3) products that Cox provide[d] to [them] under th[e] Agreements; and (4) bills that Cox sen[t] to [them] or amounts that Cox charge[d] for services or goods provided under th[e] agreement."[1] CAJA 105, 107 (§ 5.1); *id.* at 98-99. Approximately 140,000 cable-television subscribers had separately agreed in their agreements for high-speed Internet access that "all claims or disputes between [them] and Cox w[ould] be arbitrated individually, and that there w[ould] be no class, representative, or consolidated actions in arbitration." CAJA 117 ¶ 20.3; 99-98.[2] Only roughly 20,000 current Cox subscribers have not agreed to at least one of these arbitration clauses. It is currently unknown how many former subscribers have agreed to one or the other.

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[1] Cox first included this clause in its subscriber agreements as part of a Price Lock Guarantee that it offered in November 2009. CAJA 97-98.

[2] Cox began including this clause in its High Speed Internet Subscriber Agreements in November 2011. CAJA 98-99.

This appeal concerns whether Cox will be permitted to enforce the arbitration rights granted by these agreements.

B. The District Court Proceedings

Healy filed his complaint on April 30, 2012. CAJA 40. Although Healy had agreed to an arbitration clause, Cox opted not to enforce its arbitration rights against him. Instead, Cox litigated against him individually, and vigorously contested his claims. The parties participated in typical pre-trial discovery, exchanging documents, submitting interrogatories, hiring experts, and deposing witnesses. App. 3a.

In September 2013, Healy moved to certify a class. *Id.* Cox opposed certification on the ground, among others, that Healy had failed to prove that the class was "so numerous as to make joinder impracticable," because only those subscribers who would have preferred not to lease its set-top box should be included in the class, and Healy had not proven how many subscribers held such a preference. Opp. to Class Certification 20-21, ECF No. 81 (citation omitted). Cox also argued that certification was inappropriate because individual issues concerning the application of the filed-rate doctrine[3] to certain class members'

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[3] The filed-rate doctrine holds that in a regulated industry, where the rates charged by participants must be filed with federal or state authorities, the filed rate is the only legal rate, and a plaintiff cannot seek damages for paying allegedly higher rates than would otherwise be present in perfect competition. *See, e.g.*, *Keough v. Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922). During the class period, Cox was required to file rates with local franchising authorities in some, but not all, communities in the Oklahoma City market.

claims would predominate over any common issues at trial. *Id.* at 25-28.

The district court rejected those arguments and certified the class on January 9, 2014. Class Certification Mem. and Op. 26, ECF No. 123 ("Class Certification Op."). On numerosity, the court rejected Cox's contention that Healy needed to prove who would have preferred not to lease the set-top box, and reasoned that because "the proposed class includes several thousand current and former Cox customers," the numerosity requirement was satisfied. *Id.* at 6. With respect to the filed-rate doctrine, the court reasoned that Cox had not provided sufficient evidence of the number of members whose claims would be subject to that defense to prove that those issues would predominate over common issues at trial. The court reasoned that if it later found the doctrine applicable to a significant number of class members, "adjustment of the class is relatively straightforward." *Id.* at 14.

After the class was certified, no further discovery occurred. Cox requested reconsideration of the district court's certification decision, and, after reconsideration was denied, petitioned the Tenth Circuit for relief under Rule 23(f). CAJA 30-31. But the Tenth Circuit denied the 23(f) petition on March 11, 2014, and the absent class members became officially—and for the first time—parties to the case. *Id.* at 31.

Three weeks later, on April 3, 2014, Cox filed a motion to compel arbitration against those absent class members who had agreed to one of the arbitration clauses described above. Mot. to Compel 1-12, ECF No. 144 ("Mot. to Compel"). That motion did not challenge the class certification decision or ask the district court to "redo" its certification analysis on the

basis of the arbitration agreements. It simply requested, "[n]ow that this Court has certified a class of Oklahoma-based Cox subscribers, and the final composition of the class is known," that "Cox's mandatory arbitration and class action waiver clauses . . . be enforced against those newly joined absent class members whose claims are subject to mandatory arbitration." *Id.* at 1.[4]

Cox simultaneously moved for summary judgment on April 3, 2014. Mot. Summ. J., ECF No. 143. The district court had previously ordered that all dispositive motions be filed no later than that day. Mem. and Op., ECF No. 131. And regardless of how the court resolved Cox's motion to compel arbitration, at least 20,000 members of the class had no arbitration clause and would continue to have antitrust claims pending against Cox in federal court. Mot. Summ. J., ECF No. 143.

The district court granted in part and denied in part Cox's motion for summary judgment and, two weeks later, denied Cox's motion to compel arbitration. *Id.* at 37-38; App. 23a. In the latter order, the district court concluded that Cox had waived its right to compel arbitration with the absent class members when it had

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[4] Although the Court of Appeal's opinion stated that it was not clear that Cox was not seeking to compel Healy into arbitration until its reply, the title of this motion was "Defendant Cox Communications, Inc.'s Motion To Compel Arbitration Of Absent Class Member Claims." Mot. to Compel 1. The first sentence read: "This Court should order that all absent class members covered by Cox's mandatory arbitration and class action waiver clauses must proceed in arbitration rather than as class members in this case." *Id.* And the second sentence is quoted above in the text. The scope of Cox's request was not ambiguous.

not "raised" or "mentioned" the potential arbitration issue at some earlier stage of the litigation, even though those persons were not yet parties to the case or subject to the court's jurisdiction. App. 14a, 18a, 23a. "Whether or not the Court could have compelled a non-class member to arbitrate" at any earlier stage, the court reasoned, "failure to raise the issue can result in waiver." *Id.* at 22a. Specifically, the court stated that "[w]ithout question this fact would have a significant impact on the issue of numerosity" in the class certification proceedings, though it did not hold that the at least 20,000 remaining subscribers without arbitration agreements would not satisfy that requirement. *Id.* at 23a.

C. The Tenth Circuit's Decision

A panel of the Tenth Circuit affirmed. Although it acknowledged that the FAA "strongly favors enforcement of agreements to arbitrate," *id.* at 5a (citation omitted), the court affirmed the district court's conclusion that Cox's failure to "mention" the arbitration agreements "earlier" waived any right to compel arbitration, *id.* at 7a-8a. Applying the Circuit's six-factor test for deciding waiver in the arbitration context, the Court of Appeals determined (i) that Cox had acted inconsistently with an intent to arbitrate its claims with absent class members when it "fail[ed] to inform [the district court] about the presence of the arbitration agreements until after certification," *id.* at 7a; (ii) that Cox had "substantially invoked" the "litigation machinery" by filing a motion to dismiss, participating in discovery prior to class certification, and defending against and appealing class certification, *id.* at 8a; (iii) that Cox unduly delayed its request for arbitration by not "mentioning" it until after class

certification, *id.* at 9a; (iv) that Cox had taken advantage of discovery procedures not available in arbitration prior to class certification, *id.* at 10a, and (v) that both Healy and the court had suffered prejudice from Cox's delay by engaging in (Healy) and supervising (the court) discovery prior to certification, by briefing (Healy) and resolving (the court) numerous motions prior to certification, and by moving for (Healy) and analyzing (the court) class certification, *id.* at 10a-11a.[5] With these factors supposedly cutting "strongly against Cox," the Court concluded Cox's right to compel arbitration was waived. *Id.* at 8a.

The court acknowledged that the district court "may not have been able to *compel* arbitration of absent class members" before the absent class members became parties to this case through class certification, but it reasoned that Cox could still have "*assert[ed]* or mention[ed] its right" prior to that time, and that its failure to do so constituted waiver. *Id.* at 12a-13a. The court also suggested—though stopped short of holding—that even if Cox could not waive its right to arbitrate with absent class members until they were parties to the case, Cox should have filed its motion to compel immediately following the certification decision, instead of "filing a motion for reconsideration, continuing to participate in discovery, petitioning this court for leave to appeal the certification decision, and filing a motion for summary

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[5] The Court of Appeals did not consider the sixth factor—"whether a defendant seeking arbitration filed a counterclaim without asking for a stay of proceedings." App. 6a.

judgment." *Id.* at 13a.[6] The court expressed particular concern with the fact that "Cox filed a motion for summary judgment simultaneously with its motion to compel." *See id.* at 13a-14a; *see also id.* at 8a. "That action could have, on its own, supported a finding of waiver." *Id.* at 14a.

Cox timely filed a petition for rehearing, which was denied on July 27, 2015.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit held that Cox waived its right to compel arbitration of the claims of at least 140,000 class members—all of whom agreed in binding contracts that they would arbitrate any claim they had against Cox. That holding undermines the FAA's strong policy favoring arbitration, violates the statutory prohibition against procedural or substantive rules that discriminate against arbitration, and merits review.

The Tenth Circuit's primary holding was that Cox had some kind of duty to "mention" whether it intended to enforce its arbitration rights against absent putative class members prior to class certification—even though those persons had not yet asserted any claim against Cox, and the district court had no jurisdiction to compel them to arbitrate. The panel created that rule out of whole cloth. It has no foundation in any known principles of contract or litigation waiver, and apparently applies *only* to

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6 The court cited nothing to support its assertion that Cox continued to participate in discovery after certification. The district court never said any such thing, and it is not true. No discovery occurred at all after the district court's certification decision.

arbitration rights. This Court has held over and over that the FAA means what it says, and that arbitration rights cannot be burdened by rules that uniquely disfavor arbitration. The Tenth Circuit's holding cannot be reconciled with those decisions.

The Tenth Circuit's alternative suggestion that Cox's filing of a motion for summary judgment simultaneously with its motion to compel "could have" supported its waiver decision should not insulate that decision from review. To the contrary, if taken seriously it deepens a circuit split between the D.C. Circuit and the Fifth Circuit on an issue of great importance to arbitration practice. Defendants often file dispositive motions on the merits simultaneously with a motion to compel arbitration, to give the court the efficient option to decide the case on either ground. As with any argument in the alternative, there is nothing improper or fatally inconsistent in doing so.

Finally, the Tenth Circuit's decision relies on a deeply misguided understanding of what constitutes prejudice in the arbitration and class action context. Neither Mr. Healy nor the district court did *anything* in this litigation, prior to Cox's invocation of its arbitration rights, that they would not have had to do in order to prepare for a trial solely on behalf of Mr. Healy and the more than 20,000 class members who had not agreed to arbitration. Nor did the absent class members suffer any prejudice. Cox moved to compel arbitration only three weeks after those subscribers were first joined to the litigation. The only arguable "prejudice" here lies in the disappointment that *the lawyers* may feel upon learning that the class (and hence their potential contingent fee) will be smaller than they had hoped. That is not cognizable prejudice.

If allowed to stand, the Tenth Circuit's decision in this case will undermine the national policy favoring arbitration reflected in the FAA, and needlessly complicate litigation procedures in cases involving arbitrability issues. These issues are important and recurring. This Court should grant the petition for certiorari and either set the case for full briefing on the merits or summarily reverse.

I. THE DECISION BELOW CREATES A JUDGE-MADE EXCEPTION TO THE FAA THAT UNIQUELY DISFAVORS ARBITRATION

The Tenth Circuit held that Cox somehow waived its contractual arbitration rights against at least 140,000 people, by failing to "mention" its intention to invoke those rights prior to or during class certification in this case. *See* App. 8a. At that point, none of the absent class members had asserted any claim against Cox that was potentially arbitrable, and none of them were before the district court or subject to its jurisdiction.

This newly-announced, arbitration-specific, waiver rule is precisely the type of judge-made hurdle to arbitration that the FAA and this Court's precedents prohibit. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (rejecting "a judge-made exception to the FAA," even though it had a sound policy rationale in promoting antitrust litigation); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) ("inefficient maintenance of separate proceedings" did not justify court's refusal to enforce arbitration agreement (citation and quotation marks omitted)). No duty to "mention" arbitration agreements with persons not before the court finds

support anywhere in the FAA, in any "generally applicable contract defense[]," or in the ordinary rules of litigation waiver. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citation and quotation marks omitted). This is a special, judge-made rule of waiver that applies only to arbitration and uniquely disfavors arbitration. The Tenth Circuit's adoption of that rule conflicts with several recent decisions of this Court, and merits review and reversal. Indeed, we respectfully submit that the error is plain enough to permit summary reversal.

A. The Tenth Circuit's Exception Is Not Supported by General Contract Waiver Principles

In the decision below, the Court of Appeals purported to find waiver by applying general principles of contract law. *See* App. 5a. Of course "the right to arbitration, like any other contract right, can be waived." *Reid Burton Constr., Inc. v. Carpenters Dist. Council*, 614 F.2d 698, 702 (10th Cir.), *cert. denied*, 449 U.S. 824 (1980); *see Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 468 (10th Cir. 1988). But neither general principles of contract waiver nor any other contract principle supports the Tenth Circuit's reasoning here.

The Circuits generally agree that if a defendant voluntarily and "substantially invokes the litigation machinery" in an attempt to gain some advantage against an opposing party, it waives any right to later invoke arbitration rights against that party concerning that dispute. *See, e.g.*, *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011) (citation and quotation marks omitted); *Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, 897 (5th

Cir. 2005). That rule makes sense, and is simply an application of the broader principle of contract law that a party to a contract can waive its rights by taking action inconsistent with an intent to enforce them. *See, e.g.*, *Mardirosian v. Lincoln Nat'l Life Ins. Co.*, 739 F.2d 474, 477 (9th Cir. 1984) ("Waiver occurs when there is 'an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished.'" (citation omitted)); *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003); *Silva v. Nat'l Am. Life Ins. Co.*, 130 Cal. Rptr. 211, 214 (Ct. App. 1976); *Dahl v. Brunswick Corp.*, 356 A.2d 221, 230 (Md. 1976); *see also, e.g.*, 23 *Williston on Contracts* § 63:9 (4th online ed. 2015).

But that principle cannot support the Tenth Circuit's new rule for the simple reason that the absent class members were not parties to the arbitration agreement between Mr. Healy and Cox, and were not parties to the litigation between Mr. Healy and Cox prior to class certification. Cox has always understood that by litigating against Mr. Healy, Cox was waiving its rights under the arbitration clause that Mr. Healy agreed to. That was a deliberate decision. But waiving its rights against Mr. Healy does not evince any intent to waive similar contractual rights held *against other persons*, under completely separate contracts—particularly when those other persons do not yet have any pending claim against Cox. A bank does not waive its right to timely payment (or late fees) under every mortgage loan when it gives one borrower an extension. It does not even waive its right to timely payment of the next scheduled payment.

Under ordinary contract principles a contract right cannot be lost through waiver until it has become enforceable. A contracting party must have actual knowledge of a breach before any act can constitute a waiver of its remedies for that breach. *See* 23 Williston, *supra*, § 63:9. In a context like this one, an absent class member does not breach his agreement to arbitrate until after a class is certified and that class member becomes party to a dispute in federal court. Without a breach, there can be no right to compel arbitration. *See also* 9 U.S.C. § 4 (prohibiting a party from moving to compel arbitration before the opposing party has refused to arbitrate). And without a right to compel, there can be no waiver of the right to compel. As the Eleventh Circuit explained when holding that a court lacks Article III jurisdiction to compel arbitration against absent class members, "because the unnamed putative class members are not yet before the court, any claims that they might have against Wells Fargo necessarily exist only by hypothesis." *Larsen v. Citibank FSB (In re Checking Account Overdraft Litig.)*, 780 F.3d 1031, 1037 (11th Cir. 2015). A litigant cannot be faulted for not raising an issue that the court lacks jurisdiction to resolve.

The law of contract waiver in the analogous context of forum selection clauses is, if anything, even harder to reconcile with the Tenth Circuit's rule. The Circuits have generally held that a party may waive rights granted by a forum selection clause by participating in litigation in a different forum. *See, e.g.*, *Schwilm v. Holbrook*, 661 F.2d 12, 16 (3d Cir. 1981). But while they take different paths to that result, none have suggested that a forum selection clause can be waived by not "mentioning" those rights at an early stage of

litigation—particularly when the party who agreed to a particular forum had not yet joined the case. In Circuits that enforce forum selection clauses through Federal Rule of Civil Procedure 12(b)(6), a party does not waive its right to dismiss for improper forum until after a trial on the merits with the relevant party. *See, e.g.*, *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 (1st Cir. 2001); *Spectracom, Inc. v. Tyco Int'l, Inc.*, 124 F. App'x 75, 77 (3d Cir. 2004). And in Circuits that enforce forum selection clauses solely through a transfer motion under 28 U.S.C. § 1404(a), courts, including the Tenth Circuit, have permitted defendants to seek transfer "even after judgment has been entered." *See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); *Martin-Trigona v. Meister*, 668 F. Supp. 1, 3 (D.D.C. 1987); *see also Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013) ("When the parties have agreed to a valid forum-selection clause, ... [o]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.").

The Tenth Circuit's holding therefore is flatly inconsistent with the general rules of contract law that would govern alleged waiver of any other contractual right, including in the Tenth Circuit itself. This new rule apparently applies to arbitration rights, and arbitration rights alone.

B. The Tenth Circuit's Exception Is Not Supported By Ordinary Procedural Waiver Rules

The Tenth Circuit's comments about judicial efficiency suggest that it may have believed that its holding is supported by ordinary procedural rules

governing waiver in litigation. *See* App. 12a ("The court may not have been able to *compel* arbitration of absent class members at th[e] time, but Cox's *assertion* or mention of its right [during class certification] would have ... ensured a more expedient and efficient resolution ....."). It is not.

Defendants in litigation are not generally required to "mention," on penalty of waiver, potential legal defenses that they may have to claims that might be brought by someone else, that have not yet been made, and over which the court does not yet have jurisdiction. There are settled black-letter rules governing when failing to press an argument against one plaintiff can cause a defendant to forfeit similar rights against different, future plaintiffs—and those rules plainly are not satisfied here.

For example, collateral estoppel prevents a party from relitigating an argument if the issue was actually litigated and determined in a prior case, and embodied either in a final judgment or in a decision that "was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered." Restatement (Second) of Judgments § 13 & cmt. g (1982); *see also, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.5 (1979) ("[T]he judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action."); *Sec. Ins. Co. of New Haven v. Johnson*, 276 F.2d 182, 186-87 (10th Cir. 1960) ("The question, however, is not what might have been litigated in the state court action, but what was actually decided."). But arbitrability has not been actually litigated and determined here. The whole point of the Tenth Circuit's waiver analysis was that Cox never

presented, and the district court never considered, that issue. A deliberate decision to *waive* a personal right like arbitration in one case cannot be mistaken for a contested and conclusive adjudication that that right was unavailable.

Likewise, judicial estoppel can sometimes bar a litigant from pressing an argument if he previously argued the opposite and won. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel applies when a party prevails on an argument in one phase of a case and then seeks to rely on a contradictory argument in another phase of the case). But Cox certainly is not judicially estopped by *failing* to press an argument at class certification and having certification resolved *against it.*

Even within the same lawsuit with the same plaintiff, it is rarely the case that failing to press a legal argument in one procedural context or stage of litigation constitutes a waiver of that argument for different, future purposes. The Federal Rules specify a very limited set of legal issues that a party must raise at a particular stage or risk waiver, but the right to compel arbitration is not one of them. *See* Fed. R. Civ. P. 8(c), 12(h). A defendant is not required to move to dismiss a complaint on every possible legal theory, for example, even though failing to do so may prolong the litigation for years. A defendant can raise during summary judgment legal arguments that it did not raise on a motion to dismiss, and it can make arguments at trial that it did not make on summary judgment. *See id.* 12(h)(2) (failure-to-state-a-claim arguments may be brought in any pleading allowed, by motion under Rule 12(c), or at trial); *id.* 56 (motion for

summary judgment is not mandatory and can be limited to only parts of a claim or defense).

The Tenth Circuit itself, as well as other Courts of Appeals, have recognized previously that there is no special obligation to raise arbitration rights earlier in litigation than other potentially dispositive issues. *See, e.g.*, *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 771 (10th Cir. 2010) ("[Defendant] was not required by Rule 8(c)(1) to demand arbitration in its answer."); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 598 (3d Cir. 2004) ("Allowing a waiver of the right to arbitration based on Rule 12(h)(1) would undermine the strong judicial posture favoring arbitration . . . ."), *cert. denied*, 543 U.S. 1049 (2005).

No exception to these general principles can be found in Rule 23. Class certification is supposed to happen at an "early practicable time" and always remains provisional. Fed. R. Civ. P. 23(c)(1)(A), (C). Indeed, in this very case the district court held that class certification would be granted because Cox had not proven, at that stage, that a great number of putative class members would ultimately be subject to individualized defenses under the filed rate doctrine—but that "adjustment of the class is relatively straightforward" if that picture changed later in the litigation. Class Certification Op. 14. Neither the district court nor the Tenth Circuit cited any principle that failing to "mention" rights that the defendant may have against absent class members during class certification proceedings waives those rights going forward. If that were the law, certification could never be decided before discovery—which is not at all what the Rule contemplates.

Finally, the Tenth Circuit's holding cannot be justified as an exercise of a federal court's inherent power to manage proceedings. Rules that apply only to arbitration, or that draw their content from the fact that arbitration is at stake, are prohibited—period. And however important litigation efficiency goals may be, this Court has made clear that it is for Congress, not courts, to decide what burdens can be placed on the right to arbitrate. *See Italian Colors Rest.*, 133 S. Ct. at 2309 ("[T]he FAA's mandate" can only be "overridden by a contrary congressional command." (citation and quotation marks omitted)); *cf. Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). The FAA is not designed to promote the most efficient result, but rather to correct and override a perceived "judicial hostility to arbitration." *CompuCredit Corp.*, 132 S. Ct. at 668-69. This Court thus has expressly rejected efficiency-based rationales for limiting the right to arbitrate. *See, e.g.*, *Cocchi*, 132 S. Ct. at 25 (rejecting argument that arbitration should not be ordered if it would be duplicative of judicial proceedings, because of the "emphatic federal policy in favor of arbitral dispute resolution" (quotation and citation omitted)); *cf. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012) (state's public policy was no justification for departing from the FAA's dictates). The same principles are controlling here.

II. THE TENTH CIRCUIT'S THEORETICAL ALTERNATE GROUND WOULD DEEPEN AN EXISTING CIRCUIT SPLIT ON WHETHER A PARTY WAIVES ITS RIGHT TO COMPEL ARBITRATION BY FILING A MOTION FOR SUMMARY JUDGMENT SIMULTANEOUSLY WITH A MOTION TO COMPEL ARBITRATION

In addition to holding that Cox waived its right to compel arbitration with absent class members by not "mention[ing]" those rights prior to class certification, the Tenth Circuit suggested that Cox's simultaneous filing of a summary judgment motion with its motion to compel "could have, on its own, supported a finding of waiver." App. 14a (citing *Khan v. Parsons Global Servs.*, 521 F.3d 421 (D.C. Cir. 2008)). This hypothetical alternative ground cannot be taken seriously. Nearly all of the Tenth Circuit's analysis of waiver here rested on the purported consequences of Cox's failure to "mention" arbitration before or during class certification, not the simultaneous filing of its motion for summary judgment. *See* App. 7a-10a; *see, e.g.*, *id.* at 10a (finding prejudice based solely on how mentioning arbitration would have affected class certification). If the Court of Appeals meant to replace all of its analysis with one sentence about summary judgment, it should have said so clearly. In any event, even if taken seriously as alternate ground, it is no more defensible than the first holding, and independently warrants review by deepening a square conflict between the D.C. and Fifth Circuits.

In *Khan*, the D.C. Circuit held that "irrespective of other indicators of involvement in litigation, filing a motion for summary judgment based on matters

outside of the pleadings is inconsistent with preserving the right to compel arbitration," even if the motion is accompanied by a motion to compel arbitration in the alternative. 521 F.3d at 428. By filing simultaneously, that court reasoned, the movant "takes the risk that the district court will choose to rule on the motion for summary judgment, thereby preventing the movant from subsequently seeking arbitration." *Id.* In effect, the court concluded, such a party "cede[s] the choice of forum to the district court." *Id.*

In *Keytrade*, the Fifth Circuit took the opposite approach. 404 F.3d at 897-98. In that case, the plaintiff argued that defendant had substantially "invoked the judicial machinery" when it filed "an extensive summary judgment motion—in excess of 100 pages—with little evidence of an indication for arbitration." *Id.* at 897. The Fifth Circuit expressed doubt that a summary judgment motion, "filed from a defensive posture," could *ever* be characterized as an invocation of the judicial process inconsistent with an intention to arbitrate. *Id.* But regardless, the Fifth Circuit held, the fact that the defendant "concurrently filed a motion to compel arbitration in the alternative . . . remove[d] any doubt as to waiver." *Id.* at 898; *see also Steel Warehouse Co. v. Abalone Shipping Ltd.*, 141 F.3d 234, 238 (5th Cir. 1998) ("The Appellants had to participate in the litigation in order to protect themselves if the district court chose not to stay the proceedings.").

The Fifth Circuit's rule is obviously the correct one. Parties regularly make arguments in the alternative and, at least since the adoption of the Federal Rules, such arguments are "entirely proper." *Simmons v. Orion Ins. Co.*, 366 F.2d 572, 574 (8th Cir. 1966); *see* 5 Charles Alan Wright et al., *Federal Practice and*

Procedure § 1283 (3d ed. 2004) ("[T]he draftsmen of the federal rules sought to liberate pleaders from the inhibiting requirement of the law's insistence on technical consistency."). Making arguments in the alternative in these circumstances is not the same as "ced[ing]" to the district court a party's choice of forum. It simply allows the court to proceed directly to the merits if it determines that arbitration is inappropriate.

Indeed, the D.C. Circuit's rationale is self-defeating. Filing simultaneous motions either waives a party's right to arbitration or it does not. If it does waive the right, there is nothing for the court to choose—it cannot enforce a waived contract right. *See* 23 Williston, *supra*, § 63:9 ("An express or implied waiver *excuses* the failure to perform a condition." (emphasis added)). If it does not waive the right to arbitrate, then nothing the district court later decides can evince an intent of the *party* not to enforce rights it has already asked the district court to enforce.

Of course, it will often be the case that by the time a defendant files a motion for summary judgment it has long since waived any arbitration rights by participating in discovery with that plaintiff. But here the simultaneous motions to compel arbitration and for summary judgment were the very first things that Cox did, once the absent class members formally entered the case.[7] And it is plainly unfair to accuse Cox of

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[7] In that respect Cox was in a position much more like the ordinary defendant deciding whether to file a 12(b) motion. It is settled law that filing a substantive 12(b)(6) motion on merits issues, simultaneous with or even *before* a motion to compel arbitration, does not automatically waive the right to compel arbitration. *See ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters,*

gaming the process, as the Tenth Circuit did, when Cox left the appropriate staging of decisions on those two motions up to the district court. Cox also could not have delayed filing its summary judgment motion under the court's scheduling order, which dictated the deadline for that motion. *Cf. Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 982 (4th Cir. 1985) ("We decline to create a rule that would require a party seeking arbitration to avoid a finding of default by ignoring court-ordered . . . deadlines and assuming the risk that its motion under the Federal Arbitration Act will be unsuccessful."). Even if Cox were certain that its motion to compel arbitration would be granted (which it obviously could not be, as events illustrate), there were 20,000 class members as to whom Cox sought summary judgment but *not* arbitration.

In short, the Tenth Circuit's suggestion that Cox's motion for summary judgment could provide an independent basis for waiver should not insulate its primary holding from this Court's review and reversal, because it was not a true alternative ground to the decision. But if this Court believes to the contrary, the Court should still grant review to correct the Tenth Circuit's clear error, and resolve the circuit split on this

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728 F.3d 853, 863-65 (8th Cir. 2013) ("Not every motion to dismiss is inconsistent with the right to arbitration." (quoting *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 922 (8th Cir. 2009))); *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004) ("[I]t is well-established that a party does not waive its right to arbitrate merely by filing a motion to dismiss."); *see also Creative Solutions Grp., Inc. v. Pentzer Corp.*, 252 F.3d 28, 33 (1st Cir. 2001) (no waiver despite motion to dismiss); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 661-62 (5th Cir. 1995) (same).

second issue of substantial importance to arbitration practice in the process.

III. THE TENTH CIRCUIT'S PREJUDICE ANALYSIS ALSO IMPLICATES AN ENTRENCHED CIRCUIT SPLIT, AND MERITS REVIEW

Finally, both rationales for the Tenth Circuit's waiver holding rely on its finding of prejudice. *See* App. 10a-11a. There is an entrenched Circuit split on whether showing prejudice is necessary to establish a waiver of arbitration rights. *See Erdman Co.*, 650 F.3d at 1118-19 (recognizing the split); *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992) (same).[8] This Court previously granted certiorari to resolve this split, *see Stok & Assocs., P.A. v. Citibank, N.A.*, 131 S. Ct. 1556

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[8] *Compare, e.g.*, *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 948 (1st Cir. 2014); *Sutherland v. Ernst & Young, LLP*, 600 F. App'x 6, 8 (2d Cir. 2015); *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 451 (3d Cir. 2011); *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001); *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004); *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 827-28 (6th Cir. 2015); *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003); *Fisher v. A.G. Becker Paribas Incorporation*, 791 F.2d 691, 694 (9th Cir. 1986); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989); *Johnson v. KeyBank Nat'l Ass'n (In re Checking Account Overdraft Litig.)*, 754 F.3d 1290, 1294 (11th Cir. 2014); *with Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, 660 F.3d 988, 994 (7th Cir. 2011); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (allowing waiver, despite failure to show prejudice); *Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648, 653 (7th Cir. 2000) (same); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987).

(2011), but dismissed the case when the parties settled the dispute, *see* 131 S. Ct. 2955 (2011). Although this case is on the right side of that split because the Tenth Circuit has held that prejudice is required for waiver, this Court would necessarily resolve the split in the course of addressing whether the Court of Appeals' prejudice analysis was appropriate. If prejudice is not required at all, this Court could simply say so.

The Tenth Circuit's substantive analysis of the prejudice issues also merits review and reversal. It embraces a conception of prejudice that should not be cognizable, and applies the prejudice requirement in a way that essentially nullifies it in the class action context. There are several distinct problems with the court's analysis.

First, the Tenth Circuit held that Cox waived its right to compel absent class members to arbitrate their claims based on purported prejudice to Healy and to the court itself. App. 10a-11a. Under ordinary contract waiver principles, however, it is "the *party opposing* a motion to compel arbitration [who] must have suffered prejudice." *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989) (emphasis added) (citation omitted); *see also, e.g.*, *Johnson v. KeyBank Nat'l Ass'n (In re Checking Account Overdraft Litig.)*, 754 F.3d 1290, 1294 (11th Cir. 2014). Here, only the absent class members were subject to the motion to compel, and thus only prejudice to them should have been considered. *Cf. Larsen*, 780 F.3d at 1039 ("Whether or not [the defendant] is precluded from asserting arbitration rights against *other* individuals has no legal relevance to the named plaintiffs."). But absent class members are not prejudiced by being held to their arbitration promises

promptly after certification first brings them into the case. They may be *disappointed* that they are unable to participate in the class action, but they are in exactly the same position as if they had sued Cox individually, and Cox had promptly invoked its rights. They did not participate in anything that happened in the litigation, and will not be bound by anything that happened or happens in the litigation. They should be excluded from the class definition, and will not be bound by any eventual judgment.

Second, even if prejudice to Healy or to the court were relevant, neither suffered cognizable prejudice here. The Court of Appeals reasoned that the arbitration issue would have been "material" to class certification, quoting the district court's assertion that the arbitration issue would "have [had] a significant impact on the issue of numerosity when evaluating the propriety of certifying a class." App. 10a-11a (citation omitted). But that is plainly incorrect. As the court acknowledged, at least *20,000* class members do not have arbitration clauses. That is clearly sufficient for numerosity under any conceivable standard. *See, e.g.*, *Lowery v. City of Albuquerque*, 273 F.R.D. 668, 682 (D.N.M. 2011) ("several hundred" sufficient); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 358 (D. Colo. 1999) (2000 sufficient). In fact, in the district court's certification order in this case, it held that numerosity was satisfied because "the proposed class includes several thousand current and former Cox customers." Class Certification Op. 6. Essentially, the district court and the Tenth Circuit accuse Cox of sandbagging the court by not raising an argument that would have been a clear loser—indeed, potentially frivolous. Courts are not prejudiced when litigants

choose not to make bad arguments. The rule the Tenth Circuit adopted also will not be understood, in future cases, as limited to situations in which an earlier invocation of arbitration rights actually would have defeated numerosity. The decision below conspicuously does not undertake that analysis.

The Tenth Circuit also concluded that Healy and the court were prejudiced because "Cox's *assertion* or mention of its right [prior to certification] would have fundamentally changed the course of the litigation [and] ensured a more expedient and efficient resolution of the trial." App. 12a. That assertion is unexplained, and hard to understand. *Nothing* would have changed other than the size of the class. Every step in this litigation had to be taken regardless of whether Healy sought to represent 160,000 or 20,000 subscribers. All of the same motions would have been filed, the same documents and depositions would have been exchanged in discovery, and the same class certification proceedings would have occurred. At most, granting Cox's motion to compel arbitration might require the district court to narrow the class definition—a ministerial task, as the district court has already acknowledged. Class Certification Op. 14 ("[A]djustment of the class is relatively straightforward.").

The Tenth Circuit reasoned that Healy suffered prejudice because "[b]oth parties conducted extensive discovery." App. 10a. But "pretrial discovery relating to nonarbitrable subject matter cannot prejudice a party opposing arbitration." *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1159 (5th Cir. 1986); *see also Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 463 (2d Cir.), *cert. denied*, 474 U.S.

819 (1985). Even when discovery on the non-arbitrable claims "would be helpful to a presentation of the [arbitrable] claims to the arbitrator, . . . pursuit of such discovery is not sufficient to constitute a waiver." *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 642 (7th Cir. 1981). As long as a party "is unable to point to any specific discovery conducted by defendants that was not relevant to the [non-arbitrable] claims, he cannot establish that prejudice in the arbitration would result from that discovery." *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 888-89 (2d Cir. 1985); *see also Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 697 (9th Cir. 1986). Here, all discovery, by both sides, was relevant to the claims of Healy himself and of the 20,000 class members without arbitration clauses.[9]

Third, the case law cited by the Tenth Circuit also expresses concern for the resources expended by class counsel, in the hope or expectation of representing a larger class and securing a larger fee award. *See, e.g.*, *Edwards v. First Am. Corp.*, 289 F.R.D. 296, 307-08 (C.D. Cal. 2012) (finding prejudice in the "stranded" expenses incurred by "class counsel"), *aff'd in part, vacated in part on other grounds*, 2015 U.S. App. LEXIS 14841 (9th Cir. Aug. 24, 2015). But as explained above, everything that class counsel did or paid for would have been necessary if the class had been limited to Mr. Healy and 20,000 others from the

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[9] There was no information that Cox accessed during discovery that will be useful during arbitration—to the contrary, the absent class members have benefited from the discovery that Healy obtained *from* Cox. In any event, Cox's arbitral use of discovered information would not constitute prejudice because the same discovery would have been conducted *regardless* of the timing of Cox's motion to compel.

beginning. *Cf. Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 (9th Cir. 2013) ("expenses" incurred during litigation are "self-inflicted" and are not "evidence of prejudice"), *cert. denied*, 135 S. Ct. 355, (2014); *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) ("[P]retrial expense and delay—unfortunately inherent in litigation—without more, do not constitute prejudice sufficient to support a finding of waiver.").

No doubt class counsel would be *disappointed* by a narrowing of the class, which would reduce the potential damages and contingent fee award. But that disappointment is not a form of legally cognizable prejudice. Nor can they genuinely claim to have been misled into taking on clients, or investing in a case, that they otherwise would have passed up. Even under the rule the Tenth Circuit invented, Cox would have had no obligation to "mention" its intentions about arbitration until the class certification proceedings. At that point all the real investments in the case had been made. Surely Mr. Healy's counsel would not have abandoned the case prior to filing their reply brief in support of class certification if Cox had disclosed its intentions regarding arbitration in its brief in opposition to their motion to certify a class. The real "problem" for class counsel (if there is one) could only be solved by a rule that defendants must declare, immediately upon filing of a class complaint, whether they would seek to arbitrate claims against absent class members if a class were ever certified. Obviously there would be no justification or authority for inventing such a rule.

All together, the Tenth Circuit's analysis essentially eliminates the requirement of prejudice for a waiver in

class action contexts like this one. The Tenth Circuit says nothing at all specific about prejudice in its opinion. This case will be cited for the proposition that failing to "mention" an intent to arbitrate against absent class members prior to certification *always* causes prejudice, because the case supposedly would have been different in some unspecified way. That holding merits review, particularly if the Court is reviewing the other important issues.

CONCLUSION

The petition for certiorari should be granted, and the case should be heard on the merits or summarily reversed.

Respectfully submitted,

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