No. 08-1214

In the Supreme Court of the United States

GRANITE ROCK COMPANY,

Petitioner,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing arbitration issues, including, most recently, *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza, LLC* v. *Pyett*, 129 S. Ct. 1456 (2009); *Vaden* v. *Discover Bank*, 129 S. Ct. 1262 (2009);

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters reflecting the parties' consent to the filing of this *amicus* brief have been filed with the Clerk's office.

Preston v. *Ferrer*, 128 S. Ct. 978 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003); and *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001).

Many members of the Chamber have found that arbitration allows them to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts, including collective bargaining agreements. For this reason, the Chamber has a strong interest in ensuring that the federal law of arbitration is appropriately applied and that businesses can rely upon stable arbitration precedent.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Three years ago in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), this Court held that, when a party challenges the validity of an entire contract that contains an arbitration provision, the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires that the party present those arguments to an arbitrator rather than a court. This case presents a question that *Buckeye* left open: whether a party to an alleged collective bargaining agreement that disputes the very *existence* of the agreement (including its arbitration clause) must similarly challenge the existence of the contract (including the arbitration agreement) before an arbitrator.

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[2] In this *amicus* brief, the Chamber addresses only the first question presented by this case.

The Chamber strongly supports the use of arbitration agreements. This Court's precedents establish that parties to a contract may agree to refer to an arbitrator virtually all questions concerning the arbitrability of a dispute—including the scope and validity of an arbitration agreement. But there is a narrow exception to this principle: When a party challenges the very existence of an arbitration agreement (or of a contract containing an arbitration clause), a court rather than an arbitrator must resolve that challenge.

1. Over eight decades ago, Congress enacted the FAA to ensure that private agreements to arbitrate are given effect and are not thwarted by judicial hostility to arbitration. *Buckeye*, 546 U.S. at 444. This Court therefore "has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

In furtherance of that policy, this Court applies a "presumption of arbitrability" when a contract contains an arbitration clause: a motion to compel arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 650 (1986). Particularly when labor disputes are at issue, this presumption of arbitrability "recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements," "furthers the national labor policy of peaceful resolution of labor disputes," and "best accords with the parties' presumed objectives in

pursuing collective bargaining." *Id.* (internal quotation marks omitted).

At the same time, this Court has recognized that arbitration agreements are founded on the consent of the parties. Arbitrators have authority to resolve disputes only when the parties have agreed to that mode of dispute resolution. See, *e.g., AT&T Techs.*, 475 U.S. at 648-649. Before compelling parties to arbitrate their dispute, therefore, a court must be satisfied that the parties have actually entered into an agreement to arbitrate. *Id.* As this Court explained nearly fifty years ago, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

2. The Court has grappled with these principles in two independent lines of precedent: *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and *Buckeye*, 546 U.S. 440, on the one hand, and *AT&T Technologies*, 475 U.S. 643, and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), on the other. Each of these cases considered the threshold question of who—a court or an arbitrator—should resolve particular categories of issues when the parties' contract contains an arbitration clause.

Prima Paint and *Buckeye* held that, in order to ensure that the parties' intent to arbitrate is given full effect, a broad challenge to the enforceability of a contract containing an arbitration clause is presumptively a question for the arbitrator, while challenges that are specific to the validity of the arbitration clause itself generally are for the court. *AT&T Technologies* and *First Options* addressed *who* should de-

cide whether a particular dispute is subject to arbitration—so-called "questions of arbitrability"—holding that such questions are presumptively for a court, unless the parties have clearly and unmistakably agreed otherwise.

The first question presented in this case lies at the intersection of these two lines of precedent: When a putative contract contains an arbitration clause, should a court or an arbitrator decide a challenge to the *formation* of that agreement—*i.e.*, a challenge to the contract's very existence?

Citing *Prima Paint* and *Buckeye*, the Ninth Circuit held that, in the circumstances presented by this case, such a dispute could be decided by an arbitrator because the challenge related to the formation of the entire contract rather than the arbitration clause itself. As petitioner has demonstrated, however, every other Court of Appeals to have considered this issue has held that questions of contract formation go to the heart of whether the parties have in fact consented to arbitrate their dispute, and that such issues of consent to arbitrate must be resolved by the court in the first instance.

The majority rule accords with this Court's precedent, federal arbitration law, and common sense. Under the FAA, an arbitrator's power to resolve any dispute requires the consent of the parties. It would be hopelessly circular to vest an arbitrator with the power to decide whether he or she has the power to decide a dispute. Thus, when (as here) the question is whether the parties assented to a contract containing an arbitration clause, that issue is necessarily the domain of the court.

The first question presented here is therefore both narrow and simple to resolve. This Court should bring the Ninth Circuit in line with this Court's prior precedent, as well as the decisions of every other federal court of appeals, and hold that—regardless of which party resists arbitration—threshold disputes about whether the parties entered into a contract containing an arbitration clause may not be referred to an arbitrator on the basis of that disputed contract.

ARGUMENT

A. The Court Rather Than An Arbitrator Must Decide Whether The Parties To A Dispute Have Entered Into An Arbitration Agreement.

1. This Court's decisions in Prima Paint *and* Buckeye *left open who decides questions of contract formation.*

a. *Prima Paint* and *Buckeye* conclusively establish that, under the FAA, challenges to the enforceability of an entire contract containing an arbitration clause—on grounds such as fraud and violation of public policy—are decided by an arbitrator. But the Court left unanswered in those decisions the question whether an arbitrator may decide a claim that the parties never consented to a contract containing an arbitration clause—for example, on grounds of lack of assent, physical duress, or capacity to enter into a contract.

In *Prima Paint*, the underlying lawsuit involved a claim by Prima Paint for rescission of a contract under which it had purchased a paint manufacturing business from Flood & Conklin ("F&C"). Prima

Paint alleged that F&C had fraudulently induced it to enter into the contract by misrepresenting F&C's solvency—pointing out that F&C had filed for bankruptcy within a week of executing the contract. F&C sought to compel arbitration under the arbitration clause contained in the parties' contract. 388 U.S. at 399.

This Court held that, when a party seeks to invalidate a contract containing an arbitration clause on the ground that the entire contract was fraudulently induced, the dispute is for an arbitrator rather than a court to decide. *Prima Paint*, 388 U.S. at 403-404. As this Court explained, Section 4 of the FAA requires a federal court to order arbitration once it is "satisfied that 'the *making* of the agreement for arbitration * * * is not in issue.'" *Id.* at 403 (quoting 9 U.S.C. § 4) (emphasis added). Concluding that agreements to arbitrate are "separable" from the larger contracts within which they are embedded (*id.* at 402)—the so-called "separability" doctrine—this Court held that a claim of fraud relating specifically to the arbitration clause itself—"an issue which goes to the 'making' of the agreement to arbitrate"—may be decided by a court, but that "claims of fraud in the inducement of contracts generally," which do not necessarily implicate the "making" of the arbitration agreement, are reserved for the arbitrator. *Id.* at 403-404.

The Court's holding in *Prima Paint* flowed naturally from the basic principles of consent underlying the FAA. Prima Paint did not dispute that it had entered into an agreement with F&C. It simply contended that, had it known of F&C's impending bankruptcy, it would not have entered into that agreement. Although the ultimate enforceability of the

entire contract for sale was therefore under challenge, there was no question that the parties had in fact entered into an agreement and that both parties had consented to submit their disputes under that contract for determination by an arbitrator. Consistent with the well-established federal policy of promoting and enforcing arbitration agreements, the Court held that, so long as the making of an arbitration agreement was not in dispute, the agreement to arbitrate must be enforced notwithstanding a challenge to the enforceability of the contract as a whole.

b. Nearly four decades after *Prima Paint*, this Court again addressed the separability doctrine in *Buckeye*. Buckeye involved so-called "payday lending" agreements (also known as "deferred-payment transactions") under which consumers would receive cash in exchange for a post-dated personal check for the loaned amount plus a finance charge. For each such transaction, the parties signed a written agreement that contained, among other terms, an arbitration clause. Cardegna filed suit against Buckeye in Florida state court, alleging that the finance charges associated with the transactions constituted usurious interest rates that were illegal under Florida law.

Buckeye sought to compel arbitration under the parties' agreements, but Cardegna resisted, arguing, among other things, that because (in his view) the interest rates were usurious, the payday lending agreements—including the arbitration clause—were illegal and therefore void in their entirety. *Id.* at 443.

This Court disagreed, holding that, because the parties had unquestionably consented to arbitrate their disputes under the contract, and the consum-

ers' contention that the contract was void went to the validity of the contract in its entirety rather than the arbitration clause in particular, the question of the contract's legality should be decided by an arbitrator in the first instance. *Id.* at 444-446.

Amplifying the principle recognized in *Prima Paint*, this Court distinguished between two types of challenges to the "validity of arbitration agreements": (1) *specific* challenges to the "validity of the agreement to arbitrate"; and (2) *general* challenges to the validity of "the contract as a whole." *Buckeye*, 546 U.S. at 444. In the Court's view, the consumers' challenge was of the second type: "The crux of the complaint is that the contract as a whole * * * is rendered invalid by the usurious finance charge." *Id.* Therefore, under *Prima Paint*'s separability doctrine, "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract." *Id.* at 446.

As in *Prima Paint*, there was no dispute in *Buckeye* that the parties had formed an agreement. Instead, the parties disagreed about the validity of the agreement as a whole on public policy grounds. The *Buckeye* Court recognized the "conundrum" that, although "the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void," it is "equally true" that the contrary approach "permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." 546 U.S. at 448-449. Applying the "federal substantive law" of arbitrability (*id.* at 447), this Court explained, "*Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of

arbitration provisions" (*id.* at 449). Therefore, the Court reaffirmed *Prima Paint*'s conclusion that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.*

The holding in *Buckeye* is fully consistent with the well-established federal policy favoring arbitration. The respondent in *Buckeye* sought to have the state court decide whether the finance charge imposed by the contract was usurious as a precondition to enforcing the arbitration agreement. In the process, however, the court would have decided the merits of the very issue that the parties had agreed to arbitrate. As this Court has repeatedly cautioned, courts must not be permitted to usurp the authority of the arbitrator by resolving questions that the parties intended for an arbitrator to decide. See *AT&T Techs.*, 475 U.S. at 649-650 ("[A] court is not to rule on the potential merits of the underlying claims. * * * The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.") (internal quotation marks omitted).

In reaching its holding in *Buckeye*, however, this Court was careful to note that challenges to an entire contract's *validity* should not be confused with general challenges to a contract's *existence*. In a footnote, the Court reserved judgment on the latter question:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents * * * which hold that it is for the courts to de-

> cide whether the alleged obligor ever signed the contract * * *, whether the signor lacked authority to commit the alleged principal * * *, and whether the signor lacked the mental capacity to assent * * *.

546 U.S. at 444 n.1.

2. This Court has held that a court must decide "questions of arbitrability" unless the parties have expressed a clear intention to submit such questions to an arbitrator.

A separate line of this Court's precedent provides additional guidance on the question left open in *Prima Paint* and *Buckeye*. In *AT&T Technologies*, the Court held that parties to a contract may agree to arbitrate virtually any "questions of arbitrability," so long as their intent to do so is "clear[] and unmistakabl[e]." 475 U.S. at 649. But a court will decide such questions in the absence of an express agreement to arbitrate questions of arbitrability. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).

a. *AT&T Technologies* addressed who—a court or an arbitrator—decides whether a particular dispute is within the scope of the parties' arbitration agreement.

The collective-bargaining agreement at issue in that case required arbitration of certain—but not all—employment-based grievances. *AT&T Techs.*, 475 U.S. at 645. The union sought to compel arbitration of its grievance that AT&T had laid off a number of workers. *Id.* at 646.

Because arbitrators derive their authority solely from the parties' agreement, the Court explained that basic "question[s] of arbitrability"—including "whether a collective-bargaining agreement creates a duty for the parties to arbitrate the *particular* grievance"—are issues for judicial determination unless the contracting parties "clearly and unmistakably provide otherwise." *Id.* at 649 (emphasis added). Without such an express agreement, the Court held, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.*

b. The Court expanded upon this principle in *First Options*, which also involved a "question of arbitrability." Specifically, a married couple—one of whom owned an investment company that had agreed to arbitrate its disputes with a stock-clearing firm—resisted arbitration on the ground that they had not personally signed a contract containing an arbitration clause. 514 U.S. at 940-941.

The Court noted that the threshold question of "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate" was "fairly simple." *Id.* at 942-943. "Just 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." *Id.* at 943 (citations omitted). Although ordinarily a presumption in favor of arbitration applies when analyzing whether parties agreed to arbitrate a given dispute (see *id.* at 944-945), with respect to questions of arbitrability, the presumption is reversed and may be overcome only when there is "clear and unmistakable evidence" of

the parties' intent to arbitrate such questions. *Id.* at 944-945 (alterations and internal quotation marks omitted).

This narrow exception to the usual presumption in favor of arbitration was appropriate because contracting parties are unlikely to contemplate "the significance of having arbitrators [rather than a court] decide the scope of their own powers," and the FAA does not "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945. See also *Howsam*, 537 U.S. at 83 ("Although the Court has also long recognized and enforced a 'liberal federal policy favoring arbitration agreements,' * * * it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25, and *AT&T Techs.,* 475 U.S. at 649).

3. Courts should resolve challenges to the formation of an arbitration agreement and to contracts in which an arbitration clause is contained.

As this Court's precedents make clear, most questions of arbitrability can be resolved by an arbitrator when the parties to a contract agree to do so. There is, however, one fundamental "gateway" question of arbitrability (*Howsam*, 537 U.S. at 83-84) that generally cannot be determined by an arbitrator: Whether the parties to a dispute in fact formed a putative contract containing an arbitration clause.

a. Consider, for example, a case in which party A seeks to compel arbitration based on an arbitration clause contained in a contract allegedly signed by party B. Party B resists arbitration—and enforcement of the contract in general—on the ground that her signature has been forged. In response, Party A asserts that party B's signature is genuine, but that in any event the dispute over whether the signature has been forged should be decided by an arbitrator under the arbitration clause in the putative contract.

Such a dispute, which directly places the "making of the agreement for arbitration * * * in issue" (9 U.S.C. § 4), surely must be resolved by a court. As the Eleventh Circuit has explained, when a party claims that her signature was forged, she is "challenging the very existence of *any* agreement, *including the existence of an agreement to arbitrate*." *Chastain* v. *Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (emphasis in original). In that "unusual case," "there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the [FAA]." *Id.* at 852-854.

Indeed, even if the contract contains broad language expressly reserving to the arbitrator the power to resolve questions of contract formation, it would seem extraordinarily difficult for a court to conclude that (under *First Options* and *Howsam*) the parties clearly and unmistakably evidenced an intention to have the arbitrator resolve whether a party's signature on the contract was forged. After all, one of the parties is challenging the validity of his very assent

to that contract, including the language that would authorize an arbitrator to proceed.[3]

b. The Courts of Appeals have concluded with near uniformity that questions of contract formation must be decided by a court rather than an arbitrator. See, *e.g.*, *Large* v. *Conseco Fin. Servicing Corp.*, 292 F.3d 49, 53 (1st Cir. 2002) (holding that the *Prima Paint* doctrine of separability does not apply to cases involving "allegations that the contract with the arbitration clause *never* existed") (emphasis in origi-

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[3] During the *Buckeye* oral argument, the Chief Justice questioned Buckeye's counsel about a similar example involving a challenge to the formation of the contract on the basis of alleged physical duress:

> [The Chief Justice]: [Y]ou concede, though, that if * * * the challenge to the underlying contract implicates the arbitration clause as well, that that is for the court and not the arbitrator. * * * In other words * * * you put a gun to the person's head and say, sign this contract, and the person does. It contains an arbitration clause. They don't have to go to arbitration to challenge that.
>
> [Counsel]: [W]e concede that there is [an] asterisk, as we put it in our brief, to the otherwise bright line rule set down in *Prima Paint*, that rule being if you're challenging the underlying contract, you have to go to arbitration, precisely along the lines that Your Honor identified where the challenge to the underlying contract involves the parties' assents to the underlying contract, that challenge necessarily challenges your assent to arbitration. And given that the whole premise of arbitration in the first place is that it's a matter of consent, we would say that that particular challenge, as the lower courts have recognized since *Prima Paint*, an assent-based challenge to the underlying contract, is * * * an exception or an asterisk to the otherwise brightline rule.

Transcript of Oral Argument at *4-*5, *Buckeye Check Cashing, Inc.* v. *Cardenga*, 546 U.S. 440 (2006), available at 2005 WL 3370429 (Nov. 29, 2005).

nal); *Adams* v. *Suozzi*, 433 F.3d 220, 226 (2d Cir. 2005) (concluding that the court "possessed not only authority, but a duty, to determine whether there ever existed an agreement to arbitrate between the parties"); *Specht* v. *Netscape Commc'ns Corp.*, 306 F.3d 17, 26 (2d Cir. 2002) (finding it "well settled that a court may not compel arbitration until it has resolved 'the question of the very existence of the contract embodying the arbitration clause'"); *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 100-101 (3d Cir. 2000) (refusing to compel arbitration when a party asserted that "the agent who signed the agreement on its behalf lacked authority to do so"); *Will-Drill Res., Inc.* v. *Samson Res. Co.*, 352 F.3d 211, 215 (5th Cir. 2003) (holding that the doctrine of separability does not apply to challenges to contract formation because "[w]here no contract exists, there is no agreement on anything, including an agreement to arbitrate"); *Seawright* v. *Am. Gen. Fin. Servs., Inc.,* 507 F.3d 967, 972 (6th Cir. 2007) (concluding that the "underlying question" of whether parties assented to the contract containing an arbitration clause "is to be 'decided by the court, not the arbitrator'"); *Sphere Drake Ins. Ltd.* v. *All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) ("[A] person who has not consented (or authorized an agent to do so on his behalf) can't be packed off to a private forum. * * * [T]he parties *do* control the existence and limits of an arbitrator's power. No contract, no power."); *I.S. Joseph Co.* v. *Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986) ("If there is in fact a dispute as to whether an agreement to arbitrate exists, then that issue must first be determined by the court as a prerequisite to the arbitrator's taking jurisdiction."); *Spahr* v. *Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003) (holding that "the rule announced in *Prima Paint*

does not extend to a case where a party challenges a contract on the basis that the party lacked the mental capacity to enter into a contract"); *Cancanon* v. *Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000 (11th Cir. 1986) (per curiam) (holding that, "where the allegation is one of * * * ineffective assent to the contract, the issue [of arbitrability] is not subject to resolution pursuant to an arbitration clause contained in the contract documents"); *Microchip Tech. Inc.* v. *U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004) (concluding that "the responsibility of the judiciary to resolve the gateway dispute of whether an agreement to arbitrate exists is not limited to situations in which there is an independent challenge to the arbitration clause").

Indeed, even other panels of the Ninth Circuit have read *Prima Paint* and its progeny as being "limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to." *Three Valleys Mun. Water Dist.* v. *E.F. Hutton & Co.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (emphasis in original). In the view of these panels, "[o]nly a court" can decide "the threshold issue of the *existence* of an agreement to arbitrate." *Id.* at 1140-1141 (emphasis in original); see also *Sanford* v. *Memberworks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) ("Issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration.") (emphasis in original).

Judge Easterbrook, writing for the Seventh Circuit in a case decided before this Court's ruling in *Buckeye*, noted that "*Prima Paint* sits uneasily

alongside *AT&T Technologies* and *First Options*." *Sphere Drake*, 256 F.3d at 590. Nevertheless, he found the answer to the question presented by this case straightforward, explaining:

> A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority to make that commitment. This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being; and as arbitration depends on a valid contract, an argument that the contract does not exist can't logically be resolved by the arbitrator (unless the parties agree to arbitrate this issue after the dispute arises).

Id. at 590-591.

In short, because arbitration is at bottom a matter of contract, a court cannot compel arbitration under a contract unless it first determines that the contract in fact *exists*.[4] Although this Court's settled precedent properly holds that parties may agree to submit virtually any issue—including questions of arbitrability—to an arbitrator, a challenge to the formation of an arbitration agreement presents a narrow exception to the rule. When a party challenges its very assent to a contract containing an arbitration clause, that dispute over contract formation

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[4] Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 546-547 (1964) (because "[t]he duty to arbitrate [is] of contractual origin," there can be "no doubt" that "a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty").

simply cannot be decided by the arbitrator in the first instance.

B. The Ninth Circuit's Decision Is Contrary To These Established Principles.

The Ninth Circuit failed to apply these principles in holding that petitioner Granite Rock and respondent Local 287 are required to arbitrate over whether the parties assented to a collective bargaining agreement (and to the arbitration clause contained in that agreement).

1. There is no dispute that, in the midst of an ongoing labor strike, Granite Rock and the leadership of Local 287 reached a "tentative" collective-bargaining agreement ("CBA") that contained, among other terms, a "no-strike" provision and a clause requiring arbitration of "all disputes arising under this agreement." The CBA was to take effect as soon as it was ratified by union members. J.A. 45-47.

The crux of the parties' dispute centers on what happened the morning after the company and union leadership reached the tentative CBA. Granite Rock contends that the union members convened, voted to accept the agreement, ended their strike, and prepared to return to work. J.A. 345. Local 287, on the other hand, submits that the union members never ratified the agreement, and that it accordingly never went into force. J.A. 346.

Whether or not the CBA in fact was ratified, however, the union soon thereafter resumed the strike. Granite Rock, contending that the strike violated the CBA, filed suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), requesting a so-called "*Boys Markets* injunc-

tion" (J.A. 46), an important mechanism by which an employer may request that the court enjoin a strike in order to facilitate resolution of the parties' labor disputes through arbitration. See *Boys Mkts., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970).[5]

In resisting the injunction, the union asserted that its members had never ratified the tentative agreement, and that the CBA—which would have obligated the union to resolve its dispute through arbitration rather than by striking—therefore had never come into effect. Nevertheless, after the strike ended, the union moved to compel arbitration of Granite Rock's claims on the ground that the agree-

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[5] Employers commonly seek "*Boys Markets*" injunctions to enforce anti-strike provisions of collective bargaining agreements, allowing arbitration of the underlying labor disputes to proceed without a strike looming over efforts at conciliation. As this Court explained in *Boys Markets*, "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures"—an important goal that would be "largely undercut" without an "immediate, effective remedy for those very tactics that arbitration is designed to obviate." 398 U.S. at 249.

We note that, just over two decades after *Boys Markets*, this Court made clear that an arbitrator has the authority to provide injunctive and other equitable relief. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Arguably, then, Granite Rock and other employers could seek to compel a union to arbitrate and direct requests for injunctive relief to the arbitrator. Nevertheless—particularly given the emergency conditions that a strike can create—the *Boys Markets* injunction remains a frequently-used judicial mechanism to facilitate the process of labor arbitration. See, *e.g.*, Richard A. Lord, 20 Williston on Contracts § 56:66 (4th ed. 2009).

ment (alleged not to exist by Local 287) committed the parties' disputes to arbitration. J.A. 346-347.

Noting the paradox of the union's attempt to "avail itself of arbitration while at the same time insisting that the agreement was never ratified," the district court ordered a jury trial, limited to the threshold question of whether the parties had entered into the CBA (including its arbitration clause). J.A. at 231, 359-61; see also 9 U.S.C. § 4 ("If the making of the arbitration agreement * * * be in issue, the court shall proceed summarily to the trial thereof. * * * Where such an issue is raised, the party alleged to be in default [of the arbitration agreement] may * * * demand a jury trial of such issue.").

After a unanimous jury found that the CBA had in fact been ratified, the district court ordered arbitration of the remaining issues, including Granite Rock's claims for breach of contract and damages. J.A. 381-382; see also 9 U.S.C. § 4 ("If the jury find[s] that an agreement for arbitration was made in writing * * *, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.").

The Ninth Circuit vacated the jury's determination that the parties had entered into the CBA (and thus the arbitration agreement), instead ordering the district court to compel arbitration of the dispute "in its entirety"—including the issue of whether the parties had formed the CBA. J.A. 61. In the Ninth Circuit's view, the separability doctrine set forth by this Court in *Prima Paint* and *Buckeye* generally requires that "challenges to an entire contract"—as opposed to "challenges to an arbitration clause" specifically—be considered by the arbitrator in the first instance. J.A. 56. Because neither party independently chal-

lenged the arbitration clause here, the court held that the formation dispute was committed to the arbitrator. J.A. 58-59.

The Ninth Circuit acknowledged its own prior decision to the contrary in *Three Valleys*, in which it held that "[o]nly a court" may resolve "the threshold issue of the *existence* of an agreement to arbitrate." 925 F.2d at 1140 (cited at J.A. 57). But it distinguished *Three Valleys* on the ground that here the party resisting arbitration (Granite Rock) was also the party suing to enforce the agreement that contained the arbitration clause. J.A. 58. The Ninth Circuit stated that a party implicitly "consent[s] to arbitration"—of, apparently, all conceivable issues—"by suing under [a] contract containing [an] arbitration clause." J.A. 60.

2. By converting the parties' litigation positions into an implied consent to arbitrate questions of contract formation, the court wrongly inferred, in effect, a post-dispute agreement to arbitrate between the parties.

Importantly, the Ninth Circuit did *not* hold that the parties through their litigating positions had conceded the CBA's validity. It might have been possible for the lower courts to conclude that Granite Rock's suit for a *Boys Market* injunction constituted a concession of the validity of the CBA and that Local 287's effort to compel arbitration similarly amounted to an acknowledgement that the CBA was valid. In that situation, with both parties impliedly conceding the validity of the contract, the question of contract formation would be resolved, and the parties' underlying disputes could properly be referred to arbitration.

Instead, however, the Ninth Circuit drew a very different inference—it implied the parties' consent to resolution by an arbitrator of the question of contract formation. That conclusion is plainly wrong.

a. The court of appeals relied in part on the arbitration clause contained in the CBA (the agreement whose existence Local 287 disputed), holding that the CBA could properly reflect an intent to refer to an arbitrator disputes over the formation of the CBA itself. The court asserted that the arbitration provision at issue was "broad enough to cover the disputes over contract formation," noting that "[a]rbitration clauses are to be construed very broadly" and that "[d]oubts should be resolved in favor of coverage." J.A. 58 & n.4.

That ruling is directly contrary to the principles of this Court's decisions, discussed above, which hold that the claim that a party did not assent to an agreement containing an arbitration clause always must be decided by a court. See Part A(3), *supra*. Thus, even assuming that the language of the arbitration clause could be read to encompass disputes over the formation of the CBA, the very nature of a challenge to a contract's formation precludes reliance on the language of the disputed contract to provide the necessary evidence of the parties' intent to arbitrate that issue. Because the "making" of the CBA is in question, and no separate post-dispute "written agreement for arbitration" exists, the district court could not compel arbitration under the FAA. See 9 U.S.C. § 4.

b. The court of appeals also erred in its evaluation of the effect of the parties' litigating positions. First, the Ninth Circuit failed to appreciate that Granite Rock's effort to enforce the CBA by seeking a

Boys Markets injunction was consistent with this Court's well-established labor law precedent, and did not constitute consent (implied or otherwise) to having an arbitrator decide the parties' dispute over the existence of a contract.

In *Boys Markets*, the Court expressly contemplated a situation such as the one presented here, in which a party goes to federal court to seek an injunction against a strike before arbitrating the underlying labor disputes. In such circumstances, it held, a court must resolve the question of contract formation before compelling arbitration of the remaining issues. 398 U.S. at 254; see also *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (noting that Congress has, "by [section] 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate").

Understood in view of the common *Boys Markets* procedure, therefore, Granite Rock's attempt to obtain an injunction to enforce the anti-strike provision in the CBA did not amount to a post-dispute agreement that an *arbitrator* should decide whether the CBA was formed.[6]

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[6] After the district court denied Granite Rock's request for an injunction against the strike, Granite Rock pursued its lawsuit in court, contending that it had suffered damages because of respondent Local 287's strike, which had proceeded in violation of the CBA's no-strike provision. J.A. 229. The district court properly determined that it should resolve only whether the parties had formed a CBA; once it did so (by conducting a jury trial on the disputed factual issues), it properly referred the remaining breach and damages claims to arbitration. J.A. 381-382.

In assessing Local 287's litigation positions, the Ninth Circuit also failed to recognize that the union was attempting to have its cake and eat it, too. By seeking to compel arbitration, Local 287 was required to prove that an agreement to arbitrate existed—and it did so by relying upon the arbitration provision contained within the collective-bargaining agreement. In defending against Granite Rock's request for an injunction against its strike, however, Local 287 asserted that the tentative CBA never had been ratified and that the CBA—including the agreement to arbitrate—therefore did not exist.

Such a position is untenable. It would have been perfectly reasonable for the Ninth Circuit to hold that, because the local union had moved to compel arbitration under the arbitration clause in the CBA, the union had necessarily admitted that it had ratified the CBA and the arbitration clause it was seeking to enforce. But it was inappropriate for the court to determine that Local 287's arguments "in the alternative" (J.A. 59)—*i.e.*, that (i) Granite Rock is bound by the arbitration clause in the CBA but (ii) that the CBA was never formed—somehow authorized the arbitrator to determine the question of contract formation.

The Ninth Circuit dismissed these difficulties by noting that arbitration is a matter of consent, and asserting that here "both parties consented to arbitration; Granite Rock implicitly by suing under the contract containing the arbitration clause, and Local 287 explicitly by asserting the arbitration clause." J.A. 60. As we have discussed, however, while that conduct might have provided grounds for finding a concession of the contract's validity, it in no way pro-

vides a justification for allowing an arbitrator to resolve the question of contract formation.

Moreover, the Ninth Circuit's implication of a post-dispute arbitration agreement between the parties (divorced from the CBA itself) ignores that any consent to arbitration would have taken place here only if the underlying contract existed. Common sense suggests that Granite Rock would consent to arbitrate its disputes with the union *only if* the union in turn consented to the other terms of the collective-bargaining agreement. See, *e.g.*, *Boys Mkts.*, 398 U.S. at 248 (noting that a no-strike provision in a CBA "is the quid pro quo for an undertaking by the employer to submit grievance disputes to the process of arbitration"). It would be an odd notion of consent indeed if an employer's offer of a contract containing an arbitration provision, allegedly rejected by the offeree, nonetheless permanently bound the offeror to arbitrate. See, *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"); *Blossom* v. *Milwaukee & Chicago R.R.*, 70 U.S. 196, 205 (1866) (noting that "[u]naccepted offers to enter into a contract bind neither party" and that an offeror cannot be held to the terms of an offer not accepted by the offeree).

The court of appeals plainly erred in holding that an arbitrator could decide the contract formation issue. The question whether the parties assented to the CBA was an issue for resolution only by the district court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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