No. _____

IN THE

Supreme Court of the United States

MCINNIS ELECTRIC COMPANY,

Petitioner,

v.

BRASFIELD & GORRIE, LLC
AND JAMES MAPP,

Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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February 26, 2024

PARTIES TO THE PROCEEDING

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CORPORATE DISCLOSURE STATEMENT

Applicant (Plaintiff-Appellant below), McInnis Electric Company, is a privately held entity incorporated and headquartered in the State of Mississippi. It has no parent company. No publicly held company owns 10% or more of its stock.

Respondent (Defendant-Appellee below), Brasfield & Gorrie, Inc., is a privately held entity incorporated and headquartered in the State of Alabama. It has no parent company. No publicly held company owns 10% or more of its stock.

Respondent (Defendant-Appellee below), James Mapp, is a natural person and was an employee of Brasfield & Gorrie, Inc.

APPLICATION

To the Honorable Samuel Anthony Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and to 28 U.S.C. § 2101(c), Applicant McInnis Electric Company respectfully requests an extension of time within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case. Applicant McInnis Electric Company is the only party for whom an extension is sought. This request is for 60 days, which would be from the current deadline of March 13, 2024, to be extended to terminate on and to include Monday, May 13, 2024.

1. The Supreme Court of Mississippi entered judgment on October 19, 2023. *See McInnis Electric Company v. Brasfield & Gorrie, LLC, and James Mapp*, — So.3d —, 2023 WL 6889119, 2023 Miss. LEXIS 284 (Miss. Oct. 19, 2023) (McInnis v. B&G), App. 2. That Court denied Applicant's petition for rehearing on December 14, 2023. App. 1. The Mississippi Supreme Court stayed entry of its mandate, pending McInnis's filing a petition for a writ certiorari in this case before this Honorable Court.

2. This application conforms to Rule 13.5, being filed at least ten days before the date the petition is due. The petition is due, unless time is extended, on March 13, 2024. This application is submitted prior to March 3, 2024.

3. The Applicant would invoke jurisdiction of this Court to review, by writ of certiorari, "final judgments or decrees rendered by the highest court of a State . . . where any title, right, privilege, or immunity is specially set up or claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a).

4. In this case, the statute in question is the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*.

5. In this case, the Mississippi Supreme Court reviewed a state trial court's stay of a suit by McInnis Electric Company (McInnis), a Mississippi electrical subcontractor, against Brasfield & Gorrie (B&G), a general contractor with global operations. McInnis alleged B&G committed tortious and illegal conduct that was patently outside the scope of a construction subcontract. McInnis also alleged that B&G had so materially breached the contract as to default.

6. B&G's construction subcontract contained vague boilerplate language including an arbitration agreement, the scope of which is now contested. The express language of the pre-formed arbitration clause specified that "binding arbitration between the parties" would be "in accordance with the current Construction Industry Rules of the American Arbitration Association [AAA] by one or more arbitrators selected in accordance with said Rules." *McInnis v. B&G*, App. 2, at p. 3, ¶3.

7. B&G's boilerplate arbitration clause in its construction subcontact did ***not*** contain an express delegation clause. Id.

8. The Mississippi Supreme Court ruled that the mere reference to the rules of the American Arbitration Association was sufficient to create a delegation agreement between the parties. Furthermore, asserting the authority of the Federal Arbitration Act as well as state law, the Mississippi Supreme Court ruled the delegation was of sufficient scope that the delegation agreement included all issues of arbitrability. *McInnis v. B&G*, App. 2, at pp. 10-11, ¶¶ 20-22.

9. The issues of arbitrability, clearly (and without objection), would include McInnis's issues that might have arisen concerning the parties' performance of the contract B&G gave McInnis. Yet the issues now subject to mandatory arbitration also include McInnis's issues as to whether the purported delegation was too vague to be an enforceable delegation agreement contract and whether there was clear evidence that McInnis had entered a delegation agreement. Furthermore, McInnis's substantive issues went far beyond the contract, such as whether the claimed delegation amounted to a prospective waiver of McInnis's rights under statutes and public policy, whether an array of material breaches by B&G amounted to default of the contract, whether criminal conduct by B&G's agent James Mapp could have been contemplated by the parties *ab initio*, and whether the drastic effects of the COVID-19 pandemic amounted to *force majeure*.

10. The Mississippi Supreme Court also subsumed McInnis's allegations of tortious and illegal conduct by B&G into the delegation agreement that it implied from the mere reference to the AAA rules in the adhesive, vague, and

unconscionably misleading delegation contract. *See* "Adhesive Contract" in *Bouvier Law Dictionary*, Vol. 1, pp 604-605 (2012).

11. As a result, the Mississippi Supreme Court claimed that the Federal Arbitration Act required it to uphold the trial court's order to compel McInnis to arbitrate issues that were neither known or contemplated by the parties at the time of entry to the subcontract, nor have ever been within the scope of the construction subcontract. *See id.* at *McInnis v. B&G*, App. 2, at p. 7, ¶ 11 ("conversion and trespass to chattel").

12. Mississippi Supreme Court Presiding Justice Kitchens, joined by Presiding Justice King, dissented from the majority's opinion. They believed that the parties did not clearly and unmistakably contract to have the scope of arbitration determined by the arbitrator. Further, they did not consider the effects of *force majeure* to be arbitrable because the scope of the parties' arbitration agreement did not contemplate the impact of the COVID-19 pandemic. *McInnis v. B&G*, App. 2, at pp. 12-17 (arguments commencing at ¶¶ 26 and 31).

13. The Mississippi Supreme Court's analysis and conclusion are wrong. It patently failed to follow this Court's guidance in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 675 (2010), that an analysis of a disputed delegation clause should be clearly divided between issues of ordinary contract law to be decided under state law, and issues of federal policy that apply under the Federal Arbitration Act, (FAA), 9 U.S.C. § 1 *et seq*. Nor did the Mississippi court

recognize this Court's requirement in *Stolt-Nielsen S.A.*, that judicial assessment of a purported delegation of a particular issue to an arbitrator requires evidence related to the non-demanding party. A clause in a contract written by the demanding party that merely refers to the rules of an arbitral association, when the clause is silent as to the specific issue in question – indeed silent as to any specific issues – is insufficient notice to the non-demanding party of the scope of the obligations it is later said to have accepted. *See Stolt-Nielsen S.A.*, 559 U.S. at 684.

14. Instead, the Mississippi Supreme Court merged its analysis of state contract law with FAA policies, distorting each, in an analysis that failed to assess whether the party who was not demanding arbitration, McInnis, had clearly agreed to arbitrate the various issues in dispute. "A party may not be compelled under the FAA to submit [an issue to arbitration or to a form of arbitration] unless there is a contractual basis for concluding that the party agreed to do so." Id.

15. Furthermore, the Mississippi Court elevated the mere reference to the rules of an arbitration association (whose rules allow an arbitrator to determine issues of arbitrability that have been voluntarily delegated by each party to that arbitrator for resolution) from an interpretative tool of contract law to federal policy to favor arbitration. Judicial reliance on mysterious references to vaguely applicable rules in an arbitration agreement's delegation agreement cannot substitute for evidence of the non-demanding party's having clearly intended that the arbitrability of the issues in question be delegated to the arbitrator. This is the

type of "special, arbitration-preferring procedural rule..." that is not allowed under the FAA. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022).

16. Mississippi's opinion illustrates the persistent confusion and variation among the lower courts analyzing the delegation of arbitrability. There are splits among the Circuits and the States in each of the discrete steps in this analysis: the interpretation of the arbitration and delegation contracts as a matter of state contract law, the application of policies under the FAA, and the determination of whether there is sufficient, clear evidence that the non-demanding party has voluntarily consented to delegate each issue in dispute and each essential aspect of the dispute to the arbitrators for decision.

17. For example *Richardson v. Coverall North America, Inc.*, 811 Fed.Appx. 100 (3d Cir., 2020), *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), and *Caremark, LLC. V. Chickasaw Nation*, 43 F. 4th 1021 (9th Cir. 2022), treated references to the AAA rules as evidence that non-demanding parties actually knew the issues that would later arise and voluntarily agreed to delegate their arbitrability to an arbitrator and surrender their rights to trial by a judge and jury. On the other hand, *American Institute for Foreign Study, Inc. v. Fernandez-Jimenez*, 6 F.4th 120 (2021), *Doctor's Associates, Inc. V. Alemayehu*, 934 F.3d 245 (2d Cir. 2019), *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021), and *Catamaran Corporation v. Towncrest Pharmacy*, 946 F.3d 1020 (8th Cir. 2020), were each much more circumspect as to reference to the AAA rules. Perhaps the

most balanced recent circuit analysis of disputed arbitrability delegation came from the Fifth Circuit, which found a valid delegation agreement between the parties not owing to slavish recitation of AAA references but resulting from specific evidence that satisfied the appropriate state standard of meeting of the minds in the formation of the delegation agreement. *See Bowles v. OneMain Financial Group, L.L.C.*, 954 F.3d 722, 728 (2020).

18. A preliminary study of delegation of arbitrability among state courts suggests there are myriad splits among the them along similar lines. *Compare* the Mississippi case in issue here (*McInnis v. B&G*, App. 2) to the conclusory use of AAA rules in *AirBNB, Inc. v. Doe*, 336 So.3d 698 (Fla. 2022) and *Beco v. Fast Auto Loans, Inc.*, 86 Cal.App.5th 292 (Cal. Ct. App., 4th Dist, Div.3, 2022), *with Gandhi-Kapoor v. Hone Capital, et al.*, 307 A.3d 328 (Ct. Ch. Delaware 2023), and *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W. 3d 432 (Mo. 2020), each of which considered evidence specific to the non-demanding party to determine that there was insufficient evidence that the non-demanding party knowingly and voluntarily agreed to delegate essential issues of arbitrability to the arbitrator.

19. This case is the ideal vehicle to answer the question this Court expressly reserved for later consideration in *Henry Shein v. Archer & White Sales, Inc,* 139 U.S. 524, 531 (2019): whether an arbitrability question – indeed a delegation agreement – can be proved by evidence that is no more than a reference to the rules of AAA or other arbitration association.

20. This case is the ideal vehicle to synthesize the Court's recent FAA jurisprudence and to restore the Court's original analysis of the presumption of arbitrability in *United Steelworkers of America, v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). Research indicates that the hearty vision of arbitrating all possible disputes entered the Court's FAA jurisprudence through an infelicitous transition from *United Steelworkers*, in which Justice Douglas's opinion declared that doubts as to a contract's scope of delegation should be "resolved in favor of coverage." Id. at 583. Four terms later, the second Justice Harlan cited *United Steelworkers* for the same point. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Yet the *Republic Steel* opinion omitted a footnote from *United Steelworkers* that held an essential caveat, that when the party demanding arbitration claims "that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose." Id. at 583 n.7, *citing* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1508-1509 (1959).

21. The preparation of the petition for certiorari has been unavoidably delayed by the illness of counsel. The undersigned attorney was timely approached by Counsel for the Applicant to consider work on the petition for certiorari in early January 2024. The undersigned had spent considerable time with the record and in assessing the research needed, when he began developing flu-like symptoms. On

February 7, 2024, tests by his medical GP found he had COVID/SARS. *See* App. 3. He suffered loss of energy and "brain fog," conditions that intermittently arise still, three weeks later. Over a month of research and collaboration has been lost from the 90 days intended for this work to be completed.

22. The analysis intended for the petition for certiorari will likely be affected by this Court's pending decision in *Coinbase, Inc. v. David Suski, et al.*, No. 23-3, set for argument on February 28, 2024. It is to be hoped that, if not from later consideration of issues raised in oral argument, then from the opinions of the court that result, the issues presented in this case may be further narrowed and refined.

23. The analysis of this case may be affected by legislation now pending in the final months of this 118th Congress, including H.R. 7119, Fairness in Nursing Home Arbitration Act; H.R. 5125, End Servicemember Forced Arbitration Act, H.R. 3038, Ending Forced Arbitration of Race Discrimination Act of 2023, and H.R. 2953, Forced Arbitration Injustice Repeal Act of 2023, among others. These bills echo concerns that will be raised in the petition for certiorari in this matter, as did an act passed in the 117th Congress, The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Public Law No. 117-90 (March 3, 2022).

For these reasons, McInnis respectfully requests an extension of time to present its petition for writ of certiorari.

Respectfully submitted,

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