No. 18-1308

In the Supreme Court of the United States

KPMG LLP,
Petitioner,
v.
SINGING RIVER HEALTH SYSTEM A/K/A SINGING RIVER HOSPITAL SYSTEM,
Respondent.

KPMG LLP,
Petitioner,
v.
JACKSON COUNTY, MISSISSIPPI,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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The Federal Arbitration Act (FAA) preempts any state rule that overtly or covertly discriminates against arbitration. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Nonetheless, the Supreme Court of Mississippi here showed a willingness to exploit jurisprudential confusion and to adopt whatever label for the state law minutes rule challenge it felt best served the desired result of refusing to compel arbitration, despite a broad agreement that delegated even gateway issues of arbitrability to the arbitrators for resolution.

In *Singing River*, the court applied Mississippi's judicially-created minutes rule to refuse to enforce a delegation clause contained in the audit engagement letters, even while holding that the minutes rule goes to the enforceability of the engagement letters and arbitration provisions therein. Pet. App. 27a. Soon thereafter, this Court issued its decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, which reaffirmed that "courts must respect" "[w]hen the parties' contract delegates the arbitrability question to an arbitrator" but also reiterated that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." 139 S. Ct. 524, 530–31 (2019). Just nine days later, the Mississippi Supreme Court decided *Jackson County* and there again refused to honor the delegation clause based on the minutes rule, but this time changed its reasoning to hold, on identical facts, that the very same engagement letters it had addressed in *Singing River*

were never formed in the first place. Pet. App. 42a, 44a n.5.

That attempt to feign compliance with *Henry Schein* while in fact disfavoring arbitration is precisely the kind of "subtle" discrimination that the FAA forbids. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019). In both decisions, the effect was to nullify the same engagement letters' clear and unmistakable delegation of questions of arbitrability to the arbitrators. Remarkably, the claims asserted in both cases arise out of, and quote from, the engagement letters containing the arbitration provisions.

The Mississippi Supreme Court's actions starkly present a key question: Do courts have unfettered discretion to label a state law contract challenge as going to the formation of an agreement to arbitrate, rather than its enforceability, so as to allow a court to decide the merits of the challenge, rather than the arbitrators? This Court has repeatedly raised, but not addressed, this question, and federal and state courts struggling with how the FAA applies to various state law contract challenges have reached conflicting answers. This void in instruction has created the opportunity for courts, such as the court below, to circumvent the FAA by labeling a state law contract challenge as going to formation and not enforceability. This Court should grant the petition for a writ of certiorari.

A. The Mississippi Supreme Court Has Recharacterized The Minutes Rule On The Same Facts, In Order To Disfavor Arbitration.

Respondents do not dispute that the Mississippi Supreme Court characterized the same state law contract challenge in different ways, pre- and post-*Henry Schein*, on the same facts and based on the same contracts. Singing River Br. in Opp. at 11, 14; Jackson County Br. in Opp. at 15, 16.[1] Nor do Respondents explain why this recharacterization should be viewed as anything other than an effort to avoid the effect of the delegation clause in the engagement letters, in violation of the FAA. Respondents maintain that the case law regarding the characterization of the minutes rule, including the two opinions below, is consistent, but the opinions below and the opinion of the United States Court of Appeals for the Fifth Circuit in a similar case, *Lefoldt v. Horne, L.L.P.*, 853 F.3d 804, 811–13 (5th Cir. 2017), reach three conflicting conclusions on how to characterize the minutes rule in the context of a dispute over arbitrability: (1) the minutes rule is sometimes an enforceability challenge and sometimes a formation challenge (*Lefoldt*); (2) the minutes rule is a challenge to a contract's enforceability (*Singing River*); or (3) the minutes rule is a challenge to a contract's formation (*Jackson County*). In the opinions below, the Mississippi Supreme Court ultimately picked the label that, under *Henry Schein*, would appear to allow it – and not the

[1] Respondents still identify no challenge specific to the delegation clause.

arbitrators – to decide the merits of Respondents' minutes rule challenge to the engagement letters containing the arbitration provisions.[2]

Respondents' only response is that because Mississippi's minutes rule is one of general application and has been applied to all types of contracts, it cannot violate the FAA. But this Court's precedent explicitly rejects such an argument: a "neutral rule that gives equal treatment to arbitration agreements and other contracts alike" will violate the FAA when it "target[s] arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration." *Lamps Plus*, 139 S. Ct. at 1418 (internal punctuation and citation omitted). Even generally applicable contract defenses can be used to discriminate against arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that FAA preempted California's generally applicable rule classifying most collective-arbitration waivers in consumer contracts as unconscionable).

The fact that the Mississippi Supreme Court was willing to select whatever characterization of the minutes rule challenge it believed supported denial of

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[2] Contrary to Respondent Jackson County's representations, *Lefoldt*'s explanation (and *Arnold*'s explanation of *Lefoldt*) that the minutes rule can be either a formation or enforceability challenge does not harmonize the opinions below. *See Lefoldt*, 853 F.3d at 811–13; *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 551 (5th Cir. 2018). While these cases recognize that the minutes rule may sometimes be a rule of formation and other times one of enforceability, neither *Lefoldt* nor *Arnold* contemplated that the minutes rule could go to enforceability in one case and to formation in a related case involving the exact same contracts.

the motions to compel arbitration in two related cases on identical facts demonstrates an intent to single out delegation clauses for disfavored treatment, which is preempted by the FAA. "[S]tate law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Concepcion*, 563 U.S. at 352).[3]

B. The Questions Presented Are Important Federal Questions That Warrant This Court's Review.

As recently as January 2019, this Court held that a court must determine whether an agreement to arbitrate exists before compelling arbitration, but again declined to define when a contract challenge puts the formation of an agreement to arbitrate at issue. *Henry Schein*, 139 S. Ct. at 530. *See also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010) (distinguishing issues related to enforceability and formation of arbitration agreements; "we address only the former"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (same).

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[3] Even if the Mississippi Supreme Court had labeled the minutes rule as relating to contract formation and not enforceability in both decisions, federal law would still preempt the application of that rule to arbitration agreements, for at least two reasons. First, the question of which contract defenses relate to formation as opposed to enforceability is a question of *federal* law. *See infra* Section B.1; 9 U.S.C. § 4 (requiring courts to determine whether the "making" of an arbitration agreement is "in issue" before enforcing the agreement). Second, the minutes rule attempts to further "public policy considerations" and thus impermissibly "seeks ends other than the intent of the parties." *Lamps Plus*, 139 S. Ct. at 1417.

Courts are struggling with where and how to draw the distinction between formation and enforceability challenges to agreements to arbitrate, not only in the context of the minutes rule but across a variety of state law contract challenges. Pet. at 11–13. Respondents' briefs in opposition do nothing to negate this obvious confusion in the law, but indeed further demonstrate it by treating formation and enforceability as interchangeable terms when this Court's jurisprudence indicates that the choice of label has significant ramifications. This Court's intervention is needed to address the conflict in authority regarding how to determine when state law contract challenges properly put at issue the formation of an agreement to arbitrate and its accompanying delegation provision, precluding the delegation of the challenge to the arbitrator. 9 U.S.C. § 4.

1. Courts Should Not Have Unfettered Discretion To Label State Law Contract Challenges In Order To Defeat Arbitration.

Respondents imply that a State has the final say in labeling a state law contract challenge as going to the formation (rather than enforceability) of an arbitration agreement and, accordingly, that the Mississippi Supreme Court's ultimate decision in *Jackson County* to treat the minutes rule as a formation challenge precludes any further inquiry. But this is very much an open question. On the one hand, this Court has previously stated, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply

ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). On the other hand, this Court has rejected the notion that "States have free rein to decide—irrespective of the FAA's equal-footing principle—whether such contracts are validly created in the first instance." *Kindred*, 137 S. Ct. at 1428. This Court has explicitly rejected state contract law when it interferes with the purpose of the FAA: "Although courts may ordinarily . . . rely[] on state contract principles" when analyzing arbitration agreements, "state law is preempted to the extent it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." *Lamps Plus*, 139 S. Ct. at 1415 (internal quotation marks and citations omitted).

As a result of these mixed signals, lower courts are in conflict. While some courts have held that state law governs formation issues, other courts have resolved formation challenges without reference to state law principles. *Compare Edwards v. Doordash, Inc.*, 888 F.3d 738, 745 (5th Cir. 2018) ("We use state law to evaluate the underlying agreement."), *with Rogers v. SWEPI LP*, 757 F. App'x 497, 500 (6th Cir. 2018) (finding that "there is no question regarding formation" of the contract, instead characterizing a condition precedent argument as one of validity without consideration of state law).[4] Review is warranted to

[4] The plaintiff in *Rogers* recently filed a petition for a writ of certiorari; one of the questions presented is "[w]hether courts must rely on state law or federal law in determining whether a contractual defense to arbitration is one of contract formation or one of validity for purposes of applying the severability doctrine."

instruct courts definitively on what law governs when the existence of an agreement to arbitrate is at issue.

2. Without The Court's Guidance, Courts Will Continue To Reach Conflicting Conclusions As To Whether State Law Challenges Go To The Formation Of An Agreement To Arbitrate.

Guidance on the distinction between challenges to the formation of an agreement to arbitrate, as opposed to its enforceability, affects far more than the characterization of Mississippi's minutes rule. As set forth in the Petition, courts have reached conflicting conclusions on the formation/enforceability question regarding a variety of state law contract challenges, including illusoriness of consideration and lack of capacity. Pet. at 28–29. Comparison of a recent decision of the United States Court of Appeals for the Fifth Circuit to that court's earlier precedent highlights the same inconsistency regarding unconscionability. In June 2019, the Fifth Circuit concluded that a procedural unconscionability challenge implicated the formation of an agreement to arbitrate under Mississippi law and must be resolved by the court. *Bowles v. OneMain Fin. Grp., L.L.C.*, No. 18-60749, 2019 WL 2521667, at *4 (5th Cir. June 19, 2019). But the Fifth Circuit had previously reached the opposite conclusion when applying California law, determining that unconscionability challenges do not go to formation and must be decided by the arbitrator. *Doordash*, 888 F.3d at 746. These decisions highlight

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Rogers v. SWEPI LP, No. 18-1565, 2019 WL 2577757 (U.S. June 19, 2019).

that the current state of the law makes it unpredictable whether arbitrators will be permitted to decide arbitrability questions, even if there is a delegation clause, and will lead to inconsistency across jurisdictions in enforcement of bargained-for and federally protected contractual rights to arbitrate.

3. Respondents Do Not Identify Any Valid Obstacles To The Court's Review.

Respondents devote the majority of their briefs in opposition to the merits of the arbitrability dispute and the perceived importance of Mississippi's minutes rule: whether it was satisfied here, its history under Mississippi case law, and its public policy rationale. None of this is relevant. This case presents the question whether the FAA prohibits courts from engaging in creative relabeling of state law contract challenges when doing so would nullify the parties' delegation of questions of arbitrability to the arbitrators. The question to be resolved, in other words, is *who* – the court or the arbitrators – has authority under the FAA to decide whether the minutes rule was satisfied, when the engagement letters at issue contain an arbitration provision with a delegation clause. Who decides arbitrability is not an academic exercise, but has "practical importance." *First Options*, 514 U.S. at 942. "[W]ho – court or arbitrator – has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration," *id.*,

and to the party seeking to vindicate its contractual right to arbitration.[5]

Whether the minutes rule was satisfied in this case is decidedly not the point of the Petition. Nor does the long history of the minutes rule or its public policy rationale matter here. Courts are required to respect and apply the FAA, regardless of state public policy. *See Kindred*, 137 S. Ct. at 1426–27; *Lamps Plus*, 139 S. Ct. at 1417–18.

C. An Agreement To Arbitrate Exists When A Party Seeks Affirmative Relief Based Upon A Contract That Contains An Arbitration Provision.

The second question presented identifies a division in authority as to whether a court should be "satisfied that the making of the agreement for arbitration . . . is not in issue" when the party resisting arbitration bases its substantive claims on a contract that contains an arbitration clause. 9 U.S.C. § 4. Respondent Jackson County does not address this issue at all. Respondent Singing River counterfactually argues both that "there is no dispute that [it] engaged KPMG" (Singing River Br. in Opp. at 16) – even though the Mississippi Supreme Court ruled that no contracts were formed

[5] That the Mississippi Supreme Court deemed the minutes rule not to have been satisfied here does not mean that arbitrators would necessarily reach the same conclusion. "After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way." *Henry Schein*, 139 S. Ct. at 531.

between Singing River and KPMG, as would be necessary for an engagement – and that its claims do not depend upon the existence of a contract between SRHS and KPMG – even though its complaint seeks damages for breach of contract and professional malpractice and quotes extensively from the engagement letters at issue. Despite Singing River's protestations to the contrary, it is self-evident that a breach of contract claim cannot survive without a contract, nor can a claim for professional malpractice survive absent engagement of the professional by the client. Pet. at 7 n.2. The question here, however, is whether a party can invoke a contract to seek affirmative relief and then, in a transparent effort to avoid the arbitration provision in that same contract, argue in the same case that no contract was ever formed. To the extent that state law would permit such "heads I win, tails you lose" tactics to avoid arbitration, federal law should preclude its application.

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The petition for a writ of certiorari should be granted. In light of the Mississippi Supreme Court's obvious hostility to arbitration in these cases, the Court may wish to consider summary reversal. In the alternative, the Court should grant plenary review and set the case for briefing and oral argument.

Respectfully submitted.

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