No. _____

In The
Supreme Court of the United States

MATT A. ROGERS,

Petitioner,

v.

SWEPI LP, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the severability doctrine first announced in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–05 (1967), applies in determining who decides arbitrability in the absence of clear and unmistakable evidence that the parties delegated that issue to an arbitrator, as required by *First Options of Chicago* v. *Kaplan*, 514 U.S. 938, 944–45 (1995).

2. Whether 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.

3. Whether a contractual defense directed solely to the validity of an arbitration provision must be decided by an arbitrator simply because that defense could apply to other provisions in the contract containing the arbitration provision.

PARTIES TO THE PROCEEDING

Petitioner Matt A. Rogers was the appellee in the court below. Respondents are SWEPI LP and Shell Energy Holding GP, LLC, and were appellants in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matt A. Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–21) is reported at 757 F. App'x 497. The order of the court of appeals denying rehearing (App. 32) is unreported. The order of the district court denying SWEPI's motion to compel arbitration (App. 22–31) is unreported, but is available at 2018 WL 797331.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2018. A timely petition for rehearing was denied on February 19, 2019. Justice Sotomayor extended the time for filing a petition for a writ of certiorari to and including June 19, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the FAA, 9 U.S.C. § 4, 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 United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof. . . .

STATEMENT

This case presents the opportunity to address questions on which the circuits are split, and to resolve confusion among the lower courts regarding a familiar and recurring issue: who, courts or an arbitrator, decides whether a claim is arbitrable? This Court's prior decisions set forth fundamental principles for deciding this issue, but lack clear guidance as to how those principles intersect with each other. The result is confusion on an issue that the Court has observed carries "practical importance." *First Options of Chicago* v. *Kaplan*, 514 U.S. 938, 942 (1995).

The starting point for this issue—as with all questions of arbitrability—is the foundational principle that "[a]rbitration is strictly a matter of consent." *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (quotation marks omitted). This principle extends to questions of *who* decides whether a claim is arbitrable: "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943 (emphasis in original) (citations omitted). Given "the significance of having arbitrators decide the scope of their own powers," *id.* at 945, this Court requires questions of arbitrability to be decided by courts in the absence of "clea[r] and unmistakabl[e]" evidence that the parties delegated that issue to an arbitrator, *id.* at 944 (alterations in original) (quotation marks omitted).

Rather than examine whether there was any evidence delegating arbitrability to an arbitrator, the court below held that an arbitrator should decide whether Rogers' claims are arbitrable. (App. 6–9). To reach that conclusion, the panel majority relied on the severability doctrine, which posits that when a party challenges the validity of the entire agreement containing an arbitration clause—as opposed to the validity of the arbitration clause itself—that challenge effectively goes to the merits of the underlying dispute, which is for an arbitrator to decide. See *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–05 (1967); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445–46 (2006).

Rogers argued below that an agreement to arbitrate was never formed because of the non-occurrence of a condition precedent. Questions of whether an arbitration agreement was formed are "always" questions for a court to decide. See *Granite Rock*, 561 U.S. at 297. And under Ohio law, conditions precedent are a matter of contract formation. See *Transtar Elec., Inc.* v. *A.E.M. Elec. Servs. Corp.*, 16 N.E.3d 645, 650 (Ohio 2014) ("A condition precedent is a condition that must be performed before obligations in a contract become effective.") (quotation marks omitted). Nevertheless, the decision below held that Rogers' challenge related to validity. (App. 7). In reaching this conclusion, the panel majority ignored state law, conflicting with this Court's precedent and one other circuit holding that state law controls such inquiries. Furthermore, the decision below exemplifies the inconsistent manner in

which courts have grappled with the distinction between formation and validity.

Separately, even though Rogers directed his challenge to the arbitration clause specifically, the decision below held that the challenge should be decided by an arbitrator because it implicated other provisions of the contract (in that the same condition precedent was also a condition precedent to other obligations beyond the arbitration provision). (App. 7–9). This reasoning, however, deepens an existing circuit split regarding the treatment of challenges that, while directed to an arbitration clause, implicate other parts of the same agreement, which the First, Second, Third, Fifth, and Ninth circuits hold must be decided by courts, while the Sixth and Eleventh circuits hold such challenges are for the arbitrator to decide.

A. Background

Rogers and hundreds of other Ohio landowners entered into oil and gas leases with SWEPI LP ("Shell") in 2011. (App. 1). Shell induced the landowners to sign the leases with a promise to pay a "signing bonus" of $5,000 per acre.[1] (App. 1).

The lease was structured in two phases so that some of its provisions did not become binding or effective unless and until the signing bonus was paid. In the first phase (the "title-review phase"), Rogers

[1] A signing bonus is "a payment that is made in addition to royalties and rent as an incentive for a lessor to sign an oil-and-gas lease." *Bonus*, BLACK'S LAW DICTIONARY (9th ed. 2009).

conveyed a leasehold interest to Shell and Shell had an opportunity to review Rogers' title. (App. 33–34 (¶1)). Under the title-review phase of the agreement, Shell was obligated to pay the signing bonus unless, within 120 days after the execution of the lease, Shell determined in good faith that Rogers lacked marketable title and terminated the lease. (App. 44 (¶16)). Once the signing bonus was paid, the second phase of the lease (the "operating phase") became binding and effective. (App. 44 (¶16)) ("By Lessor's signing this Lease, Lessor promises to proceed with this Lease and be *bound* thereby *upon* Lessee's paying the full amount of the bonus payment.") (emphasis added). In effect, the lease had a narrow initial agreement that gave Shell an opportunity to encumber Rogers' land—and therefore preclude its competitors from leasing the land—while Shell completed its due diligence. Upon payment of the signing bonus at the end of the title-review phase, the lease would transition to the operating phase, which governed the long-term relationship between the parties regarding exploration and production activities that Shell might conduct on Rogers' land.

This two-phase structure is evident from the text of the lease, which states that Rogers was *never bound* to portions of it until the signing bonus was paid. For example, Paragraph 8 of the lease defines the lease's "Effective Date" as the date Rogers executed the lease. (App. 39). That was the date Rogers encumbered his land and provided Shell time to review his title. (App. 33 (¶1), 44 (¶16)). But Paragraph 16, which describes the signing bonus, states: "By Lessor's signing this

Lease, Lessor promises to proceed with this Lease and be *bound* thereby *upon* Lessee's paying the full amount of the bonus payment." (App. 44) (emphasis added). Paragraph 25 reinforces the fact that Rogers' consent to the operating-phase portions of the lease was conditioned upon receipt of the signing bonus: "Upon this Lease *taking effect* (thus, upon Lessor's *receipt of the bonus payment*), Lessee's obligations under this Lease shall not be diminished or affected by any title encumbrance on the Lease Premises. . . ." (App. 51) (emphasis added). Thus, only after Shell paid the signing bonus would the remainder of the lease's terms become binding and effective.

There is no dispute that Shell never paid Rogers the signing bonus. Nor did Shell notify Rogers that it had determined that Rogers lacked marketable title. Instead, Shell allowed the 120-day review period to lapse, and did not seek to terminate the lease until 171 days later for reasons having nothing to do with Rogers' title. (App. 23–24). Because the 120-day review period lapsed without payment of the signing bonus, the remaining obligations of the lease never became binding and effective.

Rogers filed suit on October 19, 2016 on behalf of a putative class, all of whom had likewise been harmed by Shell's failure to pay the signing bonus.

The present dispute centers on the status of the arbitration clause in Paragraph 33 of the lease. (App. 64–66). Rogers contends the arbitration clause was part of the operating phase, which never became

binding and effective due to Shell's failure to pay the signing bonus—and thus, an agreement to arbitrate was never formed.

Several factors indicate that the arbitration clause was part of the operating phase, and not the title-review phase. First, the arbitration clause requires each arbitrator to be experienced in "exploration and production activities associated with the oil and gas industry." (App. 64–65). Notably, the clause does not require expertise in determining whether a landowner has marketable title—the predominant issue in the title-review phase of the lease. Second, Ohio law—which governs the lease—does not permit arbitration of title disputes. See Ohio Rev. Code Ann. § 2711.01(B)(1). And third, the obligation to arbitrate disputes was the only substantial remaining obligation for Rogers after conveying the leasehold interest in the title-review phase.[2] Thus, the language in Paragraphs 16 and 25 of the lease stating that Rogers would not be bound to the lease's remaining obligations until payment of the signing bonus would be meaningless if the arbitration clause was part of the title-review phase.

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[2] While the lease certainly contains myriad other obligations, those obligations are placed on Shell. For example, Paragraph 22 requires Shell to reimburse Rogers for increases in property taxes attributable to Shell's operations. (App. 49). The only substantial obligation placed on *Rogers*, though, after the payment of the signing bonus is to resolve disputes through arbitration.

B. Proceedings Below

After Rogers filed suit, Shell moved the district court to compel individual arbitration. In its motion, Shell acknowledged that questions of arbitrability are for courts to decide and did not argue that the parties delegated those issues to an arbitrator. D. Ct. Doc. No. 21-1 at 2 ("[T]his is a determination that must be made by the Court and not the arbitrator. . . ."). In response, Rogers argued that the arbitration clause did not become binding unless and until Shell paid the signing bonus. In effect, the signing bonus operated as a condition precedent to the formation of an agreement to arbitrate. In its reply, Shell did an about-face on all fronts. Instead of arguing that there was a binding arbitration agreement, Shell took the position that *no* binding contract was ever formed between the parties. (App. 27).

The United States District Court for the Southern District of Ohio denied Shell's motion. The district court reasoned that "the final sentence of the bonus payment clause did not negate the existence of a contract but rather provided that once plaintiff made the initial conveyance, his remaining obligations were conditioned upon [Shell] paying the signing bonus." (App. 29). The district court further reasoned that "[w]hile the Lease contained a broad arbitration clause, the specific language of the bonus payment clause made clear that [Rogers] was not agreeing to arbitration until he was paid his signing bonus." (App. 30). Because the district court denied Shell's motion, it did not reach

the issue of whether class arbitration was authorized by the lease.

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed in an unpublished opinion. Rather than address Rogers' challenge to arbitration directly, the panel majority punted the issue to an arbitrator. (App. 9). The panel majority holding is contrary to this Court's decisions stating that questions of arbitrability should typically be decided by courts rather than arbitrators. The panel majority reached its conclusion without finding any evidence that the parties delegated those questions to an arbitrator.

Instead, the panel majority misapplied this Court's severability doctrine. That doctrine posits that challenges to the validity (but not formation) of an entire agreement—as opposed to the validity of the arbitration clause—are to be decided by arbitrators. (App. 7–9). Without looking to state law for guidance, the panel majority decided that Rogers' condition precedent challenge was one of validity rather than formation. The panel majority based that determination on this Court's decision in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63 (2010), even though that decision does not explain how to distinguish validity from formation or address Ohio law. (App. 7). The panel majority also held that even though Rogers sought to "invalidate *only* the arbitration clause," the issue had to be decided by an arbitrator because the signing bonus condition implicated other provisions of the contract. (App. 7–8) (emphasis added). The Sixth Circuit

remanded the case to the district court to consider the class arbitration issue in the first instance.

Judge Karen Nelson Moore wrote a separate opinion dissenting in part and concurring in part. Judge Moore dissented from the panel majority's decision to refer Rogers' arbitrability challenge to an arbitrator. Judge Moore found that there was no clear and unmistakable evidence that the parties delegated questions of arbitrability to an arbitrator. (App. 10–21). Judge Moore further found that "the best reading of the contract concludes that it contemplates two distinct phases of a relationship between Rogers and Shell" and that Rogers' condition precedent argument should be decided by a court. (App. 14). Judge Moore otherwise concurred with the decision that the question of class arbitration should be resolved by the district court in the first instance. (App. 21).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's holdings regarding the severability doctrine. This Court has held that courts must decide questions of arbitrability absent clear and unmistakable evidence that the parties delegated those issues to an arbitrator. At least four circuits have recognized that this inquiry precedes application of the severability doctrine—meaning that courts decide whether parties agreed to arbitrate issues of arbitrability before applying the severability doctrine to compel arbitration of those issues. By

contrast, the panel majority improperly used the severability doctrine to hold that the arbitrability question goes to an arbitrator without finding the parties agreed to arbitrate that issue. This result gives an arbitrator the authority to determine their own jurisdiction while leaving open the question whether the parties ever concluded an agreement to arbitrate in the first place.

Separately, the decision below reflects another source of growing confusion among the lower courts regarding the severability doctrine. This Court has distinguished challenges to arbitrability based on contract formation from those based on an agreement's validity for purposes of applying the severability doctrine. While this Court—and at least one circuit—has suggested that courts should look to state law in characterizing a challenge as one of formation or of validity, this distinction has proven elusive in practice. Several lower courts make this determination based on whether a challenge to arbitrability renders a contract void or voidable, as, under state-law principles of contract law, void contracts are not formed, whereas voidable contracts are invalid. See, *e.g.*, *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000). But this Court's precedent questions the viability of that framework without providing further guidance. See *Buckeye*, 546 U.S. at 445–46 (treating challenge that would have rendered contract void as one of invalidity). Lower courts have also been prone to rely exclusively on federal law or create exceptions to state law that amount to federalizing contract law.

Finally, the decision below conflicts with the decisions of this Court and five other circuits by holding that challenges to arbitration—even if they are exclusively directed to the arbitration provision—are arbitrable so long as they may implicate other portions of the agreement. The petition for a writ of certiorari should therefore be granted.

I. The Decision Below Defies the Plain Text of the FAA and Cannot Be Reconciled With This Court's Arbitrability Decisions.

1. "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Comm'n Workers of Am.*, 475 U.S. 643, 648–49 (1986); see also *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1416 (2019) ("Consent is essential under the FAA because arbitrators wield only the authority they are given."). And "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943 (emphasis in original) (citations omitted).

Questions of arbitrability, including the threshold question of "who decides arbitrability" are "[q]uintessential gateway matters" that parties generally expect courts to decide. *Rent-A-Center*, 561 U.S. at 77 (Stevens, J., dissenting). Permitting arbitrators to decide

arbitrability is significant because it permits them to decide the scope of their own powers. *First Options*, 514 U.S. at 945. That is especially so given that an arbitrator's jurisdictional decision is subject to limited judicial review and will be set aside "only in very unusual circumstances." *Id.* at 942. Permitting arbitrators to decide arbitrability also risks compelling a person to arbitration who has never actually agreed to arbitrate. Thus, "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945.

This Court has emphasized on several occasions that the "question of arbitrability . . . is undeniably an issue for judicial determination." *AT&T Techs.*, 475 U.S. at 649; see also *Rent-A-Center*, 561 U.S. at 69 n.1 (stating that, unless the parties clearly provide otherwise, the question of arbitrability is decided by the courts); *First Options*, 514 U.S. at 943–44 (same); see also 9 U.S.C. § 4 (requiring courts to determine whether an arbitration agreement was concluded). Courts must therefore presume—absent evidence to the contrary—that parties expect courts to decide arbitrability: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options*, 514 U.S. at 944 (alterations in original) (quoting *AT&T Techs.*, 475 U.S. at 649).

This case concerns the relationship of *First Option*'s "clear and unmistakable evidence" requirement with the severability doctrine articulated by this Court in *Prima Paint* and *Buckeye*. This Court's severability decisions demonstrate the following distinction from *First Options*: The severability doctrine applies only when deciding whether the *merits* of a case are arbitrable—*not* in determining *who* decides that question. *Prima Paint*, for example, centered on whether, pursuant to a "broad" arbitration clause, an arbitrator could decide the merits of a claim that the entire agreement was procured by fraud. See 388 U.S. at 402. Likewise, *Buckeye* considered whether the merits of a claim that an entire loan agreement was usurious was arbitrable. See 546 U.S. at 442–43. Moreover, there was no need to consider the *First Options* requirement in *Buckeye* because the arbitration clause explicitly delegated that issue to an arbitrator. *Id.* Thus, as the Court recognized in *Granite Rock*, there was no need to decide the preliminary question of "who" decides arbitrability. See 561 U.S. at 300 (stating, after discussing *First Options*, "[t]hat *Buckeye* and some of our cases applying a presumption of arbitrability to certain disputes do not discuss each of these requirements merely reflects the fact that in those cases some of the requirements were so obviously satisfied that no discussion was required").

In *Rent-A-Center*, the plaintiff signed an arbitration agreement as a condition of his employment and later brought an employment discrimination suit against his employer. 561 U.S. at 65. The arbitration

agreement contained a delegation provision that, unlike here, explicitly delegated issues of contract formation, enforceability, and the like, to an arbitrator. *Id.* at 65–66. In resisting arbitration, the plaintiff argued that the overall arbitration agreement—in the context of that case, the entire contract—was unconscionable. *Id.* at 72–73. While the Court's opinion focuses predominately on severability, it observed an important "caveat." *Id.* at 69 n.1. The Court suggested that *First Options*' "clear and unmistakable" requirement necessarily precedes any discussion of severability. *Id.*; see also *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (stating that, prior to a court referring a question of arbitrability to an arbitrator, the parties must have delegated that issue to an arbitrator by clear and unmistakable evidence *and* determine that a valid arbitration agreement exists). The Court did not need to belabor the point in *Rent-A-Center*, however, because the *First Options* requirement was easily met—the arbitration agreement at issue explicitly delegated issues of arbitrability to the arbitrator. See *Rent-A-Center*, 561 U.S. at 69 n.1.

The decision below cannot be squared with the principles discussed above. Indeed, the majority opinion does not even recognize these principles. Rather than address whether the parties ever delegated arbitrability questions to an arbitrator, the panel majority jumped directly into its faulty analysis of the severability doctrine. Judge Moore's dissent highlighted the absence of any clear and unmistakable evidence that the parties delegated this quintessential gateway issue (App. 11–21), but the panel majority ignored her

critique and failed to address the issue. As a result, the decision below compels Rogers to arbitrate the threshold question of arbitrability without a judicial determination that he agreed to arbitrate that issue.[3]

The panel majority thus empowers arbitrators to decide their own jurisdiction in the absence of any agreement committing that matter to them. See *First Options*, 514 U.S. at 943. This outcome is at odds with the text of the FAA, which requires courts to decide whether an arbitration agreement was concluded. See 9 U.S.C. § 4. It also conflicts with this Court's heightened requirement for finding that parties delegated arbitrability questions to an arbitrator. See *Rent-A-Center*, 561 U.S. at 79 (Stevens, J., dissenting) (stating

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[3] In their forthcoming response, Respondents may argue, as they did below, that Rogers waived any argument based on *First Options*. This is wrong for at least four reasons. *First*, Rogers' principal brief on appeal pointed out that the arbitration clause here does not delegate issues of arbitrability to the arbitrator. See C.A. Doc. 23 at 29 (contrasting the arbitration clause here with the arbitration agreement at issue in *Rent-A-Center*). *Second*, Shell's motion to compel arbitration before the district court recognized that courts determine whether a dispute is arbitrable. See D. Ct. Doc. 21-1 at 2. *Third*, Rogers has consistently claimed that the courts should address his challenges to arbitrability. See, *e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (addressing a party's new argument "to support what has been his consistent claim"). *Fourth*, the court below passed upon the issue. See *id.* ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon. . . .' ") (alterations in original) (quoting *United States* v. *Williams*, 504 U.S. 36, 41 (1992)); see also (App. 11–21) (Judge Moore's dissent addressing *First Options*); (App. 32) (order denying rehearing stating that "the issues raised in the petition were fully considered upon the original submission and decision of the case").

that *First Options* established a "more rigorous standard" when assessing whether the parties agreed to arbitrate arbitrability).

2. The panel majority also ignored the role of state law in applying the severability doctrine. While the severability doctrine is "a matter of substantive federal arbitration law," *Buckeye*, 546 U.S. at 445, this Court has repeatedly emphasized the role of state law in examining questions of contract formation and validity. Not only does state law extend to the substance of those issues, but also to determining whether a challenge being asserted is one of formation or validity.

After *Prima Paint*, the severability doctrine's application to challenges regarding the formation—as opposed to validity—of an arbitration agreement remained an open question for over 40 years. See *Buckeye*, 546 U.S. at 444 n.1 ("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. . . ."). The Court answered that question in *Granite Rock*, which observed that questions of an arbitration agreement's formation are distinct from those challenging its validity or enforceability: "[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." 561 U.S. at 299. Furthermore, the Court recognized that while courts "typically"

decide questions of validity, courts "always" decide questions of formation. *Id.* at 297.

Granite Rock therefore elaborates on the framework courts should use in analyzing challenges to an arbitration clause. Accord *Solymar Invs., Ltd.* v. *Banco Santander S.A.*, 672 F.3d 981, 990 (11th Cir. 2012) (stating that *Granite Rock* requires a "two-step process" in considering arbitrability "of any contract containing an arbitration clause"). If a party challenges an arbitration agreement's formation—whether the agreement was "validly formed," 561 U.S. at 300—a court must decide that question. If, however, a party challenges the agreement's enforceability (also referred to as validity), the severability doctrine may apply. *Id.* at 298–301.

The distinction between formation and validity necessarily raises another question: Does state law or federal law control in determining whether a party's challenge to an arbitration agreement is one of formation or instead one of validity? The FAA and this Court's precedent easily answer that question—courts should apply state contract law, rather than federal law, in making this determination. See 9 U.S.C. § 2 (stating that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630–31 (2009) ("'[S]tate law,' therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 '*if* that law arose to govern issues concerning the validity, revocability, and

enforceability of contracts generally.'") (emphasis and alteration in original) (quoting *Perry* v. *Thomas*, 482 U.S. 483, 493 n.9 (1987)); *First Options*, 514 U.S. at 944 ("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."); see also *Lamps Plus*, 139 S. Ct. 1407, 1431 (Kagan, J., dissenting) ("[T]he FAA does not federalize contract law."); *Lefoldt for Natchez Reg'l Med. Cr. Liquidation Tr.* v. *Horne, L.L.P.*, 853 F.3d 804, 811 (5th Cir. 2017) (applying state law in determining whether challenge to arbitration pertains to validity or formation).

The decision below, though, disregarded the role of state law when determining whether Rogers' challenge to the arbitration clause—that consent to arbitration depended on a condition precedent that never occurred—was one of formation or validity.[4] (App. 7). The panel majority summarily decided the issue in a single sentence without any reference to Ohio law.[5] *Id.* Instead, the panel majority cited this Court's decision in *Rent-A-Center*. *Id.* But that decision addresses neither conditions precedent generally nor Ohio contract law specifically. See generally *Rent-A-Center*, 561 U.S. 63. The panel majority's failure to consider state law, as

[4] To be clear, this Petition does not ask the Court to interpret or apply state contract law. Rather, the question presented asks only the preliminary question of whether federal or state law controls in distinguishing challenges to contract formation from those challenging a contract's validity.

[5] The parties do not dispute that Ohio law governs the interpretation of the lease.

this Court's precedent requires, was significant here. As Judge Moore noted in her dissent, Ohio law treats conditions precedent as a matter of contract formation. (App. 12); see also *Transtar*, 16 N.E.3d at 650 ("A condition precedent is a condition that must be performed before obligations in a contract become effective.") (quotation marks omitted).

3. Assuming for argument's sake that Rogers' challenge presented a question of validity rather than formation, the decision below nevertheless failed to properly apply the severability doctrine. Under that doctrine, arguments aimed at the validity of the entire agreement, as opposed to just the arbitration clause, are decided by an arbitrator. See *Buckeye*, 546 U.S. at 446; *Prima Paint*, 388 U.S. at 403–04. Rogers contended that the arbitration clause was not effective because a condition precedent to its formation had not occurred. Despite Rogers directing his challenge solely at the arbitration clause, the panel majority determined that Rogers' challenge went further merely because it theoretically implicated other aspects of the lease. (App. 7–8) ("While Rogers may care to invalidate *only* the arbitration clause, his own language makes it clear that his attack is much broader.").

This Court has suggested, however, that the panel majority's approach to applying the severability doctrine is wrong. In *Rent-A-Center*, the Court examined an arbitration agreement (where the entire agreement concerned arbitration as opposed to a broader contract containing an arbitration provision within it). See 561 U.S. at 65. That agreement expressly delegated

questions of arbitrability to an arbitrator. *Id.* at 65–66. In resisting arbitration, the plaintiff argued that the overall arbitration agreement—in that context, the "entire" contract—was unconscionable. *Id.* at 72–73. The Court applied the severability doctrine and held that because the plaintiff was attacking the validity of the entire agreement, rather than the delegation clause, that issue had to be decided by an arbitrator. *Id.* The Court did observe, however, that the plaintiff's claims of substantive unconscionability—concerning a fee-splitting arrangement and limitations on discovery—theoretically could have been directed at the entire agreement or solely at the delegation provision. *Id.* at 74. The Court suggested "[i]t may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court." *Id.* (emphasis in original). Because Jackson did not direct those arguments to the delegation clause, however, the Court held they had to be decided by an arbitrator. *Id.*

Rent-A-Center therefore suggests that challenges to arbitrability that may apply to other parts of a larger contract must still be decided by a court as long as that challenge is directed solely at the arbitration clause. The decision below rejects this approach and,

therefore, conflicts with this Court's views on how to apply the severability doctrine.[6]

II. The Decision Below Conflicts With the Decisions of Other Circuits.

Other circuits have held that the delegation question in *First Options* precedes any application of the severability doctrine. And when applying the severability doctrine, other circuits have held that: (a) state law applies in determining whether a challenge to arbitrability is classified as relating to formation or validity, and (b) the severability doctrine does not apply to arguments that are directed to an arbitration clause even if the same argument might implicate other parts of the broader contract.

1. Several circuits have recognized that the "clear and unmistakable evidence" requirement from *First Options* precedes the severability doctrine. See *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130–32 (9th

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[6] The panel majority's rationale is all the more troubling because, apart from the arbitration clause, there was *no* other aspect of the lease Rogers possibly could have challenged. That is because Shell terminated the lease before Rogers filed suit. The lease permitted Shell to do so, and thereby relieve itself of obligations under the lease's *second* phase. (App. 42 (¶14)). The lone exception is the arbitration clause, which, if it had ever become effective, would have remained viable due to the presumption that arbitration clauses survive termination of the broader contracts that contain them. See *Litton Fin. Printing Div.* v. *Nat'l Labor Relations Bd.*, 501 U.S. 190, 204 (1991). So there was nothing *but* the arbitration clause left for Rogers to challenge, and in fact that was the only lease provision he did challenge.

Cir. 2015) (analyzing *First Options* requirement before addressing the severability doctrine); *Dialysis Access Ctr., LLC* v. *RMS Lifeline, Inc.*, 638 F.3d 367, 373 n.6 (1st Cir. 2011) (implying that the *First Options* requirement would be a preliminary step in the court's analysis, but that there was no need to examine it because neither party argued that an arbitrator should resolve the question of arbitrability); *Allen* v. *Regions Bank*, 389 F. App'x 441, 446 (5th Cir. 2010) (stating that the court's preceding analysis of severability "should not cause us to lose sight of an important caveat" that the parties "must have clearly intended for issues of arbitrability to be arbitrated"). These circuits further recognize the important role that courts play in deciding the question of arbitrability: "[W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator *never* had any authority to decide the issue." *Will-Drill Res., Inc.* v. *Samson Res. Co.*, 352 F.3d 211, 219 (5th Cir. 2003) (emphasis in original). Thus, arbitrators are not permitted to determine their own jurisdiction—unless the parties agree otherwise. See *Sandvik*, 220 F.3d at 111.

There is no indication here that the parties delegated the question of arbitrability to an arbitrator and Shell never argued that such a delegation occurred in the proceedings below. Nevertheless, the decision below skips this preliminary step and wrongly applies the severability doctrine to conclude that arbitrability should be decided by an arbitrator. (App. 6–9). In so

doing, the decision below conflicts in principle with these circuits' recognition that the "clear and unmistakable evidence" requirement of *First Options* must be satisfied before examining severability.

Similarly, other circuits have failed to clearly recognize the requirement that parties must have agreed to arbitrate a given dispute before compelling arbitration of that dispute under the severability doctrine. For example, in *Spahr* v. *Secco*, the party seeking to compel arbitration argued both that the parties had agreed to arbitrate arbitrability for purposes of *First Options* and that the arbitrability dispute related to the validity of the entire contract and therefore had to be arbitrated under *Prima Paint*. See 330 F.3d 1266, 1270–71 (10th Cir. 2003). The Tenth Circuit "first consider[ed]" whether *First Options* was satisfied, and concluded it was not. *Id.* at 1270. The court nevertheless proceeded to consider whether the arbitrability dispute was arbitrable under *Prima Paint*—a moot point after the court's conclusion that *First Options* was not satisfied. See *id.* at 1271–73; see also *Quilloin* v. *Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 228, 230 (3d Cir. 2012) (recognizing that *First Options* requires an agreement to arbitrate arbitrability, but implying that *First Options* does not apply to validity challenges that go to the contract as a whole).

2. The decision below also conflicts in principle with at least one circuit on applying state or federal law when determining whether a challenge to arbitrability is one of formation or validity. To Petitioner's knowledge, the Fifth Circuit is the only circuit to date

that has squarely decided this issue. In *Lefoldt*, contracts to provide auditing services to a community hospital contained arbitration clauses. See 853 F.3d at 807–10. The community hospital, however, was a public entity. The Fifth Circuit examined the effect of a Mississippi law requiring contracts with public entities to be detailed in the minutes of an entity's board of directors to be effective. See 853 F.3d at 811–12. The contracts at issue were not detailed in the hospital's board minutes. *Id.* at 809.

In applying the severability doctrine, the Fifth Circuit recognized this Court's requirement that courts should generally apply state-law principles of contract law in deciding whether a claim is arbitrable. *Id.* at 811 (citing *First Options*, 514 U.S. at 944). The Fifth Circuit therefore concluded that, in determining whether the minutes rule related to the formation or validity of a contract, state law applies. *Id.* ("We therefore consider how the state-law minutes rule has been interpreted and applied by the Mississippi courts in deciding whether it pertains to the validity or enforceability of an agreement or instead stands as a bar to the formation of a contract with a state entity. . . ."). After reviewing how Mississippi courts interpret the minutes rule, the court held that, depending on the circumstances involved, the minutes rule operates on both the formation *and* the validity of a contract. *Id.* at 813. After examining the circumstances behind the three agreements at issue in *Lefoldt*, the Fifth Circuit held that the minutes rule barred the formation of two

of the agreements and affected the validity of the third. *Id.* at 813–14.

While the panel majority below did not explicitly hold that federal law applies, the decision below never addresses how Ohio law views conditions precedent. Instead, the decision below relied only on federal law by citing this Court's decision in *Rent-A-Center*. (App. 7). In so doing, the panel majority implied that federal law governs this issue and conflicts in principle with the Fifth Circuit's decision in *Lefoldt*.

3. The decision below also deepens a circuit split regarding the treatment of defenses to arbitration that implicate other provisions of the broader agreement. In fact, the Ninth Circuit explicitly recognized this split of authority in its en banc decision in *Nagrampa* v. *MailCoups, Inc.*, 469 F.3d 1257, 1271–75 (9th Cir. 2006). In that decision, the Ninth Circuit joined several other circuits in permitting courts to "consider[] defenses to arbitration provisions that implicate the entire contract" so long as they are limited to challenging the validity of the arbitration provision. *Id.* at 1272.

In *Nagrampa*, defendant MailCoups, Inc. initiated arbitration proceedings against plaintiff Nagrampa, claiming that she owed MailCoups fees arising from a franchise agreement. *Id.* at 1265. In response, Nagrampa filed a lawsuit against MailCoups asserting, among other things, that the arbitration provision in the franchise agreement was invalid because it was unconscionable. *Id.* at 1266, 1270. In reviewing that claim, the Ninth Circuit applied California law: A

party claiming unconscionability must show both procedural and substantive unconscionability, which are then balanced on a sliding scale to determine whether the provision is unconscionable. *Id.* at 1280.

The plaintiff in *Nagrampa* claimed that the arbitration clause was procedurally unconscionable because it was a contract of adhesion—it was provided on a take-it-or-leave-it basis without any opportunity to negotiate its terms. *Id.* at 1270, 1281. This contract of adhesion argument, however, implicated the remainder of the franchise agreement because the franchise agreement was provided on a take-it-or-leave-it basis and the arbitration provision was but a part of that larger agreement. Nonetheless, the Ninth Circuit held that it could consider this defense to arbitrability because it was specifically directed at the arbitration provision.[7] *Id.* at 1270–71; see also *Tompkins* v. *23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) (citing *Nagrampa* for the proposition that an arbitration clause's validity may be informed by consideration of the contract as a whole). In support of its conclusion, the Ninth Circuit surveyed the decisions of other circuits and found that most, but not all, other circuits permitted courts to address challenges to arbitration clauses that implicate other portions of a broader agreement.

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[7] Judge O'Scannlain dissented, with Judges Kozinski and Tallman joining. *Nagrampa*, 469 F.3d at 1298 (reasoning that unconscionability argument went to the entire franchise agreement because it did not "specifically and exclusively target the arbitration clause as a contract of adhesion").

For example, the Ninth Circuit found that the Fifth Circuit's decision in *Washington Mutual Finance Group, LLC* v. *Bailey*, 364 F.3d 260 (5th Cir. 2004), supported its decision. In *Washington Mutual*, a group of illiterate plaintiffs filed suit against Washington Mutual, alleging that they had been sold insurance they did not want. *Id.* at 262. In defense against a motion to compel arbitration, the plaintiffs claimed that Washington Mutual fraudulently induced them into signing the arbitration agreement by misrepresenting the loan and insurance documents that included the arbitration clause. *Id.* at 265. While this argument implicated the broader agreements at issue, the Fifth Circuit rejected Washington Mutual's argument that the plaintiffs' challenge should be determined by the arbitrator. *Id.* at 266 n.4. The Court held that the plaintiffs' defense related specifically to the arbitration agreement and, therefore, was for the court to decide. *Id.*

The decision in *Nagrampa* also recognized that other circuits had implicitly permitted courts to consider defenses implicating the broader agreement. See, *e.g.*, *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999); *David L. Threlkeld & Co.* v. *Metallgesellschaft Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991); *Alexander* v. *Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003). In each of these decisions, the courts decided claims that arbitration clauses were unconscionable because they were contracts of adhesion—despite the fact that the agreements incorporating the arbitration clauses were also contracts of adhesion.

The majority in *Nagrampa* did observe, however, that "[t]he only circuit that appears to be at odds with this approach is the Eleventh." 469 F.3d at 1274. In *Jenkins* v. *First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2006), the plaintiffs challenged the arbitration clauses in payday loans. *Id.* at 871. The Eleventh Circuit held that the plaintiffs' claims of adhesion had to be decided by an arbitrator because they pertained to the contract as a whole and not the arbitration provision "alone." *Id.* at 877.

The decision below deepens the rift among the circuits by joining the Eleventh Circuit in holding that claims implicating other portions of the contract must be decided by an arbitrator—even if the claim is directed solely to the arbitration clause. (App. 7–8). Even though the panel majority recognized that Rogers sought to "invalidate only the arbitration clause," it held that Rogers' claim must be arbitrated because it implicated other provisions of the lease. *Id.*

This Court suggested in *Rent-A-Center* that courts should decide defenses to arbitrability—even if they implicate other portions of an agreement—so long as the party asserting it focuses their argument on the validity of the arbitration clause. See 561 U.S. at 74 ("It may be that had [the plaintiff] challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court."). Nevertheless, this statement was not part of the Court's holding in

Rent-A-Center, and thus the circuits, lacking clear guidance on this issue, remain split.

III. The Questions Presented Are Important and Recurring Ones That Warrant the Court's Review.

"The division of labor between courts and arbitrators is a perennial question in cases involving arbitration clauses." *Janiga* v. *Questar Capital Corp.*, 615 F.3d 735, 741 (7th Cir. 2010). "Whether a question is one of arbitrability . . . is not always cut-and-dried," *Escobar-Noble* v. *Luxury Hotels Int'l of Puerto Rico, Inc.*, 680 F.3d 118, 123 (1st Cir. 2012), and the "case law on the determination of issues of arbitrability" is "complex[] and evolving." *Id.* at 127 (Lynch, J., concurring). But given that "private parties have likely written contracts relying upon [this Court's interpretation of the FAA]," *Allied-Bruce Terminix Cos., Inc.* v. *Dobson*, 513 U.S. 265, 272 (1995), consistency in the lower courts in applying the FAA—and the severability doctrine in particular—is a matter of considerable practical importance. One need only look to the number of decisions rendered by this Court regarding questions of arbitrability in the last year alone to understand the importance and recurring nature of these issues. See generally *Lamps Plus*, 139 S. Ct. 1407; *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532 (2019); *Henry Schein*, 139 S. Ct. 524; *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018).

That is especially the case with determining whether a defense to arbitration is one of formation or validity, as this distinction has proven to be elusive. While precedent suggests this question should be answered by relying on state law, *First Options*, 514 U.S. at 944, many lower-court decisions diverge from state law and effectively answer this question as a matter of federal law.

This Court's severability decisions have not attempted to define what is a question of formation versus one of validity. The Court's descriptions of validity have evolved and unfortunately are less than clear. In *Prima Paint*, the Court referred a claim that the contract was induced by fraud to an arbitrator. See 388 U.S. at 404. In so doing, the Court effectively held that claims of fraud in the inducement go to validity without referring to state law. But the Court also remarked that fraud in the inducement goes to the "making" of an agreement, suggesting that such claims relate to a contract's formation.

In *Buckeye*, the Court granted certiorari to decide "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality." 546 U.S. at 442. There, the party resisting arbitration argued that the container contract was usurious and therefore void as a matter of Florida public policy. *Id.* at 444, 446. The Court concluded that this challenge related to the contract's validity and referred it to an arbitrator to decide. *Id.* at 444 n.1, 447–48. While the Court did distinguish some issues related to contract formation—whether the

obligor ever signed the contract, lacked authority to commit the alleged principal, or lacked the mental capacity to assent—that list did not purport to account for every argument that state law may recognize as directed towards formation, leaving the classification of such arguments in limbo. See *id.* at 444 n.1. Furthermore, the Court described the severability doctrine as a "matter of substantive federal arbitration law" that effectively preempts contrary state law on severing contract terms. *Id.* at 445. The preemption question, however, is distinct from the question of whether a challenge to an arbitration clause is one of formation or validity.

The Court's descriptions of "validity" after *Buckeye* are no more clarifying. In *Rent-A-Center*, the Court stated that "[t]he *validity* of a written agreement to arbitrate" went to "whether it is legally binding." 561 U.S. at 69 n.1. That formulation, however, sows confusion between formation and validity because a contract that was never formed is also not "legally binding." And in *Granite Rock*—rendered just three days after *Rent-A-Center*—the Court's parenthetical summary of *Buckeye* defined validity differently as whether the agreement "was illegal when formed." 561 U.S. at 296–97. That definition does little more, though, than distinguish validity and formation; it does not explain how to determine whether a challenge to arbitration falls within one category or the other.

Lower courts grappling with this issue generally resort to the state-law distinction between void and voidable contracts, at least as a starting point in their

analysis. See *Farnsworth* v. *Towboat Nantucket Sound, Inc.*, 790 F.3d 90, 97 (1st Cir. 2015) (holding that the severability doctrine is implicated because duress "usually renders a contract voidable by the victim, rather than void") (citing 28 Williston on Contracts § 71:8 (4th ed.)); *Burden* v. *Check Into Cash of Ky., LLC*, 267 F.3d 483, 488 (6th Cir. 2001) ("The void/voidable distinction is relevant for *Prima Paint* analysis because a void contract, unlike a voidable contract, was never a contract at all."); *Sandvik*, 220 F.3d at 107 ("[W]e draw a distinction between contracts that are asserted to be 'void' or non-existent . . . and those that are merely 'voidable.' "); *Three Valleys Municipal Water Dist.* v. *E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (holding that the severability doctrine announced in *Prima Paint* applies to "voidable" contracts); but see *Will-Drill Res.*, 352 F.3d at 218 (holding, in a case predating *Granite Rock*, that "any attempt to dissolve [an] agreement by having the entire agreement declared voidable *or void* is for the arbitrator") (emphasis added). Relying on the void/voidable distinction is reasonable because it faithfully carries out this Court's requirements to apply state law, see *First Options*, 514 U.S. at 944, and to distinguish formation from validity when applying the severability doctrine, see *Granite Rock*, 561 U.S. at 298–99.

The lower courts, however, have encountered at least two problems in applying the void/voidable distinction to the severability doctrine. First, this Court's decision in *Buckeye* raised doubts about the viability of relying on that distinction. The Third Circuit has

observed that "it is unclear whether the void/voidable distinction we noted in *Sandvik* survived the Supreme Court's subsequent decision in *Buckeye Check Cashing*." *SBRMCOA, LLC* v. *Bayside Resort, Inc.*, 707 F.3d 267, 274 (3d Cir. 2013). That is because *Buckeye* "held that a challenge to a contract's legality was arbitrable, even though illegality would have rendered that contract void rather than voidable." *Id.* And a footnote in *Buckeye* "left open the question whether mental capacity challenges to a contract are arbitrable, even though mental capacity challenges render contracts voidable rather than void." *Id.* (citations omitted).

The second problem is that lower courts are prone to make exceptions diverging from state law when they believe that a particular challenge to arbitration is better characterized as one of formation or validity. In *Spahr* v. *Secco*, for example, the Tenth Circuit held that a challenge based on mental capacity was not arbitrable because it placed the "'making' of an agreement to arbitrate at issue." 330 F.3d at 1273. The court recognized that mental capacity was a contractual defense that renders a contract voidable rather than void, but went on to hold that the severability doctrine did not apply. *Id.* at 1272 n.7. The Tenth Circuit then held that whether the severability doctrine is implicated depends on whether the challenge being asserted can be "directed at individual provisions in a contract" or could "logically be directed only at the entire contract." *Id.* at 1273. Because "it would be odd indeed if a party claimed that its mental incapacity specifically affected

the agreement to arbitrate," the court held that it was an issue for courts to decide. *Id.*[8]

The lack of consistency in applying the Court's formation/validity distinction is especially apparent with regard to the challenge asserted by Rogers here: conditions precedent. If state law applies, courts need only look to whether the applicable state views conditions precedent as a matter of contract formation or validity. As Judge Moore's dissent below recognized, Ohio treats conditions precedent as issues of formation. (App. 15). But other states may take a different approach, such that conditions precedent are not related to contract formation. See *Solymar*, 672 F.3d at 996 ("[U]nder Florida law, whether a condition precedent is at issue is not relevant to contract formation.").

While applying state law would easily resolve this issue, this Court's decisions in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25 (2014), complicate the issue. Together, those decisions hold that the arbitrability of a condition precedent depends on whether the condition is procedural or substantive. Procedural conditions are in the nature of "forum-specific procedural gateway matters," *Howsam*, 537 U.S. at 86, that govern when arbitration "may begin," *BG Grp.*, 572

[8] A footnote in *Spahr* also implies that the distinction between formation and validity may rest on whether the defense to arbitration is made on the basis of "status" or on the basis of "conduct." 330 F.3d at 1273 n.8. This formulation, however, does not appear to have any basis in case law and would only further complicate the formation/validity issue without additional guidance.

U.S. at 35, and are usually decided by arbitrators. Substantive conditions, however, look to "whether the parties are bound by a given arbitration clause." *Howsam*, 537 U.S. at 84; see also *BG Grp.*, 572 U.S. at 35 (describing substantive conditions as those relevant to whether "there is a contractual duty to arbitrate at all"). This distinction did not arise from state contract law, however, implying that lower courts should resort to federal law in characterizing a contractual defense to arbitration.

This case is an ideal vehicle for addressing these issues. Because the decisions below were made by courts, rather than an arbitrator, in the first instance, the Court's review is not limited by the deferential standard of review afforded to an arbitrator's decision. See *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 568 (2013). There are no factual issues to resolve as the decisions below rest solely on interpreting the lease. Furthermore, the Court is not being asked to decide whether Rogers' claims are arbitrable. The questions presented are limited only to deciding whether that question belongs to the court or an arbitrator.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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