No. 18-1565

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Shell's opposition rests entirely on a flawed understanding of Rogers' challenge to the decision below. The Petition asks the Court to provide much-needed guidance on the rules for determining when a challenge to an arbitration provision is properly treated as a challenge to formation, on the one hand, or validity, on the other. Rather than address *that* issue, Shell sidesteps the problem by simply *assuming* that the Sixth Circuit correctly categorized Rogers' challenge here as one to validity. If anything, Shell's opposition reinforces the core point—in the arbitrability context, categorizations (e.g., formation vs. validity) matter greatly, making clarity regarding those categorizations all the more important.

Apart from that misunderstanding, Shell's arguments do nothing to undercut the urgent need for review on the questions actually presented. Regarding the first question, Shell's argument conflates two separate issues. The severability doctrine applies to deciding arbitrability—whether the merits of a dispute should be arbitrated. But the Sixth Circuit's decision below solely addresses an entirely different issue: *who* decides questions of arbitrability.[1] The severability doctrine has little to no application there. Shell's reliance on that doctrine thus misconstrues the role that

[1] The Sixth Circuit did not address the separate issue of whether Rogers' claims were arbitrable because it decided that issue was for an arbitrator to decide.

severability plays, thereby increasing, not ameliorating the confusion arising from the decision below.

The remainder of Shell's arguments equally lack merit. The parties did not delegate questions of arbitrability to an arbitrator and Rogers raised all of the questions presented below.

I. Shell Misconstrues the Petition.

This Court's precedent requires different analytical frameworks to be applied depending on how a challenge to arbitrability is characterized, for example whether a challenge goes to the formation, validity, or scope of an arbitration agreement. See *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (distinguishing questions of formation from those of validity). The Court, however, has provided little guidance regarding the exact contours of those categories, leading to confusion on that issue in the lower courts, confusion the Petition asks the Court to address.

Rather than responding to this categorization issue, Shell seeks to sidestep it by simply assuming that the Sixth Circuit correctly categorized Rogers' challenge to arbitrability as one of validity—a point that Rogers challenged below and challenges here. Shell's refusal to meet that issue head on underlies many of the flaws inherent in its other arguments, as described below.

II. Shell's Argument Regarding the First Question Presented Conflates Two Separate Issues and Mischaracterizes Case Law.

In *First Options of Chicago, Inc.* v. *Kaplan*, the Court delineated three levels of disputes that arise in the arbitration context. 514 U.S. 938, 942 (1995). First, parties disagree about the merits of the underlying dispute (Level 1). Second, parties disagree whether the dispute on the merits must be arbitrated, generically referred to as questions of "arbitrability" (Level 2). These questions include whether an agreement to arbitrate was formed or enforceable, as well as the scope of the arbitration agreement. See *id.* at 944-45. Third, parties disagree about who—courts or arbitrators—should decide those questions of arbitrability (Level 3). See *id.*

Different tools apply in answering these questions. The severability doctrine, for example, is used in answering some Level 2 questions. That doctrine 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. 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). By contrast, Level 3 issues are answered by the rule in *First Options*: questions of who decides arbitrability are decided by courts absent "clea[r] and unmistakabl[e]" evidence that the parties delegated those

issues to an arbitrator. 514 U.S. at 944 (quotation marks omitted).[2]

Shell's argument that *First Options'* requirement does not apply where a court is examining validity contradicts this Court's precedent. For one thing, Shell's argument puts the cart before the horse: one cannot address questions of arbitrability—whether the arbitration agreement was formed, valid, or covers the underlying dispute—without first determining *who* examines those questions. This Court has previously stated that questions of validity (or enforceability, as Shell acknowledges, Opp'n 5 n.2) are decided by courts absent clear and unmistakable evidence to the contrary. See *Granite Rock*, 561 U.S. 287 at 299 ("Applying this principle, our precedents hold that courts 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."). In claiming otherwise, Shell improperly conflates issues at the second and third levels identified by the Court in *First Options*.

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[2] In only one limited circumstance, not applicable here, does the severability doctrine play any role in the "who decides" question. In the event that the parties *did* delegate questions of arbitrability to an arbitrator, the delegation clause is severable from the overall arbitration agreement. See *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 72-73 (2010). Here, however, the parties did not delegate questions of arbitrability to an arbitrator.

A. Shell's Inability to Recognize a Circuit Split Suffers from the Same Flaw.

Shell does not contest the tension in the cases cited by Rogers as showing a circuit split regarding the first question presented. Instead, Shell attempts to distinguish those cases based on their facts. Shell's distinctions are meritless for at least two reasons. *First*, Shell relies on the same flawed reasoning, discussed above, regarding the applicability of *First Options* to questions of invalidity. Given that *First Options* does apply to challenges of invalidity, see *id.*, Shell's distinctions on that point are irrelevant.

Second, Shell mischaracterizes the case law in claiming that some of the circuit cases cited by Rogers did not examine validity. That is wrong. For example, Shell contends the First Circuit's decision in *Dialysis Access Center, LLC* v. *RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011), addressed only the "scope" of an arbitration agreement. Opp'n 12. But the First Circuit's decision clearly states that it was addressing "both the scope *and validity* of their arbitration agreement." See *id.* at 370 (emphasis added). Likewise, the Ninth Circuit's decision in *Brennan* v. *Opus Bank*, 796 F.3d 1125 (9th Cir. 2015) extensively discusses the validity of the arbitration provision.

B. The Parties Did Not Delegate Questions of Arbitrability to an Arbitrator.

At the eleventh hour, Shell presents an argument it never pursued in this litigation before: that the

incorporation of the American Arbitration Association ("AAA") rules constitutes clear and unmistakable evidence that the parties delegated questions of arbitrability to an arbitrator. Opp'n 16-17. Despite litigating the issues raised in the Petition for nearly three years, Shell never advanced this argument. See generally D. Ct. Doc. 21-1; 27; C.A. Doc. 19; 25. As a result, the Court should reject Shell's argument on that basis alone. See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976).

Furthermore, the law is far less clear than Shell makes it seem. *First*, this Court has never addressed whether incorporating a set of arbitral rules constitutes the clear and unmistakable evidence required by *First Options*. In fact, this Court's recent decision in *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), observed that this issue remains an open question. In its arguments before the Court, Schein contended the incorporation of the AAA rules delegated questions of arbitrability to the arbitrator. The Court refused to address that question and emphasized courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 531.

Second, Shell neglects to mention that the Sixth Circuit rejected the idea that incorporating the AAA rules constitutes clear and unmistakable evidence of delegation. In *AlixPartners, LLP* v. *Brewington*, 836 F.3d 543, 553 (6th Cir. 2016), the circuit applied the "clear and unmistakable evidence" standard to whether the parties delegated "the question of whether the

agreement permits classwide arbitration to the arbitrator." The Sixth Circuit concluded that they did not, and expressly stated that the agreement's "incorporation of the AAA's rules" was insufficient to conclude the parties delegated that question. *Id.*

Third, several courts have questioned whether incorporating arbitral rules can constitute clear and unmistakable evidence where—as here—one of the parties is unsophisticated. See *Stone* v. *Wells Fargo Bank*, 361 F. Supp. 3d 539, 554 (D. Md. 2019) ("[I]t remains an open question whether the incorporation of arbitration rules provides 'clear and unmistakable' evidence of an unsophisticated party's intent to arbitrate arbitrability."); *Allstate Ins. Co.* v. *Toll Bros., Inc.*, 171 F. Supp. 3d 417, 428 (E.D. Pa. 2016) ("[T]his Court concludes that a cross-reference to a set of arbitration rules . . . does not automatically constitute clear and unmistakable evidence that the parties intended to arbitrate threshold questions of arbitrability—at least where those parties are unsophisticated.").

C. Rogers Preserved the *First Options* Question in the Proceedings Below.

Shell's assertion that Rogers never raised the first question presented is incorrect. To the contrary, Rogers has consistently argued—in the district court and the Sixth Circuit—that a court, not an arbitrator, should decide whether his claims are arbitrable. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (addressing a party's argument in support of

"what has been his consistent claim"). The fact that Rogers did not explicitly cite to *First Options* below is irrelevant. Rogers instead relied on the Court's decision in *Granite Rock*—a more recent case that repeatedly cites *First Options* and upholds its "clear and unmistakable evidence" standard—for the same point. See D. Ct. Doc. 24 at 9-10; C.A. Doc. 23 at 18-35. Furthermore, Rogers explicitly argued below that the arbitration clause in the Lease did not delegate issues of arbitrability to the arbitrator. C.A. Doc. 23 at 29.

Shell also mischaracterizes Judge Moore's dissent. Shell claims Judge Moore did not evaluate the *First Options* requirement because she concluded that Rogers challenged the formation of the agreement to arbitrate. Opp'n 15. But Judge Moore's analysis is just the opposite: she *first* concluded that "district court was the proper body to decide whether the dispute should be arbitrated" because the agreement "was anything but clear and unmistakable." Pet. App. 11. Only *after* reaching that conclusion did Judge Moore find Rogers' challenge to the arbitration clause was one of formation.

The case law Shell cites is inapposite. In *Cutter* v. *Wilkinson*, the Court refused to review an issue that was raised in the lower courts, but not addressed by the Court of Appeals. 544 U.S. 709, 718 n.7 (2005). Here, however, the court below did decide the very question at issue: who decides whether Rogers' claims are arbitrable. And the Court's decision in *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460 (2000), supports Rogers' position. While Shell correctly points out the "general

rule that issued must be raised in lower courts in order to be preserved," Shell neglects to add that the Court explained "this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Id.* at 470 (permitting consideration of due process issue even where Federal Circuit did not squarely address the issue). Given that Rogers argued the arbitration clause did not delegate questions of arbitrability to an arbitrator and cited case law relying on *First Options*, which Judge Moore also raised in dissent, it is difficult—if not impossible—to see how the lower court was not put on notice of the issue here.[3]

III. Shell's Attempts to Downplay the Circuit Splits Regarding the Second and Third Questions Presented are Incorrect.

Related to the second question presented, Shell does not deny the apparent conflict between the approaches taken in the decision below and the Fifth Circuit's decision in *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr.* v. *Horne, L.L.P.*, 853 F.3d 804 (5th Cir. 2017). Instead, Shell simply argues there is no square conflict because the decisions do not go so far as to hold that state or federal law "*always* applies when evaluating whether a party challenges the formation or validity of a contract." Opp'n 20. Shell's argument,

[3] *United States* v. *Williams*, 504 U.S. 36 (1992) is also inapposite because it *permitted* consideration of a question where "the petitioner did not contest the issue in the case immediately at hand." *Id.* at 44-45.

however, ignores the fact that the Court has often granted certiorari in similar circumstances. See *Poster 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516 (1994) (certiorari granted "[b]ecause of an apparent conflict among the Courts of Appeals"); *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 78 (1990) (certiorari granted "because of an apparent conflict with a decision of the First Circuit"); *Chicago Teachers Union* v. *Hudson*, 574 U.S. 292, 300 (1986) ("[T]he divergent approaches of other courts to the issue, led us to grant certiorari.").

Regarding the third question, Shell claims there is no circuit split because *Rent-A-Center* supposedly answered the question, and most of the circuit cases cited by Rogers pre-date *Rent-A-Center*. But Shell's understanding of *Rent-A-Center* suffers from several flaws.

First, to the extent *Rent-A-Center* answers this question, it answers it in Rogers' favor. *Rent-A-Center* examined an unconscionability challenge to arbitration. Pet. 21-22. Even though that challenge implicated the entire agreement, the Court suggested that if the party challenging arbitration had focused it on the delegation provision at issue, then it might "have been considered by the court." 561 U.S. at 74. That portion of the Court's opinion, however, was dicta, and not a conclusive answer to the question presented.

Second, Shell's argument relies exclusively on how Justice Stevens' dissent characterizes the Court's opinion. Opp'n 24. Shell does not point to any part of the

Court's opinion in *Rent-A-Center* they claim answers the third question presented.

Third, Shell does not contest that, absent its flawed interpretation of *Rent-A-Center*, a conflict exists among the circuits regarding the third question presented.

IV. The Second and Third Questions Presented Were Raised Below.

Shell's assertion that Rogers failed to raise the second question presented is classic doublespeak, especially where Shell acknowledges Rogers *did* argue that Ohio law applies. Opp'n 20. Before the Sixth Circuit, Rogers argued that Ohio law treats conditions precedent as a matter of contract formation. C.A. Doc. 23 at 35-36. The panel majority below, however, ignored that argument and relied solely on *Rent-A-Center* to determine that Rogers' challenge was one of validity because it asked whether the arbitration clause is "legally binding." Pet. App. 7.[4] As a result, the panel clearly (and wrongly) intended to convey that federal law applies in making this distinction.

Shell also fails to recognize that Rogers raised the third question presented. Rogers cited the same portion of this Court's decision in *Rent-A-Center* that is

[4] That superficial analysis ignores the fact that an agreement that never became binding is also not legally binding. Therefore, whether an agreement is "legally binding" cannot possibly be the standard in discerning whether a particular challenge to arbitrability relates to formation or validity.

cited in the Petition before the Sixth Circuit, see C.A. Doc. 23 at 30, arguing that: "*Rent-A-Center* teaches that courts should consider challenges to the validity of an arbitration clause contained within a larger contract—*even if that argument could be extended to other provisions of the larger contract*—so long as the challenge is focused specifically on the arbitration issue." *Id.* (emphasis added). That argument undoubtedly raised the third question presented before the court below.[5]

V. The Sixth Circuit's Use of an Unpublished Decision Counsels in Favor of Granting Certiorari.

Shell repeatedly emphasizes that the decision below is an unpublished, non-precedential opinion. That, however, is "yet another reason to grant review." *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (Mem) (2015) (Thomas, J., dissenting from denial of certiorari). The decision below satisfied several criteria for publication under the Sixth Circuit's own standards: it included a dissenting opinion; reversed the district court's decision; and, as Shell concedes, Opp'n 4, applies an established rule to a novel factual situation. 6th Cir. I.O.P. 32.1(b). As Justice Thomas recognized in similar circumstances, "[i]t is hard to imagine a reason that the Court

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[5] Shell argues *Rent-A-Center* was correctly decided, Opp'n 18, but that argument is odd because Rogers never suggests *Rent-A-Center* was wrongly decided and argues *Rent-A-Center* supports his arguments. See Pet. 14-17, 21-23.

of Appeals would not have published this opinion except to avoid creating binding law for the Circuit." *Id.*

Other members of the Court have likewise observed the need to review unpublished decisions. See *Smith* v. *United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("Nonpublication must not be a convenient means to prevent review.").

Shell does not seriously contest the importance or recurring nature of the questions presented. Rather, Shell claims those questions rest on interpreting the unique contract at issue here. Opp'n 27. But every arbitrability case before this Court has involved a contract unique in its own right; that hardly mitigates the importance of these issues.

As one district court recently observed: "The law on arbitration has become rather complex. There are nuances that can be easy to overlook, and courts use various terms interchangeably, which has led to areas of the law becoming convoluted." *Berkeley Cty. School Dist.* v. *HUB Int'l Ltd.*, 363 F. Supp. 3d 632, 639 (D.S.C. 2019). That court addressed many of the same issues presented here and expressed that the Court's holdings on these issues suffer from a "lack of clarity." *Id.* at 642. The Petition affords a chance to provide that much-needed clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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