No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Federal Arbitration Act (FAA), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "preempts any state rule discriminating on its face against arbitration" and "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). "When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

The Supreme Court of Mississippi here refused—twice—to require arbitration pursuant to the parties' arbitration agreements in related cases arising from the same contracts. In the first, it applied a judicially-created state contract rule to find that the contracts between the parties were unenforceable, despite a delegation clause referring enforceability questions to the arbitrators. Eighty-four days later, post-*Henry Schein*, the same court ruled in the second case that the same contracts, on the same facts and based on the same rule, were never formed in the first place, even though written contracts were negotiated, signed, performed, paid, and ultimately sued upon. The questions presented are:

1. Whether the Federal Arbitration Act prohibits courts from relabeling a state law contract

challenge as relating to contract formation, as opposed to enforceability, thereby nullifying the parties' delegation of questions of arbitrability to an arbitrator.

2. Whether the Federal Arbitration Act permits courts to determine that the making of an arbitration agreement is at issue where plaintiffs' claims depend upon the existence of a contract that delegates gateway issues of arbitrability to the arbitrator.

CORPORATE DISCLOSURE STATEMENT

Petitioner KPMG LLP has no parent corporation, and no publicly held company holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

KPMG LLP petitions for a writ of certiorari to review the judgments of the Supreme Court of Mississippi in the above-captioned cases. Pursuant to Rule 12.4, Petitioner files a single petition covering all of the judgments in these cases, as they arise from the same court and involve identical questions.

OPINIONS BELOW

The Supreme Court of Mississippi's decision in *KPMG, LLP v. Singing River Health System a/k/a Singing River Hospital System* ("*Singing River*") is reported at ___ So. 3d. ___, Case No. 2017-CA-01047, 2018 WL 5291088. Pet. App. 1a–30a. The Supreme Court of Mississippi's decision denying Petitioner's motion for rehearing in *Singing River* is unreported. Pet. App. 31a–32a. The circuit court's order denying petitioner's motion to compel arbitration in *Singing River* is unreported. Pet. App. 33a–34a.

The Supreme Court of Mississippi's decision in *Jackson County, Mississippi v. KPMG, LLP* ("*Jackson County*") is reported at ___ So. 3d. ___, Case No. 2018-CA-00071, 2019 WL 242688. Pet. App. 35a–45a. The circuit court's order granting petitioner's motion to compel arbitration in *Jackson County* is unreported. Pet. App. 46a–48a.

JURISDICTION

The Supreme Court of Mississippi issued its decision in *Singing River* on October 25, 2018. Petitioner filed a timely motion for rehearing, and the Supreme Court of Mississippi denied that motion on

January 10, 2019. The Supreme Court of Mississippi issued its decision in *Jackson County* on January 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (FAA) provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the FAA provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any . . . court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement . . .

> be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4.

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

A. Overview

The two cases below present a unique procedural posture and fact pattern highlighting a state court's hostility to arbitration in a politically charged environment. If allowed to stand, the two cases below will provide a road map for state courts hostile to arbitration to take advantage of a muddled distinction between formation and enforceability, in order to defeat parties' bargained-for contractual expectations and usurp the arbitrators' delegated powers. In both cases, the plaintiffs—a county-owned hospital and the county—sued KPMG, an independent public accounting firm, based upon the same written contracts, or engagement letters, that the hospital and KPMG had negotiated, executed, performed, and paid years prior. Those engagement letters contain arbitration provisions with a delegation clause. In the first case, the Mississippi Supreme Court refused to

compel arbitration, reasoning that the engagement letters as a whole were *unenforceable* on state public policy grounds and defying the delegation clause in those engagement letters that refer gateway questions of arbitrability to the arbitrators. Seventy-five days later, this Court issued its opinion in *Henry Schein*, which made clear that "when the parties' contract delegates arbitrability questions to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein*, 139 S. Ct. at 531. Only nine days after *Henry Schein*, the Mississippi Supreme Court issued its opinion in the second case, again refusing to honor the delegation clause but changing its reasoning to hold that the very same engagement letters, on the very same facts and based on the very same state rule, were never *formed* in the first place. Because, according to the court, no contract had been formed, there was no delegation provision to enforce. The Mississippi Supreme Court's recharacterization of the contract issue as one of formation rather than enforceability between the first and second cases is a transparent effort to avoid this Court's jurisprudence regarding arbitration.

This Court has held that under the FAA, a court generally may not address issues going to the contract as a whole and may not address issues related to an arbitration agreement's validity or enforceability when the parties have delegated those questions to an arbitrator. *See Henry Schein*, 139 S. Ct. at 530–31; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–68 (2010); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). But with respect to issues regarding the "making" of the arbitration agreement,

9 U.S.C. § 4, the court generally must make the determination itself before compelling arbitration. *See Henry Schein*, 139 S. Ct. at 530; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

Courts have struggled with how to determine whether a challenge is to the "making" or existence of the agreement to arbitrate, as opposed to its validity or enforceability,[1] and how to address the "making" of an agreement to arbitrate when the challenge is to the contract as a whole. In *Granite Rock*, however, the Court cautioned: "[I]t is not the mere labeling of a dispute for contract law purposes that determines whether an issue is arbitrable. The test for arbitrability remains whether the parties consented to arbitrate the dispute in question." *Id.* at 304 n.11.

Not only is the Mississippi Supreme Court's about-face between *Singing River* and *Jackson County* a transparent attempt to evade this Court's decision in *Henry Schein* and to single out Petitioner's arbitration agreements for disfavor, but the court's reasoning also fails on its own terms: the making of a contract cannot be at issue when a party's claims depend on the existence of the very contract that delegates gateway issues of arbitrability to the arbitrators. The Mississippi Supreme Court's decisions are profoundly flawed, and they necessitate this Court's review.

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[1] Courts interchangeably use the words "existence" or "formation" and similarly alternate between "enforceability" and "validity." *See, e.g.*, *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018).

B. Facts And Procedural History

Petitioner KPMG performed audits of the annual financial statements of Respondent Singing River, a community hospital owned by Respondent Jackson County, for fiscal years 2008 through 2012. Pet. App. 3a, 37a. KPMG also audited the annual financial statements of Singing River's retirement plan for fiscal years 2008 through 2011. KPMG performed these audits pursuant to written, signed engagement letters with Singing River that contain a mandatory arbitration provision, broadly stating that "[a]ny dispute or claim arising out of or relating to this Engagement Letter or the services provided hereunder . . . shall be submitted . . . to binding arbitration . . . ." The arbitration provision provides that "any dispute concerning the applicability, interpretation, or enforceability of these dispute resolution procedures, *including any contention that all or part of these procedures is invalid or unenforceable*, shall be governed by the Federal Arbitration Act and resolved by the arbitrators." Pet. App. 11a–12a, 27a, 41a–42a (emphasis added).

In 2015, Singing River sued KPMG in the Circuit Court of Hinds County, Mississippi, for breach of contract and professional negligence and malpractice arising from KPMG's audits. *Id.* at 10a. In 2017, Jackson County separately filed suit against KPMG in the Circuit Court of Jackson County, Mississippi, asserting similar claims based, again, on those same audits. *Id.* at 38a. Both plaintiffs' claims arise out of

the same set of engagement letters that contain the arbitration provision.[2] *Id.* at 10a, 38a.

KPMG moved to compel arbitration in both cases, and in each the plaintiff invoked a century-old judicially-created state contract rule to avoid arbitration: Mississippi's "minutes rule." *Id*. at 11a, 39a. Mississippi's minutes rule derives from Mississippi Code Section 41–13–35(3), which requires a board of trustees of a community hospital to "keep minutes of its official business[.]" Building on that statute, Mississippi courts have developed a rule that "where a public board engages in business with another entity, '[n]o contract can be implied or presumed, it must be stated in express terms and recorded on the official minutes [as] the action of the board[.]'" *Wellness, Inc. v. Pearl River Cty. Hosp.*, 178 So. 3d 1287, 1291 (Miss. 2015) (citation omitted). "[T]he entire contract need not be placed on the minutes. Instead, it may be enforced where 'enough of the terms and conditions of the contract are contained in the minutes for the determination of the liabilities and obligations of the contracting parties without the necessity of resorting to other evidence.'" *Id*. (quoting

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[2] Under Mississippi law, the existence of a valid and enforceable contract is a prerequisite for Singing River's and Jackson County's asserted claims. *See Wirtz ex rel. Whitley v. Switzer,* 586 So. 2d 775, 779 (Miss. 1991) (holding that professional negligence claims require the existence of a professional relationship), *abrogated on other grounds by Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So. 2d 1100 (Miss. 2007); *Singleton v. Stegall*, 580 So. 2d 1242, 1244 (Miss. 1991) (holding that the duties of a professional in tort, contract, and otherwise only arise if the professional was engaged by the client).

Thompson v. Jones Cty. Cmty. Hosp., 352 So. 2d 795, 797 (Miss. 1977)). The minutes rule is intended to further Mississippi public policy to assure that the public has the benefit of contracts considered by the governing board and to make those contracts known to the public. *Thompson*, 352 So. 2d at 796.

In response to KPMG's motion to compel arbitration, Singing River acknowledged that contracts had been formed with KPMG and that Singing River's minutes sufficiently recorded the engagement letters for them to be valid and enforceable contracts, but contended that the arbitration provisions within the engagement letters had not been specifically recorded in the minutes and therefore were not enforceable.[3] Pet. App. 23a. Singing River did not depart from this position until partway through its oral argument before the Mississippi Supreme Court, when its counsel began to use the minutes rule to challenge the engagement letters as a whole. The circuit court denied KPMG's motion to compel arbitration in a one-paragraph opinion. *Id.* at 33a–34a. The circuit court's explanation of its ruling was "that the terms of the contract herein were not sufficiently spread across the minutes and, thus, the arbitration agreement is not enforceable." *Id.* at 33a.

In *Jackson County*, on the other hand, the county took several inconsistent positions based on the minutes rule: (1) it argued that no contract between

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[3] Although Singing River used the minutes rule to challenge the arbitration provision, it made no challenge specific to the delegation clause.

KPMG and Singing River existed at all; (2) it seemed to accept that agreements between Singing River and KPMG were formed, but argued that the contracts as a whole were unenforceable; and (3) it admitted the formation and enforceability of the engagement letters as a whole, but appeared to challenge the arbitration provisions therein as unenforceable.[4] The circuit court granted KPMG's motion to compel arbitration, ruling that because the parties had delegated issues of arbitrability, the arbitrators must resolve the effect of the minutes rule in the first instance. Pet. App. 46a–48a, 53a–56a.

KPMG appealed the denial of its motion in *Singing River*, and Jackson County appealed the grant of KPMG's motion in *Jackson County*. The two appeals were pending before the Mississippi Supreme Court at the same time. Ultimately, the court issued two separate opinions, relying upon the minutes rule to refuse to give effect to the arbitration provision and delegation clause in the engagement letters. First, on October 25, 2018, the court held in *Singing River* that the engagement letters and their arbitration provisions were *unenforceable* under the minutes rule. Pet. App. 1a–30a. The court rejected KPMG's argument that, because the parties had delegated questions of enforceability to arbitrators, the question of compliance with the minutes rule was for the arbitrators to

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[4] Jackson County thus used the minutes rule to challenge the engagement letters in their entirety and, alternatively, the arbitration provisions therein. Like Singing River, Jackson County made no challenge specific to the delegation clause.

resolve. *Id.* at 27a. KPMG petitioned for a rehearing of the *Singing River* decision.

While KPMG's petition for rehearing was pending in *Singing River*, this Court issued its decision in *Henry Schein*, holding that, "[w]hen the parties' contract delegates [an] arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S. Ct. at 529. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator," the Court explained, "a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. Two days later, the Mississippi Supreme Court denied KPMG's motion for rehearing in *Singing River*.

Nine days after *Henry Schein*, on January 17, 2019, the Mississippi Supreme Court issued its decision in *Jackson County*, framing the same minutes rule argument, involving the same engagement letters and the same facts, as "go[ing] to the issue of whether a contract containing an arbitration provision *was ever formed in the first place*." Pet. App. 35a–45a, 42a (emphasis added). This time, the Mississippi Supreme Court held that failure to comply with the minutes rule meant that contracts were never formed, and therefore there was no delegation clause to enforce. Pet. App. 42a & 44a n.5. Both of the court's rulings were in reference to the engagement letters as a whole and were not based on any argument unique to the delegation clause.

REASONS FOR GRANTING THE PETITION

A. The Court's Guidance Is Needed As To When The Existence Of An Agreement To Arbitrate Is At Issue.

Parties may include delegation clauses in their contracts, agreeing "to arbitrate 'gateway' questions of 'arbitrability,'" and the "FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr.*, 561 U.S. at 68–70. Where the parties have chosen to delegate questions of arbitrability to the arbitrator, a court may not address those issues itself. *See Henry Schein*, 139 S. Ct. at 529. This Court cautioned that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."[5] *Id.* at 530 (citing 9 U.S.C. § 2). But when a contract challenge puts the existence of an agreement to arbitrate at issue is unclear.

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[5] This Court has held that arbitration provisions are severable from contracts that contain them and therefore that the enforceability of an arbitration agreement must be considered separately from the enforceability of the entire contract. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Thus, while challenges to the validity of the contract as a whole are for the arbitrators to resolve, courts must consider validity challenges directed to the arbitration provision specifically, provided a delegation clause does not exist. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. at 70–71. When a delegation clause does exist, and is not challenged specifically, it must be treated as valid under Section 2 and be enforced under Sections 3 and 4, leaving any challenge to the validity of the agreement as a whole for the arbitrator. *Id.* at 72.

This Court has twice acknowledged the distinction between issues related to the enforceability of arbitration agreements and to the determination whether any arbitration agreement "was ever concluded." But the Court has not reached the issue of what kinds of challenges to the existence of a contract as a whole require courts, not the arbitrators, to address the existence of agreements to arbitrate when the contract delegates gateway issues of arbitrability to the arbitrators. In *Buckeye* this Court stated:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.,* 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99 (C.A.3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.,* 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco,* 330 F.3d 1266 (C.A.10 2003).

546 U.S. at 444 n.1. The Court repeated this distinction in *Rent-A-Center* but did not reach the issue of what challenges put the existence of an agreement to arbitrate at issue, instead only addressing who decides validity challenges to an arbitration agreement. *Rent-*

A-Center, 561 U.S. at 70 n.2. Later in the same term, the Court rejected the notion that "mere labeling of a dispute for contract law purposes" determines "whether the parties consented to arbitrate the dispute in question." *Granite Rock*, 561 U.S. at 304 n.11.

Because courts must decide whether an agreement to arbitrate exists, they must first be able to determine when a contract challenge goes to the very existence of an agreement to arbitrate, as distinguished from the enforceability of an agreement. This distinction "is not without its difficulties, however." George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 32 (2012). Acting without the Court's guidance on these issues, state and federal courts have attempted to draw lines between the issues of formation and validity, a distinction that has been recognized as "unclear at the margins" and "murky." *See, e.g.*, *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018) (noting that the "difference between formation and validity may be unclear at the margins"); *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 192 (Tex. 2009) (Willett, J., concurring) ("I dislike the murky line between contract formation and contract validity."). As explained below, the confusion has yielded division in authority between federal and state courts of appeals, and this Court's intervention is necessary to prevent further erosion of the national policy favoring arbitration under the pretext of state contract law.

1. The Decisions Below Conflict With Each Other And With The Fifth Circuit On Whether Mississippi's Minutes Rule Challenges The Existence Of An Agreement To Arbitrate.

The United States Court of Appeals for the Fifth Circuit and the Mississippi Supreme Court have issued conflicting opinions as to whether Mississippi's minutes rule challenges a contract's enforceability, formation, or both, and the criteria to be used to make that determination.

In a factually similar case involving a motion to compel arbitration of a suit brought on behalf of a community hospital against its auditor, *Lefoldt v. Horne, L.L.P.*, 853 F.3d 804 (5th Cir. 2017), the Fifth Circuit first considered whether Mississippi's minutes rule challenged the existence of an agreement to arbitrate, noting that "whether the minutes requirement precludes enforcement of an agreement or instead forecloses formation of an agreement . . . is a close question." *Id.* at 812. The court looked to whether the minutes rule affected whether there was a "meeting of the minds" between the parties. *Id.* at 811. After reviewing the Mississippi precedent, the Fifth Circuit stated that it "cannot say that, categorically, the Mississippi minutes requirement pertains to contract formation rather than the validity or enforceability of a contract or certain of its provisions" and ultimately concluded that depending on the challenge, the minutes rule might relate either to validity or to formation. *Id.* at 813.

The Mississippi Supreme Court confronted this identical issue in *Singing River* and held that the minutes rule precluded *enforcement* of the contract terms, including the delegation clause. The court cast the minutes rule as an enforceability issue no fewer than nine times, explicitly refusing to delegate the minutes rule challenge to the arbitrators because the contracts as a whole were unenforceable:

> KPMG asserts that the issue of whether the [contracts] are *enforceable* under Mississippi's minutes rule is for an arbitrator to decide. We disagree. Pursuant to the minutes rule, the letters signed by [Singing River's CFO] are *unenforceable* in their entirety. Thus, the delegation clause contained in the dispute-resolution provision attached to the engagement letters is *unenforceable* as well.

Pet. App. 27a (emphasis added).

Finally, three months later—and mere days after this Court's opinion in *Henry Schein* reinforcing the enforceability of delegation clauses—the Mississippi Supreme Court revised its approach in *Jackson County*. The court embraced its earlier ruling in *Singing River* but this time explained that the "minutes-rule argument goes to the issue of whether a contract containing an arbitration provision *was ever formed in the first place*." Pet. App. 42a (emphasis added). Absent a formed contract, the court held *Henry Schein* inapplicable because it found "no evidence spread upon the minutes that KPMG and Singing River agreed to arbitrate, let alone delegate arbitrability questions to an arbitrator." *Id.* at 44a n.5.

An analogous case out of the Fifth Circuit highlights the inconsistent positions reached when public entities raise problems with formalities in the contracting process as barriers to arbitration provisions in those contracts. In *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986), *abrogated on other grounds by Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 248 n.6 (5th Cir. 1998), the party attempting to avoid arbitration asserted that the contract was "void as never having been entered into" because it did not comply with a state statute that required it to be approved by certain government officials. The court rejected this argument and compelled arbitration, finding that this issue was required to be decided by the arbitrator. *Id.* at 244–45. The minutes rule—which is similar in form and policy to subsequent contract approval by public officials—likewise is not a challenge to the existence of an agreement to arbitrate. In both instances, these arguments should be viewed as raising enforceability issues for resolution by arbitrators.

This Court's intervention is necessary to address this conflict in authority regarding whether the minutes rule or similar state law contract challenges properly put the making of an agreement to arbitrate at issue within the meaning of the FAA. 9 U.S.C. § 4.

2. Courts Are In Conflict Regarding Whether Suing To Enforce A Contract Containing The Arbitration Clause Evidences The Existence Of An Agreement To Arbitrate.

The Mississippi Supreme Court's ultimate ruling that no contracts were ever formed is even more

troubling because both cases involve written contracts that were negotiated, executed, performed, and paid—and because both plaintiffs' complaints are expressly based upon the contracts the Mississippi Supreme Court now says were never formed. The decisions below highlight a division of authority as to whether, where a party resisting arbitration bases its substantive claims on a contract containing an arbitration clause, a court should be "satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. The conflict is evidence of courts' struggle with demarcating issues related to the making of an agreement to arbitrate for purposes of the FAA and broader challenges to contracts containing those arbitration clauses.

In *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989), the plaintiff sued for breach of contract, and that contract contained an arbitration clause. The defendant moved to compel arbitration, despite also arguing that a valid contract did not exist because the contract was in draft form and not finalized. The United States Court of Appeals for the Ninth Circuit rejected the plaintiff's inconsistent argument that the defendant did not have a right to enforce the arbitration provisions because it denied that a valid contract existed, reasoning that such a finding would produce "an absurd result."

> The district court could grant [plaintiff] relief on the contract only if it finds that the 1986 Draft was finalized. But if the 1986 Draft were final and valid, the arbitration provision would be valid as well since it has not been the subject of

> any independent challenge. And if the arbitration provision were valid, [plaintiff's] claims would not belong in federal court in the first place.

Id. at 1410. Plaintiff's suit on the contract, according to the Ninth Circuit, evidenced its existence.

Similarly, the Supreme Court of Alabama held that a contract's existence cannot be at issue when the party rejecting arbitration uses that contract as the basis for relief. *See Serv. Corp. Int'l v. Fulmer*, 883 So. 2d 621, 630–31 (Ala. 2003) (compelling unconscionability and lack of mental capacity challenges to arbitration because existence of contract was not at issue where plaintiff's "breach-of-contract claim (and perhaps some of his other claims) is based upon [plaintiff's] own assertion that a valid contract exists between him and [defendant]").

The United States Court of Appeals for the Third Circuit, however, rejected the *Teledyne* approach. The "appeal present[ed] the anomalous situation where a party suing on a contract containing an arbitration clause resists arbitration, and the defendant, who denies the existence of the contract, moves to compel it." *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 100 (3d Cir. 2000). Expressly declining to follow the Ninth Circuit's reasoning in *Teledyne*, the Third Circuit rejected "a distinction between cases in which the party resisting arbitration is suing to enforce the underlying agreement and those in which it denies the entire agreement." *Id.* at 110. The Third Circuit held even where a party resisting arbitration sues upon the contract containing the arbitration provision, the court

must affirmatively decide whether the signature on the contract bound the party before it could order arbitration. The court thought any "absurdity" from this decision was "no greater" than that identified in *Teledyne*:

> [F]or there is also something odd about referring this matter to arbitrators without a definitive conclusion on the issue whether an agreement to arbitrate actually existed. Were we to order the District Court to compel arbitration and were the arbitrators ultimately to decide that [the] signature did not bind [the defendants] they will have effectively decided that they had no authority to arbitrate the dispute. Such a ruling would, however, allow the arbitrators to determine their own jurisdiction, something that is not permitted in the federal jurisprudence of arbitration, for the question whether a dispute is to be arbitrated belongs to the courts unless the parties agree otherwise.

Id. at 111.

Although it did not say so explicitly, the Mississippi Supreme Court in *Singing River* and *Jackson County* followed the lead of the Third Circuit, rejecting KPMG's argument that plaintiffs who sue on contracts should be bound by the arbitration provisions and delegation clauses therein, on the rationale that the public entity's minutes are the sole source of evidence to which a court may look for proof of an agreement to

arbitrate or to delegate arbitrability questions to arbitrators.[6] Pet. App. 23a, 29a, 41a–44a.

B. The Decisions Below Are Incorrect.

The decisions below are incorrect for two reasons. First, the creative relabeling evidenced in the Mississippi Supreme Court's pre- and post-*Henry Schein* decisions allow states to circumvent the FAA and violate the parties' bargained-for contractual expectations, and it does so based upon a distinction that has no relevance outside the arbitration context. Neither the minutes rule nor similar challenges put the making of an agreement to arbitrate at issue because these types of challenges do not turn on whether the parties agreed to arbitrate, but whether the state's public policy is served.

Second, when a plaintiff's claims depend upon the existence of a contract that delegates questions of arbitrability to arbitrators, the plaintiff's suit on the contract should be evidence of the plaintiff's consent to arbitration for purposes of enforcing a delegation clause.

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[6] In *Granite Rock*, one of the parties seeking arbitration argued that the plaintiff had "implicitly" consented to arbitration when it sued to enforce provisions in the collective bargaining agreement. The Court noted in dictum, "it is of course true that when *Granite Rock* sought that injunction it viewed the CBA (and all of its provisions) as enforceable." *Granite Rock*, 561 U.S. at 308. But the Court did not reach the question of "implicit" consent to arbitration by suing on the contract containing the arbitration provision, because the dispute was held to be outside the scope of the provision. *Id.* at 308–09. Notably, the CBA did not contain a delegation clause.

1. The Decisions Below Allow States To Circumvent The FAA.

The Mississippi Supreme Court's relabeling of the minutes rule from an enforceability challenge to a formation challenge on identical facts is a creative attempt to sidestep the FAA and to categorize the minutes rule in a way that allows the court, and never the arbitrator, to decide all disputes regarding compliance with the minutes rule. The FAA does not allow the courts to eliminate the parties' contractual arbitration rights by a mere change in label. *See Granite Rock*, 561 U.S. at 304 n.11.

While the FAA clearly "preempts any state rule discriminating on its face against arbitration," it also "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred*, 137 S. Ct. at 1426. Relatedly, while the FAA's saving clause permits invalidation of arbitration agreements under "generally applicable contract defenses, such as fraud, duress, or unconscionability," even a contract defense that formally falls within Section 2's saving clause can "stand as an obstacle to the accomplishment of the FAA's objectives" and therefore can be preempted. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 343 (2011) (citation omitted). "[T]he saving clause does not save defenses that target arbitration either by name *or by more subtle methods*." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (emphasis added).

Mississippi's belated categorization of the minutes rule as a challenge to the "making" of the agreement is

the type of "subtle method" that substitutes a state's public policy for that of the FAA.[7] The court's about-face in casting the minutes rule first as going to enforceability, and then, post-*Henry Schein,* as going to formation, demonstrates that the Mississippi Supreme Court singled out delegation clauses for disfavored treatment. States do not "have free rein to decide" when contracts are formed in the first instance, if such distinction selectively disfavors arbitration. *Kindred*, 137 S. Ct. at 1428. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once

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[7] Four states in addition to Mississippi—Georgia, Missouri, Ohio, and South Dakota—have a similar minutes rule for contracts with public entities and have held contracts either unenforceable or not formed due to failure to comply with the minutes rule, and thus this issue has arisen in other states with some frequency. *See Commercial Credit Corp. v. Mason*, 260 S.E.2d 352, 353 (Ga. App. 1979) (holding alleged contract between county and contractor could not be basis of action because agreement had not been reduced to writing and entered upon the minutes and therefore was invalid); *Ballman v. O'Fallon Fire Prot. Dist.*, 459 S.W.3d 465, 468 (Mo. Ct. App. 2015) (holding that employment agreements with municipal entity were void and unenforceable because minutes failed to outline terms of proposed contract); *Drillex, Inc. v. Lake Cty. Bd. of Comm'rs*, 763 N.E.2d 204, 207 (Ohio Ct. App. 2001) (holding no valid contract existed because no contract was entered in minutes of County Board of Commissioners); *Hamar Constr. Co. v. Union Cty.*, 248 N.W.2d 65, 66 (S.D. 1976) (holding that contract between county and construction company was void because contract was not spread upon board's minutes); *Bak v. Jones Cty.*, 210 N.W.2d 65, 66 (S.D. 1973) (holding that alleged contract between county and contractor was null and void because county had no authority to contract without resolution entered on minutes).

properly made." *Id*. But that is exactly what the court's relabeling did in the decisions below: it selectively found a contract improperly formed (as opposed to unenforceable) so that it could ignore the delegation clause contained in those contracts.

The Mississippi Supreme Court cannot flout the FAA's purpose, substituting its own public policy concerns for Congress's. Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements" and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citations omitted). This Court "cannot accept" a state court's "conclusion that enforceability of the arbitration agreement should turn on [the state's] public policy and contract law." *Buckeye,* 546 U.S. at 446.

The Mississippi Supreme Court's about-face on "enforceability" and "formation" is all the more problematic given that the distinction between an agreement's existence and validity is irrelevant outside of the arbitration context. This "purely verbal" label has resulted in criticism over "the 'metaphysical' lengths to which the distinction between validity and existence has been taken." Restatement (Third) U.S. Law of Int'l Comm. Arb. § 5-8 (Tentative Draft No. 1, 2010) (quoting Alan Scott Rau, *Separability in the United States Supreme Court*, 2006 Stockholm Int'l Arb. Rev. 1, 18–19).

Prior to the decisions here, no Mississippi state court had opined whether the minutes rule is a formation requirement or a question of a contract's enforceability for purposes of analyzing an arbitration

provision's delegation clause. The *Lefoldt* court, calling it a "close question," struggled with whether the minutes rule pertains to contract formation rather than the validity or enforceability of certain contract provisions. *Lefoldt*, 853 F.3d at 812–13. Ultimately, the *Lefoldt* court concluded that the minutes rule may impact either inquiry, depending on the content of the minutes.[8] When the Mississippi Supreme Court initially confronted the question head-on in *Singing River*, it stated repeatedly that the minutes rule went to a contract's enforceability.[9] Having concluded that the minutes rule presented an enforceability issue, under this Court's precedent the court should have delegated determination of compliance with the minutes rule to the arbitrators pursuant to the delegation clause. But then, post-*Henry Schein*, the

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[8] Even if this is the proper approach, and the minutes rule only sometimes affects the parties' consent to an agreement to arbitrate, here it does not. As the decisions below acknowledge, the engagement letters were discussed and approved each year by Singing River's board or a board committee, as documented in the minutes for each.

[9] It is appropriate to view the minutes rule as an enforceability issue given that the minutes rule exists for public policy reasons. As the court described in *Singing River*, "[t]he underlying rationale for the minutes rule *provides transparency for the benefit of the public*." Pet. App. 23a–24a (emphasis added). The minutes rule serves two public policy purposes. First, "the public is entitled to the judgment of the board," so that the "result reached will represent the wisdom of the majority rather than the opinion or preference of some individual member," and (2) to provide a written record "entered upon the minutes at the time, *and to which the public may have access to see what was actually done*." *Id.* at 24a (citing *Wellness, Inc.*, 178 So. 3d at 1293 (emphasis added)).

court relabeled the minutes rule challenge on the same engagement letters and the same facts as a formation question, not for resolution by the arbitrators under the delegation clause, and used this esoteric state policy to negate the engagement letters in their entirety.

2. A Court Should Be Satisfied That An Arbitration Agreement Exists When A Party Invokes A Contract Containing Such An Agreement As The Basis For Its Claims.

Section 4 of the Federal Arbitration Act provides that "upon being satisfied that the making of the agreement for arbitration . . . is not in issue," the court shall order arbitration. 9 U.S.C. § 4. The "making" of (*i.e.*, the existence of) an agreement should not reasonably be in dispute where a party seeks affirmative relief based upon a contract that contains an arbitration provision. Here, there was a meeting of the minds regarding KPMG's engagement to perform audits for Singing River; the plaintiffs alleged the formation of engagement letters in their complaints and KPMG's obligation to perform pursuant to those engagement letters. The minutes rule challenge, as applied by the Mississippi Supreme Court, applies to the engagement letters as a whole and equally to every term therein; it is not a specific challenge to the arbitration provisions, let alone the delegation clauses. In such a case, the Court should find, at least for purposes of deciding arbitration questions, that contracts exist and that any further challenge to arbitrability under those contracts is to be decided by the arbitrators pursuant to the delegation clause in those contracts. Such a rule aligns with the principle

that "[a]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

At a minimum, existence of an arbitration agreement which includes a delegation clause should be deemed sufficiently established to compel arbitration under the FAA where a plaintiff's claims depend on the contract containing the arbitration provision. Here, Singing River and Jackson County sued KPMG, basing their claims upon the same engagement letters that contain the arbitration provision and delegation clause. In neither case could they prevail if no contracts existed between KPMG and Singing River. It is eminently logical that a party's decision to sue for breach of contract manifests an acknowledgement by that party that the contract at issue was formed. Singing River's and Jackson County's about-face on this issue, solely to avoid arbitration, is legal gamesmanship, and neither the FAA nor the courts should allow plaintiffs to argue "heads I win, tails you lose" to the detriment of contractual arbitration rights.

C. The Questions Presented Are Important.

1. The Decisions Below Make It Trivially Easy For Courts To Undermine The FAA.

The decisions below, if left unchecked by this Court, will invite other courts to creatively sidestep this Court's decisions allowing parties to delegate threshold

issues of arbitrability to arbitrators. If a court wants to insulate a contract challenge from an arbitrator, all it need do is cast that challenge as an existence or a formation challenge. And then "oh so coincidentally" the delegation clause is thereby stripped of its power. *Kindred*, 137 S. Ct. at 1426. Such a rule "make[s] it trivially easy for States to undermine the [FAA]—indeed, to wholly defeat it." *Id.* at 1428. *See Abeona Therapeutics, Inc. v. EB Research P'ship, Inc.*, No. 1:18-cv-10889-DLC, 2019 WL 623864, at *5 (S.D.N.Y. Feb. 14, 2019) (noting that the purpose of the FAA "is not served by allowing parties to evade a validly executed arbitration clause by constructing a challenge to the underlying contract as one going to the 'formation' of the agreement to arbitrate"). To preserve the purposes of the FAA, review of the decisions below is necessary.

2. Without The Court's Guidance On What Challenges Put The Existence Of An Agreement To Arbitrate In Dispute, Inconsistent Results Will Continue.

Allowing the decisions below to stand without review threatens nationwide consistency in the application of the FAA. This Court has not defined what type of challenge puts the "making" of an agreement to arbitrate at issue, creating confusion as to when an arbitration agreement, specifically a delegation clause, will be given effect. If left unchecked, the two decisions below will open the door for other states hostile to arbitration agreements to circumvent the FAA and this Court's precedent, simply

by relabeling a state law contract challenge as going to formation rather than enforceability.

The potential for result-oriented relabeling of state law contract challenges extends beyond the minutes rule cases discussed above. Courts also have reached conflicting conclusions as to whether, for example, illusoriness goes to formation or enforceability. *Compare Nat'l Fed'n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 87 (1st Cir. 2018) ("because Texas law treats illusoriness as an issue regarding consideration needed to enter into a contract, the presence of an illusory agreement therefore indicates no agreement to arbitrate exists between the parties"), *and Baker v. Bristol Care, Inc.,* 450 S.W.3d 770, 774 (Mo. 2014) (deciding claim that contract lacked consideration raised contract formation issue that must be resolved by court), *with Arnold*, 890 F.3d at 551 ("allegation that a particular provision of the contract is illusory is properly considered a validity challenge rather than a formation challenge"), *and IHS Acquisition No. 131, Inc. v. Iturralde*, 387 S.W.3d 785, 793 (Tex. App. 2012) (concluding that determination of whether contract was illusory was a matter of validity or enforceability under Texas law, not a challenge to contract's formation).

Likewise, courts have treated lack of capacity alternately as a formation and an enforceability question. *Compare Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (holding that court must decide mental capacity to enter contract), *and Morgan Stanley & Co.*, 293 S.W.3d at 187 ("[b]ecause the Supreme Court has grouped mental capacity with the other issues of

contract formation, we do so as well"), *with Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (holding that arbitrator is to decide mental capacity defense); *see also* Bermann, 37 Yale J. Int'l L. at 34 ("Under standard U.S. contract doctrine, lack of capacity does not prevent a contract from coming into existence; it merely renders the contract unenforceable.").

Such confusion undermines certainty of contract and defeats contracting parties' expectations concerning arbitration. It also makes the right to enforce an arbitration agreement dependent "on the particular forum in which it is asserted," *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984), and interferes with the FAA's purpose of creating nationwide standards for arbitration and to declare "a national policy favoring arbitration." *Id.* at 10.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of 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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