No. 18-1156

IN THE

Supreme Court of the United States

MORGENTHAU VENTURE PARTNERS, L.L.C., and MORGENTHAU ACCELERATOR FUND, L.P.,
Petitioners,

v.

ROBERT A. KIMMEL,
Respondent.

On Petition for a Writ of Certiorari to the Florida Fourth District Court of Appeal

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the state courts below correctly concluded that Respondent's amendment of his complaint did not resuscitate Petitioners' previously waived right to compel arbitration as to the claims at issue.

(2) Whether, by conceding in the lower courts that waiver of arbitration is a contract defense arising under state law, Petitioners failed to preserve their claim that the Federal Arbitration Act (FAA) provides a uniform substantive standard that all state and federal courts must apply in determining whether a litigant has waived its right to compel arbitration.

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INTRODUCTION

Before reaching this Court, this case primarily concerned two legal questions, neither of which is addressed by the Petition. Below, Petitioners' primary argument was that the trial court erred in its interpretation of a contractual choice-of-law clause—itself a question of state law—and should have applied Delaware, not Florida, state law in determining whether Petitioners had waived their right to compel arbitration by litigating this action for nineteen months before moving to compel arbitration. Second, assuming that Petitioners *had* waived that right, they argued that it was resuscitated when Respondent amended his complaint ten months before Petitioners moved to compel arbitration.

Petitioners do not argue that either of these questions is appropriate for review by this Court, nor could they. As to the first, this Court has expressly held that the interpretation of choice-of-law clauses, even in the arbitration context, "is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). As to the second, the lower court issued a published decision weeks before the summary per curiam affirmance in this case, in which the court adopted a standard for determining whether an amended pleading revives a right to compel arbitration that explicitly relies on Eleventh Circuit precedent and is consistent with decisions of other courts of appeals as well. *See Stankos v. Amateur Athletic Union of the U.S., Inc.*, 255 So.3d 377 (Fla. 4th Dist. Ct. App. 2018) (applying *Krinsk v. SunTrust*

Banks, Inc., 654 F.3d 1194 (11th Cir. 2011)). Any disagreement Petitioners may have with the application of that properly-stated standard in this case is not a ground for certiorari. *See* Sup. Ct. R. 10.

Since neither of these questions meets this Court's criteria for review, Petitioners have come to this Court with two different questions drawn from the periphery of this action. Neither is squarely presented.

Petitioners' first question presented, based on this Court's decision in *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011), is an attempt to squeeze a round peg into a square hole. *Cocchi* did not set forth a rule of state court judicial administration requiring detailed written opinions in all cases involving arbitration, as Petitioners suggest. Rather, *Cocchi* held that a court may not deny a motion to compel arbitration as to all claims in a case "merely on the grounds that some of the claims" are not arbitrable. *Id.* at 19. There is no indication that the Fourth District Court of Appeal (Fourth DCA) summarily affirmed the denial of the motion to compel based on such grounds. Instead, Respondent, like Petitioners, focused on whether the claims in the amended complaint were arbitrable even if the claims in the initial complaint were not. The Fourth DCA's decision in *Stankos*, issued while this action was pending on appeal, belies any argument that the Fourth DCA fails to consider the arbitrability of each claim separately. The *Stankos* court's focus on whether new claims "materially alter[ed] the scope or theory of the litigation" in determining the impact of amendment on waiver requires a claim-by-claim analysis that is completely consistent with *Cocchi*. The first question presented reflects no more than Petitioners' objection to the state courts' administrative decision not to issue a lengthy written

opinion and their disagreement with how the Florida courts applied an unchallenged standard.

Petitioners' second question presented is based on an argument that was neither properly raised before nor addressed by the lower courts, and thus cannot be considered. *See* S. Ct. R. 14(g)(i) (requiring petition to identify where federal question was raised and passed on by state court below). Petitioners did not raise *any* argument about prejudice in their trial court briefing on their belated motion to compel arbitration. When they later addressed the issue, at oral argument and in their appellate briefs, they argued that waiver is "a contract defense" and required a showing of prejudice, citing Delaware case law. Petitioners also asserted that the Florida waiver standard Respondent invoked was preempted by the Federal Arbitration Act (FAA), but they raised a materially different claim of preemption from the one they now invoke: They acknowledged that waiver is a state-law defense to the enforcement of a contract, and that the FAA's savings clause, 9 U.S.C. § 2, preserves such state law defenses unless they stand as obstacles to the FAA's objectives, but asserted that Florida's prejudice standard was invalid because it interfered with the FAA's policies. *See*, *e.g.*, Appellants' Am. Init. Br. (DCA Case No. 17-0895) (hereafter "Appellants' DCA Br.") 13-15. Now, though, Petitioners argue that the FAA is itself the substantive source of the waiver standard, providing a uniform federal standard that applies in all fifty states. The Fourth DCA did not address this forfeited argument in its one-word summary affirmance.

This case does not represent one of the "unusual circumstances" that would allow the Court to abandon its default rule that it "will not entertain arguments not made below." *OBB Personenverkehr AG v. Sachs*,

136 S. Ct. 390, 398 (2015). Indeed, given that this is "a court of review, not of first view," it would be inappropriate for the Court to grant certiorari based on this new argument. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Petitioners did briefly suggest in their appellate briefs below that state-law waiver defenses that do not include a prejudice requirement are impermissibly hostile to arbitration. That assertion is very different from the argument for a uniform federal standard that they now attempt to pursue, and it is not fairly encompassed in their questions presented. And even if the Petition could be read to ask this Court to consider the argument that state-law waiver standards that do not require prejudice are hostile to arbitration, no court has ever adopted, or even discussed, that theory. This Court should not be the first to do so, particularly in a case where there is evidence that the opponent to arbitration *did* suffer prejudice and so consistently argued in the courts below.

STATEMENT OF THE CASE

Respondent Robert A. Kimmel, as trustee of the Robert A. Kimmel Revocable Trust and of the Kimmel Partnership Trust ("the Kimmel Trusts"), invested one million dollars and became a limited partner in the Morgenthau Accelerator Fund, L.P. ("the Partnership"), one of the Petitioners, in 2006. Pursuant to the partnership agreement, the Partnership was scheduled to dissolve on March 30, 2016, unless the General Partner, Petitioner Morgenthau Venture Partners, LLC, elected to extend the Partnership after receiving written approval from an Advisory Board. In April 2016, Kimmel had not

received a return of his investment or any notification that the General Partner had extended the partnership, despite specifically asking whether there had been an extension. Kimmel also had not received audited financial statements that he had requested and was entitled to under the partnership agreement. Accordingly, on April 16, 2016, he commenced suit against both the Limited Partner and the General Partner in Florida's Circuit Court for the Seventeenth Judicial District.

A. Trial Court Proceedings

Kimmel's initial complaint included three state-law claims. The first claim was for breach of contract, based on the failure to provide Kimmel with audited financial statements, the failure to acknowledge the dissolution of the Partnership, the failure to return the Kimmel Trusts' investment, and the failure to respond to correspondence from Kimmel. *See* Appellants' Am. App., DCA Case No. 18-0895 (hereafter "DCA App.") 223-24. The second claim was for production of a report containing certain financial information as provided for in the partnership agreement, including a statement for 2014. *Id.* at 224-25. The final claim was for an accounting of the Partnership's operations since its inception. *Id.* at 226-27.

Petitioners answered the complaint and pleaded affirmative defenses, none of which raised arbitation. *See* DCA App. 204-13. Over the next year, the parties engaged in discovery, including motion practice and court hearings. *See id.* at 233-35 (trial court docket sheet). During that year, Petitioners also revealed for the first time that the Fund's dissolution date had purportedly been extended by a year and produced

some of the withheld financial statements. Accordingly, in January 2017, without any opposition from Petitioners, Respondent filed an amended complaint reciting these facts. The amended complaint continued to seek an accounting. *See id.* at 107-08. Respondent amended the breach of contract claim to allege the purported extension of the partnership was invalid, while maintaining allegations relating to the Funds' failures to respond to Kimmel or provide the information required in a timely fashion. *Id.* at 101-02. Respondent included an additional claim based on breach of fiduciary duty, resulting from the failure to provide the required financial statements in a timely fashion, the extension of the dissolution date, and conflicts of interest on the Limited Partner Board. *Id.* at 103-07.

Nine months after Respondent amended the complaint, in October 2017, Petitioners changed counsel. *See* Am. Supp. App. of Appellee, DCA Case No. 18-0895 (hereafter, "DCA Supp. App.") 99-103. One month after that, Petitioners, for the first time, filed the motion to compel arbitration based on a clause in the Limited Partnership Agreement. *See* DCA App. 78. In opposition, Respondent argued that Petitioners had waived any right to arbitrate the matter, "having participated in discovery and causing Kimmel to expend resources in connection therewith, and by waiting for more than eighteen (18) months since the initiation of this action to attempt to invoke arbitration, doing so only after its original counsel withdrew from the case." *Id.* at 66.

In their reply, Petitioners' sole argument against waiver was that their conduct over the prior nineteen months "hardly constitutes substantially invoking the litigation machinery that might justify a finding of

waiver." Appellants' Reply Br., DCA Case No. 18-0895 (hereafter "Appellants' DCA Reply") 6 (quoting *CheyTac USA, LLC v. NextGen Tactical*, LLC, No. 17-60925-CIV, 2017 WL 5634937, at *4 (S.D. Fla. Oct. 12, 2017)). They did not address the presence or absence of prejudice; they did not address whether Florida law, Delaware law, or the FAA provided the substantive standard. They did argue, though, citing both Florida law and Eleventh Circuit cases, that even if they had waived their right to arbitrate, the right had been revived by the amendment.

At oral argument on the motion to compel, Petitioners argued, for the first time, that Delaware law governed the waiver analysis, and, on a brief rebuttal, that this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), invalidated Florida's waiver standard. *See* DCA App. 10-13, 39-41. Respondent's counsel noted on the record that Petitioners had not raised Delaware law in their briefing. *Id.* at 25.

One week after the hearing, the trial court issued a brief order denying the motion to compel, which concluded that, as a matter of Delaware law, Florida law applied, and Respondent had met the standard for waiver under that law, citing the Florida Supreme Court's decision in *Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707 (Fla. 2005). *See* Pet. App. 3a-4a.

B. Proceedings on Appeal

Petitioners appealed the trial court's decision to the Fourth DCA. Their primary arguments on appeal were that the court erred in construing the choice-of-law clause in the contract to apply Florida law, and that the claims added in the amended complaint were

subject to arbitration even if they had waived arbitration of the earlier claims. In a brief two paragraphs at the end of their argument as to why the trial court should have applied Delaware law, Petitioners argued that it was "at least doubtful that" *Saldukas* "remains good law" after *Concepcion*. Appellants' DCA Br. 13-14; *see also* Appellants' DCA Reply 9 (one-half of a paragraph arguing that *Saldukas* "is not likely still good law"). As to their theory that their right to arbitrate was revived, Petitioners argued, citing the Eleventh Circuit's decisions in *Krinsk*, 654 F.3d 1194, and *Collado v. J. & G. Transp., Inc.*, 820 F.3d 1256 (11th Cir. 2016), that Respondent's amended complaint had "fundamental[ly] alter[ed]" the case. Appellants' DCA Br. 20.

The Fourth DCA issued a one-word *per curiam* affirmance, Pet. App. 1a, which is neither precedential nor appealable to the Florida Supreme Court. *See Dep't of Legal Affs. v. Dist. Ct. of Appeal, 5th Dist.*, 434 So. 2d 310 (Fla. 1983) (a *per curiam* affirmance does not have "any precedential value"); *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (Florida Supreme Court lacks jurisdiction to review a *per curiam* affirmance issued by an intermediate appellate court). Petitioners subsequently sought both panel and *en banc* reharing, which was denied. Pet. 5a.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Implicate *Cocchi*.

Petitioners' first question presented is an attempt to transform this Court's decision in *Cocchi* into a rule of state-court judicial administration. Arguing that a blanket order denying arbitration without addressing the arbitrability of all claims violates the FAA,

Petitioners' emphasize the format of the lower courts' opinions, while ignoring that the standard applied in the Fourth DCA to determine whether the addition of new claims to a complaint revives a defendant's waived opportunity to arbitrate is both correct and the same standard used by other courts. Indeed, the standard applied by the Fourth DCA is the same one advocated by Petitioners below.

Petitioners' argument about *Cocchi* is based on an out-of-context reading of one-half of one sentence in a case addressing a completely different issue. *Cocchi* did not, as Petitioners suggest, announce a ban on "blanket orders" denying motions to compel arbitration; *Cocchi*'s holding is not a procedural one as to the format or level of detail that must be contained in state court opinions. Such a rule would be an affront to the dignity of state courts and their ability to manage their own workloads. *See, e.g., Johnson v. Williams*, 568 U.S. 289, 298 (2013) (noting "it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference"). In light of the dispute among members of this Court as to whether the FAA applies to state courts *at all*, it would be exceptional to read *Cocchi* as imposing such a role on state courts. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (Thomas, J., dissenting). Rather, the decision in *Cocchi* sets out a substantive rule that a court may "not issue a blanket refusal to compel arbitration *merely on the grounds* that some of the claims could be resolved by the court without arbitration." 565 U.S. at 19 (emphasis added).

Cocchi concerned a published opinion of the Fourth DCA that "upheld a trial court's refusal to compel arbitration of respondents' claims after determining

that two of the four claims in a complaint were nonarbitrable," without addressing "whether the other two claims in the complaint were arbitrable." 565 U.S. at 19. The question in *Cocchi* was not whether the right to arbitrate had been waived as to each specific claim, but whether certain of the claims were subject to the arbitration agreement at all. Reversing, this Court emphasized that:

> [W]hen a complaint contains both arbitrable and nonarbitrable claims, the [FAA] requires courts to "compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."

565 U.S. at 22 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Florida courts, including the Fourth DCA, continue to follow *Cocchi*'s holding, examining the arbitrability of each claim separately. *See, e.g., N. Shore Med. Ctr., Inc. v. Accredited Health Sols., Inc.*, 245 So. 3d 789, 790 (Fourth DCA 2018); *Newman for Founding Partners Stable Value Fund, LP v. Ernst & Young, LLP*, 231 So. 3d 464, 468 (Fourth DCA 2017); *see also Beck Auto Sales, Inc. v. Asbury Jax Ford, LLC*, 249 So. 3d 765, 769 (First DCA 2018) (citing *Cocchi*).

Here, there is no indication that the Florida courts departed from this consistently applied rule and denied Petitioners' motion to compel "merely on the grounds that some of the claims could be resolved without arbitration." *Cocchi*, 550 U.S. at 19. Indeed, both the parties' briefing and a contemporaneously issued opinion of the Fourth DCA indicate otherwise.

At no point in this case did Respondent argue that the mere fact that some claims were not arbitrable meant arbitration must be stayed as to claims that were arbitrable. Unlike in *Cocchi,* here no one disputed that all of the claims were, absent waiver, within the scope of the arbitration clause. Respondent argued that waiver applied to *all* of the claims, as Petitioners could not rely on the amended claims to revive their previously-waived right. Respondent relied on Petitioners' decision to wait to compel arbitration, doing so only after a change in counsel. And invoking the standard announced by the Eleventh Circuit in *Krinsk,* which Petitioners themselves endorsed, Respondent argued that the new claims did not fundamentally alter the case, and thus were waived on the same grounds. *See* Appellee's Answer Br. (DCA Case No. 17-0895) (hereafter "Appellee's DCA Br.") 24.

The likelihood that the Fourth DCA's *per curiam* affirmance was based on grounds not raised by Respondent is particularly low given that, while this action was pending in the DCA, that court issued a published, precedential opinion addressing the issue—an opinion that is entirely consistent with *Cocchi* and with the standard Petitioners advocated below.

Specifically, in *Stankos*, the defendant had undisputedly waived its right to arbitration with respect to the plaintiffs' initial complaint. The plaintiffs subsequently filed an amended complaint, and the defendant moved to compel arbitration, arguing that its right to do so was revived by the amended complaint. The trial court agreed and compelled arbitration of all the claims. The plaintiffs appealed, and the Fourth DCA reversed on the

grounds that "the amended complaint does not alter the scope or theory of the underlying litigation in an unforeseeable way," nor "involve issues significantly separate and distinct from those raised in the original complaint," citing the Eleventh Circuit's decision in *Krinsk*. *Stankos*, 255 So. 3d at 380. The court's precedential, published decision was accompanied by a concurrence further "expounding upon why the *Krinsk* standard is the correct standard to apply." *Id.* at 380-82.

Stankos, like *Krinsk*, inherently requires a court to examine in detail the claims added in an amended complaint to determine whether they unforeseeably alter the scope or theory of the litigation, and thus determine whether they are arbitrable notwithstanding the waiver of arbitration as to the original complaint. The Fourth DCA did exactly that in the *Stankos* decision, addressing why each of three new claims did not alter the scope or theory of the litigation. The *Stankos*/*Krinsk* standard is fully consistent with *Cocchi* because it does not permit arbitration to be stayed unless the court determines that the defendant's waiver of arbitration applies to all the claims the defendant contends are arbitrable.

The Fourth DCA's summary affirmance in this case was issued only fifteen days after *Stankos*, by a panel that included one of the judges in *Stankos*. The entire Fourth DCA denied Petitioner's motion for en banc rehearing six weeks after *Stankos*. This Court should not presume the Fourth DCA acted contrary to its own binding case law. *Cf. Wainwright v. Witt*, 469 U.S. 412, 431 (1985) ("[W]here the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one."); *Merryman v. Bourne*, 76 U.S. 592, 600 (1869) ("Error

is not to be presumed. It must be affirmatively shown. Doubts are to be resolved in favor of the judgment rather than against it."). In any event, a nonprecedential summary affirmance does not merit review by this Court where the contemporaneous, reasoned precedent of the same court is consistent with this Court's decisions and those of other state and federal courts, which have similarly based their waiver analysis on whether an amended complaint unexpectedly alters the scope of the action. *See, e.g.*, *Manasher v. NECC Telecom*, 310 F. App'x 804, 806 (6th Cir. 2009) (examining whether amendment "substantially alter[ed] the scope or theory of the case such that it created new and different issues"); *Gilmore v. Shearson/Am. Express Inc.*, 811 F.2d 108 (2d Cir. 1987), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) and *discussed in Krinsk*, 654 F.3d at 1202-03; *Bitton v. Healthcare Servs. Grp., Inc.*, No. CV 17-2580, 2019 WL 415570, at *5 (E.D. Pa. Feb. 1, 2019) (applying *Krinsk* standard); *Maxwell v. Phares*, No. D064849, 2014 WL 7271996, at *5 (Cal. Ct. App. Dec. 19, 2014) (citing *Gilmore*); *Waldman v. Old Republic Nat. Title Ins. Co.*, 12 P.3d 835, 838 (Colo. App. 2000) (applying *Gilmore*); *Principal Investments v. Harrison*, 366 P.3d 688, 698 (Nev. 2016) (declining to find right to compel arbitration revived because new and original claims all concerned same issue "at their core").

Petitioners' argument boils down to the assertion that *Cocchi* bars state courts from issuing summary affirmances or brief decisions in cases with multiple claims under the Federal Arbitration Act. But *Cocchi* does not purport to regulate the form or length of state judicial decisions. Given the lack of evidence that the

Fourth DCA abandoned its own rule of closely examining the nature of claims added in an amended complaint to determine if they fundamentally differ from claims as to which the right to arbitrate has been waived, there is no reason for review, let alone reversal, of its decision.

II. This Case is Not an Appropriate Vehicle to Review Whether the FAA Imposes a "Uniform" Waiver Standard.

In seeking review of a one-word summary affirmance, Petitioners ask this Court to decide that the FAA imposes a uniform waiver standard in all state and federal courts, one that includes a prejudice requirement. Although the Petition discusses at length what various federal courts of appeals have held as to prejudice, it fails to comply with this Court's Rules by identifying where its argument for a uniform federal waiver standard requiring prejudice was raised below, "with specific reference to the places in the record where the matter appears." Sup. Ct. R. 14(g)(i). Had it attempted to satisfy this requirement, the Petition would have inevitably failed, because the one federal-law issue it briefly alluded to below—that Florida's waiver standard does not qualify for the savings clause of FAA section 2 because it is somehow hostile to arbitration—is fundamentally at odds with its current claim that the FAA itself provides an exclusive, substantive standard for waiver.

Even if Petitioners had preserved the question presented below, review would remain unwarranted because neither of the lower courts addressed it in their summary, non-precedential opinions. And to the extent Petitioners continue to make the FAA argument that they arguably *did* raise below (in a few

throwaway sentences in their appeal briefs)—that state-law contract defenses that do not contain a prejudice requirement do not qualify for the savings clause of FAA section 2—not only did the courts below not address that question, but it does not appear that *any* court has. This Court should thus follow its ordinary practice and "await 'thorough lower court opinions to guide [its] analysis'" should it consider that question to be one of importance. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2050 n.1 (2018) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)). Withholding consideration of these issues is particularly appropriate given that this case arises out of state court, and because respondent consistently argued below, and convincingly demonstrated, that he *did* suffer from prejudice as a result of Petitioners' waiver.

A. Petitioners have waived any argument that the FAA substantively provides a uniform national waiver standard.

Petitioners explicitly ask this Court "to create national uniformity in how State and federal courts decide waiver defenses under the FAA." Pet. 17. But in the lower courts they never argued the FAA imposes a uniform waiver standard, and thus have waived this argument.

"[T]his Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)). Where, as here, "the highest state court is silent on a federal question before [this Court], [this

Court] assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams*, 520 U.S. at 86-87 (citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987), and quoting *Webb v. Webb,* 451 U.S. 493, 501 (1981)). Petitioners cannot meet this burden here.

Petitioners made no argument addressing prejudice or the standard for waiver in their trial court briefing. In the Fourth DCA, their primary argument was that the trial court erred as a matter of Delaware law in interpreting the parties' contractual choice of law provision, and the court should have applied Delaware state contract law instead of Florida state contract law to determine waiver. *See* Appellants' DCA Br. 7-14. In two paragraphs in their opening brief and two sentences in their reply brief, Petitioners also argued that the Florida state contract law waiver standard could not be applied because it "offends the FAA's strong policies and clear instruction to resolve doubts in favor of arbitration." *Id.* at 14-15; Appellants' DCA Reply 9.

Both of these arguments presumed that the standard for waiver is one of *state* law. Indeed, Petitioners affirmatively stated:

> Neither Florida nor the FAA segregate the governing law of the agreement from a question of waiver. Rather, Florida and the FAA treat waiver for what it is, a contract defense.

Appellants' DCA Br. 13 (citing *Moses H. Cohn Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983), and *Lucky Star Horses, Inc. v. Diamond State Ins. Co.*, 233 So. 3d 1159, 1162 (Fla. Dist. Ct. App. 2017)). *See also* Appellants' DCA Reply 8 (arguing that "the substantive law of Delaware applies").

The Petition rests on an entirely inconsistent proposition: that the FAA itself provides a uniform substantive standard that applies in every state. *See, e.g.*, Pet. 17 (asking the Court to "create national uniformity"); *id.* at 20 ("There is a dire need for uniformity in how courts treat prejudice in deciding waiver claims."). The Florida courts did not have the opportunity to address this new argument below, and the summary affirmance of the Fourth DCA did not address it.

The distinction between these two arguments is not academic. Whether the FAA precludes application of a particular state law contract defense is an entirely different question from whether the FAA itself provides a substantive federal standard. If the relevant question is the former, there would be a range of permissible state-law standards for waiver, with the FAA setting a floor for those state laws. Petitioners, however, now advocate a uniform standard for waiver across the fifty states, which would apply *instead* of state law in all circumstances.

Notably, none of the cases Petitioners cite in the Petition as evidence of a circuit split examined waiver as a state-law contract defense.[1] As the Eighth Circuit

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[1] Two of the cases cited by Petitioners arise under maritime law, and thus there would be no state law to apply. *See Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695 (5th Cir. 2003) (*Footnote continued*)

has explained, the term "waiver" is used to refer to two separate concepts: a form of statutory "default" as that term is used in FAA § 3, and a contract waiver defense that derives from equitable principles of estoppel and laches. *See N & D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722, 728 (8th Cir. 1976). Although Petitioners' argument below focused on the latter, they now rely on federal appellate decisions that explicitly address a question of federal statutory construction: what constitutes "default" under FAA § 3. *See, e.g.*, *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 218 (3d Cir. 2007), *cited in* Pet. 18; *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 206-07 (4th Cir. 2004), *cited in* Pet. 19; *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 n. 17 (11th Cir. 2002) (citing *Morewitz v. West of Engl. Ship Owners Mut. Prot. & Indem. Ass'n,* 62 F.3d 1356, 1365-66 n.16 (11th Cir. 1995)), *cited in* Pet. 17.

The courts of appeals have largely *not* addressed whether the FAA § 3 default standard is the exclusive form of waiver. Only a minority of courts that have done so have indicated that the FAA, and not state law, is the sole source of a waiver standard. For example, sixteen years ago, the Ninth Circuit found that "the FAA, and not Illinois law, supplies the standard for waiver" because "waiver of the right to compel arbitration is a rule for arbitration." *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002), *opinion amended on denial of reh'g*, 289 F.3d

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(cited in Pet. 8, 17); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102 (2d Cir. 2002) (cited in Pet. 17). As discussed in greater detail below, several state high courts *have* examined waiver as a state-law contract defense, and none have suggested that the defense is "preempted" by the FAA in the manner Petitioners argued below.

615 (9th Cir. 2002), *cited in* Pet. 8, 17. *See also S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) ("Our determination of whether S & H waived its right to arbitration, as opposed to whether the contract is void under Alabama law, is controlled solely by federal law."). *Cf. Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 232 n.5 (3d Cir. 2008), *cited in* Pet. 7 (declining to decide "whether state or federal law controls the waiver analysis"); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 130-31 (2d Cir. 1997) (noting party waived issue below and concluding that an FAA standard, not state law of waiver, applies given lack of clear contrary choice of law clause). But even if the dated discussions of the issue in a handful of appellate decisions indicated a latent possibility of conflict among the federal circuits over the theoretical basis of the waiver defense in arbitration cases, Petitioners did not argue below that the FAA supplies the waiver standard as a "rule for arbitration," and explicitly argued that waiver rules were state-law contract defenses—which are presumptively valid under the FAA savings clause unless they are hostile to arbitration; thus, the argument is waived.

In arguing below that waiver is an issue of state contract law, Petitioners deprived the state courts of any opportunity to consider their new theory that the FAA provides a uniform, substantive standard. The one-word summary affirmance below certainly did not opine on the issue. This Court should thus decline to be the first court to do so in this case. Should the question presented be as recurring and important as Petitioners suggest, the Court would have ample opportunity to resolve the question in a case where it has been properly preserved, and considered and

addressed by the lower courts. Here, it has been waived.

B. No court, in this or any other case, has addressed whether a state-law waiver contract defense is valid under the policy of the FAA only if it requires prejudice.

Petitioners' argument for a uniform federal standard necessarily reflects abandonment of the argument that they briefly alluded to in their appeal briefs below: that the waiver standard is in the first instance an issue of state law, but that Florida's state law, unlike other state laws, is displaced by the FAA. Even if they were continuing to press this argument, though, it would not merit review. There is no opinion below addressing this argument, and Respondent has not found *any* state or federal court decision that has addressed whether a state-law waiver defense that does not require prejudice is "hostile" to arbitration and thus invalid under *Concepcion*.[2]

Many state courts have, however, explicitly concluded that waiver is a generally applicable contract law defense and, therefore, governed by state law under the FAA's savings clause. *See, e.g.*, *Cain v. Midland Funding, LLC*, 156 A.3d 807, 814 (Md. 2017); *Am. Gen. Fin. v. Griffin*, 2013-Ohio-2909, 2013 WL 3422900, at *4-*5 (Ohio Ct. App. 2013) (citing *Med. Imaging Network, Inc. v. Med. Resources,* 2005-Ohio-2783, 2005 WL 1324746 (Ohio Ct. App. 2005));

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[2] Respondent has located only one decision that expressly addresses the application of *Concepcion* and related cases to the issue of waiver. In *Technology in Partnership, Inc. v. Rudin*, 538 F. App'x 38 (2d Cir. 2013), the court rejected the argument that the Second Circuit's federal-law based waiver doctrine, which *does* contain a prejudice requirement, was invalid under *Concepcion*.

Parsons v. Halliburton Energy Servs., Inc., 785 S.E.2d 844, 854 (W. Va. 2016); *see also Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 835, 837-38 (Miss. 2003) (analyzing waiver both as a state law contract defense and as statutory default under FAA § 3).

Notably, each of these state courts refused to find prejudice was an essential element of the state law general contract defense of waiver in their jurisdictions. *See, e.g.*, *Cain*, 156 A.3d at 161-63; *Parsons*, 785 S.E.2d at 854; *Sanderson Farms*, 848 So. 2d at 837-38; *Am. Gen. Fin.*, 2013 WL 3422900 at *7 (stating that prejudice is one non-dispositive factor in the totality of circumstances analysis). And no courts in these jurisdictions appear to have addressed whether the lack of a prejudice requirement makes their state laws invalid as impermissibly hostile to arbitration. The Court should thus decline to reach out to decide the issue, both because the absence of disagreement among decisions on the point suggests the issue is not one of exceptional importance, and because in deciding it the Court would lack the benefit of lower court opinions.

C. The FAA does not displace non-discriminatory, facially valid state-law contract defenses.

Courts that have interpreted their state laws not to require prejudice as an element of waiver of the right to compel arbitration have done so on the ground that "[t]he general state law of contracts does not require a showing of prejudice to establish a waiver of other contract rights, and so does not require a showing of prejudice for arbitration contracts." *Parsons,* 785 S.E.2d at 184. *See also Cain*, 156 A.3d at 820. The Florida Supreme Court's analysis in

Saldukas, 896 So. 2d 707, 711 (Fla. 2005), was based on the same conclusion: that the "general definition of waiver is applicable to a right to arbitrate." 896 So. 2d at 711. In analyzing waiver as a state law contract defense, the high courts of West Virginia, Maryland, and Florida all cited the D.C. Circuit's decision in *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987), which held that "the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context."

Such analysis is not only consistent with the FAA, but mandated by the "'equal-treatment' rule for arbitration contracts" that this Court has derived from the FAA. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (citing *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426). State-law standards that treat waiver of the right to arbitrate identically to waiver of other contractual rights do not "apply only to arbitration or [] derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339.

Moreover, unlike the state law at issue in *Concepcion*, the waiver standard employed by Florida and other states does not "interfere with fundamental attributes of arbitration." 563 U.S. at 344. *Cf. Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 WL 1780275 at *7 (Apr. 24, 2019) (state law violates equal treatment principle where it "interfer[es] with fundamental attributes of arbitration"). To the contrary, a stricter waiver standard *furthers* fundamental attributes of arbitration—including those of "greater efficiency and speed" noted in *Concepcion* itself. 563 U.S. at 348 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,

559 U.S. 662, 685 (2010)). A standard that makes it easier for parties like Petitioners to sit on their rights and keep the option to move proceedings to arbitration in their pocket if they do not like the way court litigation is proceeding is not consistent with these fundamental attributes.

Accordingly, a state-law waiver defense to enforcement of a contract falls squarely within the savings clause of FAA § 2, whether or not it contains a prejudice requirement.

D. That this case comes from a state court makes it a particularly poor vehicle to resolve any circuit split about prejudice.

The Petition is primarily premised on a purported divide among federal courts of appeals, as discussed above. But this case does not arise from one of those courts, and instead presupposes that the FAA applies to state-court actions in the same manner as it does in federal courts. The lingering disagreement among the members of the Court as to that question, as referenced above, makes this case a particularly poor vehicle to address the underlying question.

In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a majority of this Court concluded that section 2 of the FAA applies to state-court actions, and thus preempts state courts from applying inconsistent standards. At the same time, several Justices expressed disagreement with that view, *see id.* at 21 (O'Connor, J., dissenting), although most eventually accepted *Keating* as a matter of stare decisis, *see, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (O'Connor, J., concurring), 284 (Scalia, J., dissenting). In *DIRECTV*, 137 S. Ct. at 471, and again in *Kindred Nursing Centers*, 137 S. Ct. at 1429,

however, Justice Thomas made clear that he "continues to adhere to the view that the Federal Arbitration Act … does not apply to proceedings in state courts." *Id.* (Thomas, J., dissenting).

As *Kindred Nursing Centers* illustrates, that view continues to determine the disposition that will command Justice Thomas's vote in a case where the issue is whether the FAA preempts a state court's refusal to compel arbitration. The continuing disagreement on the Court over this question makes a case coming from a state court a very poor candidate for resolving any significant FAA issue (even assuming a case, unlike this one, that actually presents that significant issue). Such issues have often closely divided the Court. *See, e.g.*, *Epic Systems*, 138 S. Ct. 1612 (5-4 decision arising from federal court); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (no majority opinion in case arising from state court). *Concepcion* itself was decided by a bare 5-4 majority. Had the case arisen from a state court, this Court would likely have divided 4-4 on the merits of the FAA preemption question, with the deciding vote resting on another basis entirely. Such a decision would have contributed nothing to the definitive resolution of any question of federal law.

Even if Petitioners' arguments here were strong enough to command any votes at all, there would be a strong likelihood of a similarly indecisive outcome. In such a case, the parties' investment of resources in briefing the question of federal law petitioners seek to present, and the Court's efforts to consider and resolve it, would be so much wasted effort.

The case's origin in the state-court system thus makes it a very poor candidate for review.

E. This case does not turn on whether waiver requires prejudice because Respondent demonstrated ample prejudice.

Finally, this case presents a poor vehicle to analyze the question whether prejudice is required to find waiver, because Petitioner *has* suffered prejudice and has consistently made that argument throughout the lower court proceedings. The state appellate court very likely saw no need to address the choice-of-law argument that Petitioners made regarding prejudice because the outcome did not turn on it: Respondent would prevail either way. And if the Court were to use this case to adopt a uniform federal prejudice standard (despite Petitioners' waiver of any argument for such a standard), the ultimate outcome below would likely be the same because Respondent's claim of waiver would satisfy that standard.

Even in those circuits where prejudice is a requisite element of waiver, "[t]he prejudice threshold [] is not onerous." *Hooper v. Advance Am., Cash Advance Centers of Mo., Inc.*, 589 F.3d 917, 923 (8th Cir. 2009); *see also Joca-Roca Real Estate, LLC v. Brennan,* 772 F.3d 945, 949 (1st Cir. 2014) ("To be sure, prejudice is essential for a waiver—but the required showing is tame at best."); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (collecting cases and stating, "Other courts require evidence of prejudice—but not much.").

Those courts that have concluded that prejudice is a required element of waiver have also held that whether a litigant has suffered prejudice as a result of its opponent's delay is a highly factbound determination, to which reviewing courts give great

deference. *See, e.g.*, *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.,* 683 F.3d 577, 586 (4th Cir. 2012); *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1163 (5th Cir. 1986).

Here, the record would easily support a finding that Petitioners' failure to raise arbitration until nineteen months into the litigation caused Respondent prejudice. Courts have recognized three kinds of prejudice: "delay, expense, [and] damage to a party's legal position." *Doctor's Assocs.*, 107 F.3d at 134 (cited in *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 327 (5th Cir. 1999)). While delay alone is typically not considered sufficient, it can "combine with other factors to support a finding of prejudice." *Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1051 (8th Cir. 2016). The longer the delay, the less of these other forms of prejudice that is required. As the Third Circuit has explained, "a party's capacity to develop a litigation strategy with regard to the likelihood of arbitration diminishes the longer the case is litigated with no further indication that a motion to compel arbitration is forthcoming." *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 211 (3d Cir. 2010).

Courts have regularly found delays much shorter than the nineteen months here to be prejudicial. *See Messina*, 821 F.3d at 1051 (eight-month delay); *Joca-Roca*, 772 F.3d at 951 n. 7 (eight-month delay); and *Nicholas v. KBR, Inc.*, 565 F.3d 904, 910 (5th Cir. 2009) (ten-month delay). Respondent attended multiple hearings over the course of nearly two years. In addition, Respondent suffered the actual expense associated with discovery: propounding discovery, conferring with Petitioners over discovery, and moving to compel production in response to Petitioners' objections. "These are precisely the

expenses of litigation that arbitration is designed to avoid." *Nicholas*, 565 F.3d at 911. And courts have regularly found such discovery expenses to constitute prejudice in support of a waiver finding. *See, e.g.*, *id.*; *In re Cox Enter., Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1118 (10th Cir. 2015); *Ehleiter*, 482 F.3d at 225.

Respondent made this argument to both the trial court and the Fourth DCA. *See* DCA App. 74; Appellee's DCA Br. 27. This alternate, factbound rationale for the outcome below makes this case a poor vehicle to determine whether the FAA mandates a showing of prejudice to establish waiver of the right to compel arbitration. That the *per curiam* disposition below provides no reason to believe that adoption of a prejudice requirement would make any difference to the result confirms the inappropriateness of review of the intermediate state court's nonprecedential ruling.

CONCLUSION

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

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