No. 18-1565

IN THE
Supreme Court of the United States

MATT A. ROGERS,
Petitioner,
v.

SWEPI LP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the severability doctrine announced in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), applies in determining who decides arbitrability when a party challenges the validity of a contract as a whole, as this Court held in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69 n.1 (2010).

2. Whether courts must look to state or federal law when determining whether a contractual defense to arbitration is one of contract formation or validity.

3. Whether a contractual defense directed to the validity of the contract as a whole must be decided by an arbitrator, as this Court held in *Rent-A-Center*.

RULE 29.6 DISCLOSURE STATEMENT

SWEPI LP is wholly owned by Shell Energy Holding GP LLC and Shell US E&P Investments LLC. Shell Energy Holding GP LLC is wholly owned by Shell US E&P Investments LLC. Shell US E&P Investments LLC is wholly owned by Shell Oil Company. Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is wholly owned by Shell Petroleum N.V. Shell Petroleum N.V. is wholly owned by Royal Dutch Shell plc, a publicly traded company. No publicly traded company owns 10% or more of Royal Dutch Shell plc. Royal Dutch Shell plc is not a party to this action but has a financial interest in the outcome of the proceeding as an indirect parent company of SWEPI LP and Shell Energy Holding GP LLC.

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INTRODUCTION

Petitioner Matt A. Rogers asks the Court to decide a series of questions that are not presented in order to resolve circuit splits that do not exist. The Court should decline.

At issue in this case is the interpretation of an oil and gas lease that Rogers signed with respondent Shell for his five-acre property.[1] Rogers alleged that Shell agreed to pay him a bonus of $5,000 per acre, as long as certain conditions were met. Rogers

[1] Respondents SWEPI LP and Shell Energy Holding GP LLC are affiliated companies referred to collectively as "Shell."

alleges that Shell did not pay this bonus. *See* Pet. App. 1-2.

One provision of the lease states that it "become[s] effective on the date" that Rogers signs it. *See id.* at 39. Other provisions state that Rogers "promises to proceed with this Lease and be bound thereby upon Lessee's paying the full amount of the bonus payment," *id.* at 44, and that "[u]pon 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." *Id.* at 51. The lease contains an arbitration provision, which mandates that "[a]ny dispute that arises under this Lease * * * shall be resolved by binding arbitration." *Id.* at 64.

Rogers filed suit against Shell in federal district court in Ohio for breach of contract, and Shell moved to compel arbitration. Shell argued that Rogers was bound by the lease's arbitration provision. *See id.* at 4. Rogers disagreed, contending that "the lease agreement was executed in stages, with his signature allowing Shell to encumber the property and verify title, and Shell's payment" of the bonus "effectuating all remaining aspects, including the arbitration clause." *Id.* According to Rogers, because Shell did not pay the bonus, he is not required to arbitrate the dispute. *See id.*

The district court endorsed Rogers' view of the lease and denied Shell's motion to compel arbitration. *See id.* at 4-5. The Sixth Circuit reversed. In an unpublished, non-precedential opinion, the Sixth Circuit adopted Shell's interpretation of the lease, concluding that Rogers "agreed to the Lease by signing it" and that his

"attack on the arbitration provision assumes that the contract was formed." *Id.* at 6-7. The Sixth Circuit interpreted Rogers' suit as challenging "the validity of the agreement to arbitrate." *Id.* at 7. The court acknowledged that "attacks on validity come in two varieties: those that specifically challenge the validity of the arbitration clause, and those that challenge the validity of the contract as a whole." *Id.* (citing *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444-445 (2006)). When a party challenges the arbitration clause in particular, the Sixth Circuit explained, it is up to the court to determine whether the dispute is subject to arbitration; in contrast, when a party challenges the validity of the contract more generally, it is up to the arbitrator in the first instance to determine whether the dispute is arbitrable. *See id.* (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967)).

After analyzing the specific language of the contract and Rogers' prior briefing, the Sixth Circuit concluded that Rogers' "attack goes well beyond the arbitration clause." *Id.* The Sixth Circuit held that under this Court's decision in *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 70 (2010), it is up to an arbitrator to determine in the first instance whether the parties' dispute is subject to arbitration. *See* Pet. App. 7-8. The Sixth Circuit remanded to the district court to compel arbitration. *Id.* at 10.

In his petition to this Court, Rogers ignores the Sixth Circuit's interpretation of the lease and his own prior filings. He instead raises a number of theoretical questions that are not presented, were not passed on below, and are inconsistent with his own position earlier in these proceedings. He cites alleged circuit splits, moreover, that simply do not

exist. The Sixth Circuit's unpublished, non-precedential decision in this case hinges on the interpretation of the specific terms of a unique oil and gas lease, not on the questions presented by Rogers. The Court should decline review.

STATEMENT

A. Legal Framework

Congress adopted the Federal Arbitration Act in 1925 "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). The Act reflects "both a liberal federal policy favoring arbitration" and "the fundamental principle that arbitration is a matter of contract." *Id.* (internal quotation marks omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Id.* (internal quotation marks and citation omitted).

The Court has distinguished between three kinds of challenges to arbitration agreements. First, a party may challenge the *formation* of the arbitration agreement. A formation challenge asserts that the parties never agreed to arbitrate in the first place, perhaps because the contract was not signed, the signor lacked authority to commit the alleged principal, or the signor lacked the mental capacity to agree to the contract. *See Buckeye*, 546 U.S. at 444 n.1. Where a party challenges the formation of the arbitration agreement, it is presumptively up to the court—rather than the arbitrator—to decide in the first instance whether the parties agreed to arbitrate the dispute. *See Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-300 (2010). This

presumption may be overcome, however, if there is "clear and unmistakable evidence" that the parties intended for an arbitrator to decide whether the dispute is subject to arbitration. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (alterations and internal quotation marks omitted).

Second, a party may challenge the *scope* of the arbitration agreement. This kind of challenge asserts that the "arbitration clause in a concededly binding contract" does *not* apply "to a particular kind of controversy." *BG Grp. PLC* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014) (internal quotation marks omitted); *see also Granite Rock*, 561 U.S. at 300. For example, "whether a particular labor-management layoff dispute fell within the arbitration clause of a collective-bargaining contract" is a challenge to the scope of an arbitration provision. *BG Grp.*, 572 U.S. at 34 (citing *AT & T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 651 (1986)). Where a party challenges the scope of an arbitration agreement, it is presumptively up to the court to decide in the first instance whether the parties intended to arbitrate the dispute. *See id.* Once again, however, this presumption may be overcome by clear and unmistakable evidence that the parties intended for an arbitrator to decide whether the dispute is arbitrable. *See First Options*, 514 U.S. at 944.

Third, a party may challenge the *validity* of the arbitration agreement.[2] Where a party argues that

[2] An agreement's "validity" is synonymous with its "enforceability." *See, e.g.*, *Rent-A-Center*, 561 U.S. at 70 & n.2 (using the terms interchangeably); *see also* Br. for Plaintiff-Appellee at 18,

an arbitration provision is invalid because "the contract as a whole" is invalid, "either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid," it is up to the *arbitrator* to decide in the first instance whether the dispute is subject to arbitration. *Buckeye*, 546 U.S. at 444-446. This is called the severability doctrine, which holds that an arbitration provision is severable from the agreement as a whole and should be enforced even if the agreement itself is alleged to be invalid. *See Rent-A-Center*, 561 U.S. at 70-71; *see also Prima Paint*, 388 U.S. at 403-404. In contrast, where a party "specifically challenges" *only* the validity "of the arbitration clause itself," it is presumptively up to the court in the first instance to determine whether the dispute is subject to arbitration. *Granite Rock*, 561 U.S. at 301; *see also Buckeye*, 546 U.S. at 444-446; *Rent-A-Center*, 561 U.S. at 71-72.[3]

B. Procedural History

Rogers signed a lease with Shell for his five-acre property in Ohio. Pet. App. 1. Rogers alleged that

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Rogers v. *SWEPI LP*, 757 F. App'x 497 (6th Cir. 2018) (No. 18-3229) (stating that "enforceability" is "also referred to as validity").

[3] Even if a party specifically attacks solely the validity of the arbitration clause, the court only *presumptively* hears that challenge. Arbitrators decide such disputes if there is a "valid provision specifically committing such disputes to an arbitrator." *Granite Rock*, 561 U.S. at 299 (citing *First Options*, 514 U.S. at 943).

the lease required Shell to pay him a bonus of $5,000 for each acre of land it leased, provided that certain conditions were met. *See id.* at 44. Paragraph 8 of the lease states that it "shall become effective on the date that this Lease is signed by the Lessor." *Id.* at 39. Paragraph 16 of the lease states that "Lessor promises to proceed with this Lease and be bound thereby upon Lessee's paying the full amount of the bonus payment." *Id.* at 44. Paragraph 25 of the lease states that "[u]pon 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 Leased Premises." *Id.* at 51.

The lease contains an arbitration provision, which states that "[a]ny dispute that arises under this Lease * * * shall be resolved by binding arbitration by three arbitrators in accordance with the Commercial Arbitration Rules of the American Arbitration Association and, to the maximum extent applicable, the Federal Arbitration Act." *Id.* at 64. Rule 7(a) of the Commercial Arbitration Rules in turn states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Commercial Arbitration Rules and Mediation Procedures R-7(a) (Am. Arbitration Ass'n 2009).[4]

Rogers claims that Shell never paid the bonus. *See* Pet. App. 1-2. Instead of arbitrating the dispute, however, Rogers filed suit in federal district court in

[4] *Available at* https://bit.ly/2nfbS6I.

Ohio for breach of contract. Shell moved to compel arbitration on the ground that Rogers was bound by the lease's arbitration clause. *See id.* at 2. Rogers argued, in contrast, that under Paragraphs 16 and 25, the lease was executed in two stages. According to Rogers, once he signed the lease, Shell was permitted "to encumber the property and verify title," but the arbitration clause (and other "long-term relational aspects of the Lease") did not go into effect until Shell paid the bonus. *See id.* at 4. Because Shell did not pay the bonus, Rogers asserted, the arbitration clause never went into effect. *See id.*

The district court endorsed Rogers' view of the lease and denied Shell's motion to compel arbitration. *See id.* at 4-5. The Sixth Circuit reversed. The court held that "there is no question regarding formation (whether the parties ever agreed to the contract in the first place)" because "Rogers does not dispute that he properly agreed to the Lease by signing it." *Id.* at 6 (internal quotation marks omitted). The court held that Rogers' "attack on the arbitration provision assumes that the contract was formed; that it conferred obligations on the parties; and that Shell failed to perform one of its obligations, meaning the arbitration clause was never triggered." *Id.* at 6-7.[5]

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[5] Rogers continues to assert his erroneous interpretation of the lease before this Court. *See, e.g.*, Pet. 5-8, 23-24 & n.6. In the petition, for example, Rogers claims that the "lease was structured in two phases so that some of its provisions did not become binding or effective unless and until" the bonus was paid. *Id.* at 5. Rogers similarly claims that "apart from the arbitration clause, there was *no* other aspect of the lease Rogers

Instead, the court interpreted Rogers' challenge as an attack on the *validity* of the lease. *Id.* at 7.[6] The Sixth Circuit stated that under this Court's precedents, "attacks on validity come in two varieties"—"those that specifically challenge the validity of the arbitration clause, and those that challenge the validity of the contract as a whole." *Id.* (citing *Buckeye*, 546 U.S. at 444-445). The court concluded that Rogers' "attack goes well beyond the arbitration clause," finding that Rogers' "own language makes it clear that his attack is much broader." *Id.* at 7-8.

"Under Rogers' two-stage lease theory," the Sixth Circuit explained, "the entire second stage of the lease never became effective—a stage that both the district court and Rogers defined as 'the long-term relational aspects of the Lease.' " *Id.* at 7. Because Rogers "has argued that much of the contract, which happens to include the arbitration clause, is unenforceable," the court held that it is up to an arbitrator to decide in the first instance whether the dispute is subject to arbitration. *Id.* at 9 (citing

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possibly could have challenged." *Id.* at 23 n.6. The Sixth Circuit rejected both of these arguments, *see* Pet. App. 6-8 & n.2, and Rogers has not asked the Court to review the Sixth Circuit's conclusion on those issues. Rogers is accordingly bound by the Sixth Circuit's holding. To the extent contract interpretation questions remain unresolved, moreover, it is up to the arbitrator to decide those questions.

[6] Before the Sixth Circuit, Rogers explicitly waived any challenge to the scope of the arbitration agreement, stating that "if the arbitration clause is binding, valid, and enforceable," then his breach of contract claim "is within the clause's scope." Br. for Plaintiff-Appellee, *supra* note 2, at 22-23.

Prima Paint, 388 U.S. at 403-404; *Rent-A-Center*, 561 U.S. at 70-71).

Judge Moore dissented in part. She found "that the best reading of the contract concludes that it contemplates two distinct phases of a relationship between Rogers and Shell." *Id.* at 14. "In the first phase, * * * Rogers conveys the lease to Shell and Shell has 120 days to complete verification of Rogers's marketable title to the covered land." *Id.* In the second phase, if "Shell determines that Rogers does have marketable title," Shell is required to pay Rogers the $5,000 per acre bonus. *Id.* at 15. According to Judge Moore, the second phase of the lease—including the arbitration clause—did not "become effective" until Shell paid the bonus. *Id.* Based on her alternative interpretation of the lease agreement and Rogers' briefing, Judge Moore concluded that Shell's payment of the bonus was a "substantive condition precedent" to the *formation* of the agreement to arbitrate. *Id.* at 17. Judge Moore concluded that there was no "clear and unmistakable" evidence that the parties intended to arbitrate the question of arbitrability, *id.* at 21, and she accordingly would have held that it was up to the court—rather than the arbitrator—to decide whether the dispute was subject to arbitration. *Id.* at 17-21. Judge Moore acknowledged that the "majority reads the same contract differently." *Id.* at 17.

Rogers petitioned for rehearing en banc, which was denied, *see id.* at 32, and now seeks certiorari.

REASONS FOR DENYING THE PETITION

I. THE FIRST QUESTION PRESENTED REQUESTS SPLITLESS, FACTBOUND ERROR CORRECTION WITH RESPECT TO A QUESTION THAT WAS NOT PRESSED OR PASSED ON BELOW.

The first question presented by Rogers asks whether "the severability doctrine first announced in *Prima Paint*" 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*." Pet. i. Rogers appears to ask this Court to overturn its longstanding precedent holding that where a party challenges the validity of a contract as a whole, it is "for the arbitrator" to decide whether the dispute is subject to arbitration. *Rent-A-Center*, 561 U.S. at 72. The Court should decline to do so. There is no split on this question, and in any event, Rogers *did not even raise it* below. This Court's precedent addressing this issue, moreover, is correctly decided.

A. There Is No Conflict In The Circuits Over The Question Presented.

Rogers alleges a split between the circuits over whether "the clear and unmistakable evidence requirement from *First Options* precedes the severability doctrine." Pet. 23 (internal quotation marks omitted). There is no split. Each of the cases Rogers cites follows this Court's basic framework for deciding questions of arbitrability: Where a court is examining the scope or formation of an arbitration agreement, it looks for clear and unmistakable evidence that the parties intended for an arbitrator

to decide the dispute. Where a court is examining whether the contract as a whole is valid, the court need not conduct this analysis. The circuits uniformly observe this approach, which follows directly from this Court's precedent.

Rogers asserts that in *Brennan* v. *Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), the Ninth Circuit analyzed the "*First Options* requirement before addressing the severability doctrine." Pet. 23-24. In *Brennan*, however, the court was examining the "scope" of the arbitration agreement. 796 F.3d at 1131. The First Circuit's decision in *Dialysis Access Center, LLC* v. *RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011), similarly addressed the "scope" of an arbitration agreement. *Id.* at 374. In *Allen* v. *Regions Bank*, 389 F. App'x 441, 446 (5th Cir. 2010) (per curiam), the Fifth Circuit explicitly noted that it was *not* addressing "a challenge to the validity of the agreement" but to its scope. *Id.* at 445. The same court in *Will-Drill Resources, Inc.* v. *Samson Resources Co.*, 352 F.3d 211 (5th Cir. 2003), analyzed the *formation* of a contract, concluding that "where the very existence of any agreement to arbitrate is at issue, it is for the courts to decide based on state-law contract formation principles." *Id.* at 212. In *Sandvik AB* v. *Advent International Corp.*, 220 F.3d 99 (3d Cir. 2000), the Third Circuit likewise evaluated a challenge to the *formation* of an agreement. *Id.* at 101 (holding that "when a party claims not to have even signed a contract, the district

court must first determine whether a valid arbitration agreement was signed").[7]

In short, *none* of the decisions Rogers cites as creating a split are factually similar to this case. In the decision below, the Sixth Circuit concluded that Rogers challenged the validity of the agreement as a whole, and that it was up to an arbitrator in the first instance to decide if the parties' dispute was subject to arbitration. In contrast, in cases where a party has challenged the scope or formation of an agreement to arbitrate, courts have evaluated whether the parties clearly and unmistakably intended for an arbitrator to decide the question of arbitrability. Indeed, the Sixth Circuit *agrees* that it is appropriate to look for clear and unmistakable evidence of the parties' intent to arbitrate where a party brings a scope or formation challenge. *See Reed Elsevier, Inc.* v. *Crocket*, 734 F.3d 594, 597 (6th Cir. 2013). In each of the cases cited by Rogers, the circuit court followed this Court's established precedent, as applied to the specific facts of the case at bar. There is no split, and this Court's intervention is plainly unwarranted.

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[7] Rogers cites *Spahr* v. *Secco*, 330 F.3d 1266 (10th Cir. 2003), and *Quilloin* v. *Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012), as falling on the other side of the split. Those cases are likewise distinguishable. In *Spahr*, the court evaluated a challenge to a party's mental capacity to enter into a contract. *See* 330 F.3d at 1273 (concluding that the plaintiff's "mental incapacity defense" was for the court to decide). In *Quilloin*, the court evaluated whether "the arbitration agreement, specifically"—as opposed to the contract as a whole—"is unconscionable." 673 F.3d at 230.

B. This Case Is A Poor Vehicle To Consider The Question Presented.

This case is an exceptionally poor vehicle to address the first question presented by Rogers for at least three reasons.

First—and fatally—Rogers *never raised the question presented* in the proceedings below. Rogers did not even cite *First Options* or its operative language in his district court or Sixth Circuit briefing, much less "adequately develop[ ]" his argument in those briefs. *Landon* v. *Plasencia*, 459 U.S. 21, 37 n.9 (1982). Because Rogers did not raise this argument below, the Sixth Circuit did not pass on it. The court did not cite *First Options* or analyze whether its clear and unmistakable evidence standard applied to the lease agreement in this case. This Court should not address an argument on certiorari that was not pressed or passed on below. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view * * * .").

In his petition, Rogers explicitly recognizes this obstacle to certiorari. *See* Pet. 17 n.3. He asserts, however, that he raised the question presented because he argued in the Sixth Circuit that "the arbitration clause here does not delegate issues of arbitrability to the arbitrator" and has "consistently claimed that the courts should address his challenges to arbitrability." *Id.* That general argument is a far cry from the question presented—which asks whether the clear and unmistakable evidence standard announced in *First Options* applies even when a party attacks the validity of the contract as a whole. Rogers also asserts that Shell recognized in the district court "that courts

determine whether a dispute is arbitrable." *Id.* But Shell's general acknowledgement that courts in some situations decide questions of arbitrability *does not address* the specific question presented, nor is it sufficient to preserve the issue for this Court's review. *See Cutter*, 544 U.S. at 718 n.7 (declining to review an issue because it was "not addressed by the Court of Appeals"); *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469-470 (2000) (the issue must be separately raised "before the Court of Appeals").

In no way did the "court below pass[ ] upon the issue." Pet. 17 n.3. The Sixth Circuit's boilerplate statement that it "considered" the issues raised in Rogers' rehearing petition is not sufficient to avoid waiver. *See United States* v. *Williams*, 504 U.S. 36, 44 (1992) (holding that an issue must be "expressly decided by a federal court" before it may be addressed by this Court). Nor did Judge Moore address the question presented in her dissent: She concluded that Rogers had challenged the *formation* of an agreement to arbitrate; she did not evaluate whether the *First Options* clear and unmistakable evidence standard applies even when a party is challenging the validity of a contract as a whole. Rogers cited *First Options* for the first time in his petition for rehearing, far too late to preserve an argument based on it. *See United States* v. *Huntington Nat'l Bank*, 574 F.3d 329, 331 (6th Cir. 2009) (issues raised for the first time in a rehearing petition are unpreserved). At a minimum, the dispute over whether Rogers raised the question presented—and whether the Sixth Circuit passed on it—is a significant vehicle problem that counsels against granting certiorari.

Second, Rogers stated in his Sixth Circuit briefing that the question "whether the severability doctrine applies turns entirely on what aspects of the agreement the party resisting arbitration *actually* challenges," citing this Court's decision in *Rent-A-Center*. Br. for Plaintiff-Appellee, *supra* note 2, at 29. He similarly explained that "the severability doctrine requires that when a party challenges the validity (enforceability) of 'the contract as a whole,' that challenge must be heard by an arbitrator." *Id.* at 26 (quoting *Buckeye*, 546 U.S. at 444-445). That is the *exact opposite* of Rogers' position before this Court, for here he argues that the *First Options* standard applies regardless of whether Rogers challenged the validity of the contract as a whole or raised some other kind of challenge to the agreement. Rogers embraced this Court's longstanding precedent before the Sixth Circuit; he should not be permitted to turn around and challenge that precedent at this juncture.

Third, even if the *First Options* standard applies in this case, it has been met. The arbitration clause at issue in this case states that all disputes "shall be resolved by binding arbitration by three arbitrators in accordance with the Commercial Arbitration Rules of the American Arbitration Association." Pet. App. 64. Rule 7(a) of those rules states that it is up to the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Commercial Arbitration Rules R-7(a); *see supra* p. 7.

At least six circuits have considered this issue, and all six have held that a contract's incorporation of the American Arbitration Association (or similar) rules

"is about as 'clear and unmistakable' as language can get" to demonstrate that it is up to the arbitrator to determine whether the dispute is subject to arbitration. *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *see also Emilio* v. *Sprint Spectrum L.P.*, 508 F. App'x 3, 5 (2d Cir. 2013); *Arnold* v. *HomeAway, Inc.*, 890 F.3d 546, 553 (5th Cir. 2018); *Fallo* v. *High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Terminix Int'l Co. LP* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005). Several federal district courts within the Sixth Circuit agree. *See, e.g., McGee* v. *Armstrong*, No. 5:11-cv-2751, 2012 WL 11010071, at *5 (N.D. Ohio Nov. 14, 2012); *Bishop* v. *Gosiger, Inc.*, 692 F. Supp. 2d 762, 769 (S.D. Mich. 2010). Indeed, even the Ninth Circuit in *Brennan*—a case Rogers relies on to allege a circuit split—holds that a contract's incorporation of the American Arbitration Association rules "constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." *Brennan*, 796 F.3d at 1130.

Thus, even if the *First Options* standard applies in this case, it has been met. The parties agreed to arbitrate in accordance with the American Arbitration Association rules, which plainly delegate to the arbitrator the decision whether the dispute is subject to arbitration. There is no reason to grant certiorari on the first question presented, where the answer to that question will have no effect on the outcome of this case.

C. This Court's Decision In *Rent-A-Center* Is Correctly Decided.

In the decision below, the Sixth Circuit applied this Court's straightforward decision in *Rent-A-Center*, which holds that a "party's challenge to another provision of the contract"—apart from the arbitration clause—"or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." Pet. App. 8 (quoting *Rent-A-Center*, 561 U.S. at 70). *Rent-A-Center* was correctly decided.

Section 2 of the Federal Arbitration Act requires that arbitration clauses be "severable" from the contracts in which they are embedded. *Buckeye*, 546 U.S. at 445-447. Where an agreement to arbitrate is formed, and the parties' dispute falls within the arbitration provision's scope, it is up to the arbitrator in the first instance to determine whether the parties' dispute over the validity of the contract as a whole is subject to arbitration. *See id.* at 444-446. *Rent-A-Center* applies this principle, holding that the "basis" of a party's invalidity challenge must "be directed specifically to the agreement to arbitrate" for a court to intervene. 561 U.S. at 71. As the Sixth Circuit concluded below, *Rent-A-Center* decides this case. Rogers has not asked the Court to overrule *Rent-A-Center*, and there is no reason for the Court to do so.

II. THE SECOND QUESTION PRESENTED REQUESTS SPLITLESS, FACTBOUND ERROR CORRECTION WITH RESPECT TO A QUESTION THAT WAS NOT PRESSED OR PASSED ON BELOW.

The second question presented by Rogers asks 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." Pet. i. Once again, the Sixth Circuit *did not address* this question, which is not surprising because Rogers did not raise it below. Nor is there a split on this question, as Rogers appears to concede. Rogers' ultimate complaint is with the Sixth Circuit's interpretation of his prior filings, not with the lower court's ruling on a broader question of law. This Court's intervention is unwarranted on this question as well.

A. There Is No Conflict In The Circuits Over The Question Presented.

There is no split over the second question presented by Rogers. Rogers asserts (at 25-26) that "the Fifth Circuit is the only circuit to date that has squarely decided this issue," citing *Lefoldt ex rel. Natchez Reg'l Med. Ctr. Liquidation Tr.* v. *Horne, L.L.P.*, 853 F.3d 804 (5th Cir. 2017). In *Lefoldt*, however, the court did not address the question presented. There, the Fifth Circuit examined whether a state law rule requiring that "a majority of a quorum of the board assent to a contract, in an open meeting" went to the formation or validity of a contract. *Id.* at 811-812. The court assumed that state law applied to that narrow question; it did not hold

that state law *always* applies when evaluating whether a party challenges the formation or validity of a contract—which is the question Rogers asks this Court to address. *See id.* at 811.

Even if *Lefoldt* had addressed the question presented, however, there would still be no split because the Sixth Circuit has not addressed it. As Rogers acknowledges, the "panel majority below *did not explicitly hold that federal law applies*" when determining whether Rogers' challenge went to the validity or formation of the arbitration agreement. Pet. 27 (emphasis added). And for good reason: As explained below, Rogers did not ask the panel to decide that question. *See infra* pp. 20-21. The Sixth Circuit's unpublished, non-precedential decision in this case did not rule on the question presented, and it certainly did not create a split with the Fifth Circuit (which also has not decided the question presented). For this reason as well, certiorari should be denied.

B. This Case Is A Poor Vehicle To Consider The Question Presented.

This case is an especially poor vehicle to address the second question presented by Rogers for at least three reasons.

First, Rogers once again did not raise that question in the proceedings below. In the Sixth Circuit, Rogers argued that the "severability doctrine does not apply" because he "disputes the formation of the arbitration agreement in particular, not the validity of the Lease as a whole." Br. for Plaintiff-Appellee, *supra* note 2, at 21. He also argued that Ohio law applied when determining whether he had formed an agreement to arbitrate. *See id.* at 35, 38-39. Rogers did *not* argue, however, that courts must rely on

state 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." Pet i. Rogers accordingly forfeited the second question presented by failing to raise it, and this Court should not address it.

Second, the Sixth Circuit did not decide the second question presented—presumably because Rogers did not raise it. Once again, Rogers concedes that "the panel majority below did not explicitly hold that federal law applies" when determining whether a defense to arbitration is a question of contract formation or validity. *Id.* at 27.[8] He instead argues that the Sixth Circuit "*implied* that federal law governs this issue" when the court cited this Court's decision in *Rent-A-Center*. *Id.* (emphasis added) (citing Pet. App. 7). The decision below, however, cites *Rent-A-Center* for the basic proposition that an "attack on the validity" of an agreement to arbitrate "asks whether the arbitration clause is legally binding." Pet. App. 7. It does not cite *Rent-A-Center* as deciding the second question presented. This Court should not grant certiorari on a question that was neither pressed nor passed on below.

Third, the dispute in this case ultimately concerns the proper interpretation of Rogers' own briefs. The

[8] Rogers asserts that the Sixth Circuit erred by failing to address "how Ohio law views conditions precedent." Pet. 27. To the extent there are questions regarding conditions precedent, however, the meaning of a purported condition precedent to arbitration, as well as whether that condition has been fulfilled, are issues for the arbitrator to decide. *See, e.g., BG Grp.*, 572 U.S. at 34-35; *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002).

Sixth Circuit held that "Rogers does not dispute that he properly agreed to the Lease by signing it," and that his "attack on the arbitration provision assumes that the contract was formed; that it conferred obligations on the parties; and that Shell failed to perform one of its obligations, meaning the arbitration clause was never triggered." *Id.* at 6-7. Rogers, of course, disagrees with the Sixth Circuit's interpretation of his prior briefing, and he characterizes his challenge as a question of contract formation rather than validity. *See* Pet. 4. This Court is not the proper forum for resolving such a dispute, which does not have any relevance beyond the parties to this case. *See Martin* v. *Blessing*, 571 U.S. 1040 (2013) (Alito, J., respecting the denial of certiorari) (stating that the "uniqueness" of a factual or legal issue "weighs against" certiorari). Nor has Rogers asked this Court to review the Sixth Circuit's interpretation of his own briefing. For all of these reasons, the Court should decline review.

III. THE THIRD QUESTION PRESENTED REQUESTS SPLITLESS, FACTBOUND ERROR CORRECTION WITH RESPECT TO THE PROPER INTERPRETATION OF ROGERS' LEGAL BRIEFS RATHER THAN A BROADER QUESTION OF LAW.

The third question presented by Rogers asks 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." Pet. i. Yet again, the Sixth Circuit did not address the question presented. The Sixth Circuit instead held that because Rogers

challenged far more than the arbitration provision at issue, it was up to an arbitrator rather than the court to determine whether the parties' dispute was subject to arbitration. Nor are the circuits divided over the question presented, which this Court decided in *Rent-A-Center*. The Court should decline certiorari.

A. There Is No Conflict In The Circuits Over The Question Presented.

Rogers asserts that the Sixth Circuit's decision "deepens a circuit split" on the third question presented. *Id*. at 27. According to Rogers, the First, Second, Third, Fifth, and Ninth Circuits permit 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.* (internal quotation marks omitted). The Sixth and Eleventh Circuits, Rogers contends, hold 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." *Id.* at 30.

There is no split. *All* of the cases that Rogers cites as creating a split, with one exception, were decided before this Court's decision in *Rent-A-Center*, which explicitly addressed the question presented. In *Rent-A-Center*, the Court held that the "basis of a challenge" to an arbitration provision must be "directed specifically to the agreement to arbitrate" before it is appropriate for the court to determine whether the dispute is arbitrable. 561 U.S. at 71. As Justice Stevens recognized, the Court in *Rent-A-Center* went "beyond" prior precedent to hold that a "claim that an *entire* arbitration agreement is invalid

will not go to the court unless the party challenges the *particular sentences* that delegate such claims to the arbitrator, on some contract ground that is particular and unique to those sentences." *Id.* at 76-77, 86 (Stevens, J., dissenting).

To demonstrate a split, Rogers would have to cite cases *postdating Rent-A-Center* that explicitly addressed the question presented and that disagreed about *Rent-A-Center*'s resolution of that question. He fails to do so.[9] The sole case he cites that was decided after *Rent-A-Center* is the Ninth Circuit's decision in *Tompkins* v. *23andMe, Inc.*, 840 F.3d 1016 (9th Cir. 2016). In *Tompkins*, however, the Ninth Circuit merely quoted this Court's decision in *Rent-A-Center* that "it may be that where a plaintiff challenges the validity" of the "precise agreement to arbitrate" on the "ground that certain general contract provisions as applied to the agreement to arbitrate render it unconscionable, such a challenge should be considered by the court." *Id.* at 1032 (alterations and internal quotation marks omitted). The Ninth Circuit's straightforward quotation of a decision of this Court does not create a split. *See id.*[10] And in any event, *Tompkins* addressed a

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[9] Rogers repeatedly cites *Nagrampa* v. *MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc), for example, but that case discusses the state of the law *prior* to *Rent-A-Center*. *See* Pet. 27-30. The Ninth Circuit has recognized that this Court took its analysis a "step further" in *Rent-A-Center*, and the Ninth Circuit now applies *Rent-A-Center* when evaluating whether a dispute is subject to arbitration. *Brennan*, 796 F.3d at 1132.

[10] Rogers claims that the Eleventh Circuit is on the opposite side of the alleged split, *see* Pet. 30, but that court similarly

narrow question involving the *unconscionability* of an arbitration agreement; it did not decide the broader question that Rogers seeks to resolve here.

Even if *Tompkins* had addressed the question presented, however, there would still be no split: As discussed below, the Sixth Circuit did not reach the question presented, so it did not (and could not) disagree with the Ninth Circuit's resolution of that question. *See infra* pp. 25-26. In the absence of disagreement among the circuits over the proper interpretation of *Rent-A-Center*, the Court should deny certiorari.

B. This Case Is A Poor Vehicle To Consider The Question Presented.

Yet again, this case is a particularly poor vehicle to address the third question presented by Rogers for at least two reasons.

First, the Sixth Circuit did not address the question presented. The court below did not hold—as Rogers suggests in his petition—that "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." Pet. i. The Sixth Circuit instead held that Rogers' defense to arbitration was

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applies *Rent-A-Center* when evaluating whether it is up to the court or arbitrator to determine whether a dispute is subject to arbitration. *See Parm* v. *Nat'l Bank of California, N.A.*, 835 F.3d 1331, 1334-35 & n.1 (11th Cir. 2016) (holding that a court may review a "direct challenge" to a clause delegating disputes to an arbitrator).

not "directed solely to the validity of an arbitration provision." As the Sixth Circuit explained, Rogers' "attack goes well beyond the arbitration clause." Pet. App. 7. The Sixth Circuit recognized that Rogers' "own language" in his briefs and filings "makes it clear that his attack is much broader" than an attack on the arbitration provision alone, and that Rogers "has argued that much of the contract, which happens to include the arbitration clause, is unenforceable." *Id.* at 8-9.

In the decision below, the Sixth Circuit ultimately concluded that because Rogers' challenge extended far beyond the arbitration clause, it was up to the arbitrator in the first instance to determine whether the parties' dispute was subject to arbitration. That conclusion is a straightforward application of *Rent-A-Center*, which holds that unless a party's challenge is "directed specifically to the agreement to arbitrate," it is up to the arbitrator to determine whether the dispute is subject to arbitration. 561 U.S. at 71. The third question presented—which asks whether "a contractual defense directed solely to the validity of an arbitration provision," Pet. i, may be decided by an arbitrator—is simply not at issue in this case. This Court should not grant certiorari to address a question that is not even presented.

Second, Rogers' underlying complaint is that the Sixth Circuit did not properly interpret his own briefing. According to Rogers, he challenged *only* the arbitration provision in the lease, and the Sixth Circuit incorrectly held that his challenge was instead much broader. *See id.* at 21. The Sixth Circuit, however, explicitly analyzed this issue, concluding that although Rogers at times challenged only the arbitration provision, he used "contradictory

language * * * elsewhere in his brief and before the district court," demonstrating that his challenge in fact went far beyond the arbitration provision. Pet. App. 8 n.2. Rogers has not asked this Court to reverse the Sixth Circuit's conclusion that Rogers' own briefing included "contradictory language" with respect to the nature of his challenge, nor is this Court's attention warranted to resolve that factbound question.

IV. THE PETITION DOES NOT IMPLICATE IMPORTANT QUESTIONS OF LAW AND SHOULD BE DENIED.

The Court should deny the petition. This case does not involve important questions of law, but instead rests on the proper interpretation of the unique lease provisions at issue. At bottom, the Sixth Circuit majority interpreted the entire lease to go into effect as soon as it was signed, while the dissent disagreed with that conclusion. That disagreement in turn led the majority and dissent to take different paths when analyzing Rogers' challenge to the lease's requirements, including the arbitration provision. *See supra* pp. 8-10. This factbound dispute between the majority and dissent is not worthy of the Court's attention.

The Sixth Circuit, moreover, simply disagreed with Rogers' interpretation of his own briefing, concluding that Rogers had in fact challenged many aspects of the lease beyond the arbitration provision. This too raises a factbound question rather than an important issue of law. Although Rogers' petition poses a number of broad questions about arbitration provisions, Rogers did not raise those questions in the proceedings below, and the Sixth Circuit did not pass

on them. Nor are those questions implicated in this case. This petition is thus a particularly poor vehicle to address the questions presented. This Court should decline to review the Sixth Circuit's unpublished, non-precedential decision, which is limited to its unique facts. The Court should deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 2019