No. 15-1283

IN THE
Supreme Court of the United States

INITIATIVE LEGAL GROUP APC, *ET AL.*,

Petitioners,

v.

TERRI MAXON,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the California Court of Appeal erred in holding that, where an attorney-client agreement was not signed by the attorney as required by California law and the client exercised his option to reject the agreement, arbitration was properly denied because there was no arbitration agreement between the parties.

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INTRODUCTION

A California law firm and some of its members, accused in a lawsuit brought by a former client of serious ethical misconduct, moved to compel arbitration on the basis of an arbitration provision in a purported retainer agreement with the client. Under California law, which was incorporated into the contract, a retainer agreement must be signed by the attorneys and the client, and if that requirement is not satisfied, the client may elect to treat it as a nullity. Because it is undisputed that the agreement was not signed by the lawyers and that the client has repudiated the purported agreement, an intermediate California appellate court held (in an unpublished, noncitable opinion) that there is no written agreement between the parties and hence that the arbitration provision cannot be enforced. The law firm now asks this Court to hold that the state court's decision, and the California statute on which it is based, are preempted by the Federal Arbitration Act (FAA).

The case presents no issues meriting review by this Court. The governing principles under the FAA are well established: The FAA requires enforcement of arbitration agreements, subject to generally applicable state contract principles. 9 U.S.C. § 2. But for a court to compel arbitration, there must be an agreement in writing. *Id.* The *existence* of an agreement under applicable contract law is a prerequisite to any judicial enforcement of a claimed obligation to arbitrate. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 300 (2010). By contrast, where a party challenges the validity, rather than the existence, of a contract containing an arbitration clause, and the challenge does not go to the validity of the arbitration

clause itself, the arbitration clause may be "severed" and enforced, and the arbitrator may determine the validity of the remainder of the contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967).

The lower court correctly recognized these principles, and held that the defense to arbitration asserted here—that there is no contract to enforce when a client exercises his right to void a purported retainer agreement that is not signed by the attorney—falls under the *Granite Rock* doctrine: It goes to the existence, not merely the validity, of an agreement. Whether a lower state court was correct in its application of settled principles to such a highly specific (and unusual) factual and legal setting is not an issue that merits review by this Court. Indeed, the petition itself acknowledges that this particular issue has arisen in only one other case and that the only other decision addressing it is at the trial-court level. Even if it were true that the outcomes of those two cases conflict (a point refuted by the state court here), a claimed conflict between one trial-court decision and one nonprecedential intermediate state-court opinion does not rise to a level requiring resolution by this Court.

Absent a genuine conflict, the petition argues only that the lower court misapplied established law to these facts. Not only is that exactly the kind of argument that does not merit review by this Court, but it is flatly wrong: The state court here has by far the better of the argument in light of this Court's recent emphasis in *Granite Rock* that the existence of a contract containing an agreement to arbitrate is always a

question for a court, and that arbitration may not be compelled absent a contract.

STATEMENT

In September 2012, respondent Terri Maxon's late husband and predecessor-in-interest, David Maxon, sued his former attorneys, petitioners Initiative Legal Group and four of its lawyers (collectively, "ILG"), for engaging in ethical misconduct while representing Maxon and approximately 600 other plaintiffs in litigation against Wells Fargo Bank. Pet. App. 4a-5a.[1] ILG moved to compel arbitration based on an arbitration clause in a proposed fee agreement that the ILG attorneys had never signed and that Maxon voided under California law. *Id.* at 6a-7a. Both the San Francisco trial court and the California Court of Appeal held that because Maxon had exercised his right to repudiate the proposed fee agreement, the agreement did not exist and could not serve as grounds for compelling arbitration. *Id.* at 28a, 11a-12a.

1. Maxon's Underlying Claims—In 2010, ILG approached Maxon, a Home Mortgage Consultant ("HMC") employed by Wells Fargo, about representing him along with other Wells Fargo HMCs in wage and hour claims against the bank. Pet. App. 3a-5a. Similar claims were already pending against Wells Fargo in another class action that eventually led to a $19 million settlement, but ILG's ostensible plan was to proceed separately, and the court in the class action

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[1] Mr. Maxon died on March 6, 2015, while ILG's appeal was pending, and Ms. Maxon was substituted as successor-in-interest. Because nothing in the petition depends on any distinction between Mr. Maxon and Ms. Maxon, this brief refers to both the original plaintiff and the current respondent as Maxon.

was told that ILG intended to opt its clients out of the class.[2]

Maxon agreed to participate in ILG's planned litigation. Pet. App. 4a. After filing several lawsuits against Wells Fargo on behalf of Maxon and approximately 600 other HMCs, however, ILG eventually encouraged its clients to participate in the $19 million settlement in the class action and forgo any separate or additional recovery. *Id.* at 5a. Meanwhile, lawyers at ILG secretly negotiated a "$6 million supplemental settlement," which they then sought to appropriate "for themselves as attorneys' fees." *Id.* at 5a; *see also id.* at 24a. In short, Maxon's attorneys used his lawsuit to benefit themselves, while relegating him and the other HMCs they purported to represent to relief already available under another settlement.

Upon learning of ILG's side deal, Maxon filed his complaint against ILG on behalf of himself and 600 former ILG clients in San Francisco County Superior Court, alleging breach of fiduciary duty, violations of the California Business and Professions Code, and declaratory relief. Pet. App. 4a–5a. Maxon also intervened in the class-action lawsuit in which ILG had arranged the extra $6 million settlement for itself and obtained a temporary restraining order requiring $5.5 million of that settlement to be placed in trust pend-

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[2] *See Lofton v. Wells Fargo Home Mortg.*, 179 Cal. Rptr. 3d 254, 259–60 (Cal. Ct. App. 2014). The *Lofton* opinion, issued in the related class action, contains additional background facts concerning ILG's misconduct. *See id.* at 259–63.

ing resolution of ILG's former clients' claims. *Id.* at 5a & n.4 (citing *Lofton*, 179 Cal. Rptr. 3d at 265–66).[3]

2. The Purported Fee Agreement—When Maxon consented to ILG's representation in the Wells Fargo matter, he signed a proposed fee agreement presented to him by ILG. Pet. App. 4a, 37a–40a. The agreement contained an arbitration clause stating that both ILG and Maxon "agree to submit all disputes between them to binding arbitration." *Id*. at 4a, 39a. No one from ILG ever signed that agreement. *Id.* at 4a, 40a.

California Business and Professions Code § 6147(a) provides that "[a]n attorney who contracts to represent a client on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client … to the plaintiff." Section 6147(b) states that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the [client], and the attorney shall thereupon be entitled to collect a reasonable fee." Another provision, § 6148, contains similar requirements for attorney-client agreements involving non-contingent-fee

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[3] The ILG attorneys attempted to buy Maxon and the other plaintiffs they had represented off by offering them $750 in additional compensation for a statutory penalty claim "arguably" not released in the class action settlement, thus retaining "only" about $4.95 million of the settlement—a maneuver the court in *Lofton* characterized as "fraught with the potential for conflicts of interest, fraud, collusion and unfairness." 179 Cal. Rptr. 3d at 259. ILG subsequently offered the clients an additional $1,000 in exchange for a purported release of their malpractice claims. *Id*.

representation likely to involve fees exceeding $1,000.[4] As the Court of Appeal noted, "[t]he parties agree that the Attorney-Client Agreement at issue here is subject to both sections because it provided for both contingent and, alternatively, hourly attorneys' fees." Pet. App. 7a n.5.

ILG filed a motion to compel arbitration of Maxon's claims based on the unsigned agreement. Pet. App. 6a. Maxon's attorneys sent ILG a letter asserting that no contract was formed because the parties had never executed an agreement and that Maxon was exercising his option to void the proposed fee agreement under §§ 6147(b) and 6148(c). *Id.* at 6a.

3. Proceedings Below—The San Francisco Superior Court found that the fee agreement, including its arbitration provision, did not exist as a contract. *Id*. at 28a. In reaching this conclusion, the court noted that, like all applicable laws in effect at the time Maxon signed the agreement, California Business and Professions Code §§ 6147–48 necessarily became part of any agreement "as if they were expressly referred to and incorporated." *Id.* at 26a. Under those provisions, Maxon had a right to void the agreement, and the court found, "as a factual matter," that he had successfully exercised that right. *Id.* at 27a. Accordingly, the court reasoned, any agreement, and any obligations under it, had been terminated. *Id.* Without an agreement to arbitrate, the court could not compel arbitration and denied ILG's motion. *Id.* at 28a.

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[4] Section 6147 is reproduced at Pet. 3–4 and Pet. App. 33a–34a, and § 6148 is reproduced at Pet. App. 34a–36a.

On October 2, 2015, the California Court of Appeal affirmed. Pet. App. 2a–3a. The court distinguished this Court's cases involving general attacks on the validity of an agreement, such as *Prima Paint*, 388 U.S. 395, and *Buckeye*, 546 U.S. 440, from the determination "whether there was, in fact, an agreement to arbitrate." Pet. App. 14a. While *Prima Paint* and *Buckeye* held that courts must refer disputes regarding a contract's validity to an arbitrator, the court reasoned that those cases did not speak to the threshold question, presented here, of whether a contract even exists. *Id.* at 14a–16a. Indeed, the court explained, this Court's decision in *Granite Rock*, 561 U.S. 287, indicates that questions regarding the existence of a contract are reserved for the court. Pet App. 12a.[5]

On January 13, 2016, the Supreme Court of California denied ILG's petition for review. Pet. App. 1a. ILG now asks this Court to review the intermediate appellate court's decision.

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[5] Because the court concluded that, even assuming the fee agreement existed at one time, it no longer existed, the court did not have to consider Maxon's alternative argument that no agreement was ever formed at all. Pet. App. 22a. The trial court had reached the same conclusion. Pet. App. 29a.

REASONS FOR DENYING THE WRIT

I. The petition presents no question of importance that has divided the lower courts or otherwise merits review.

A. The state court applied settled principles to the particular circumstances of this case.

The most "fundamental principle" of this Court's FAA jurisprudence is that "arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Thus, the FAA "does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986). Accordingly, the existence of a contract binding a party to arbitrate is a prerequisite to any court order compelling arbitration, and a court must "satisfy itself that [an] agreement exists" before ordering arbitration. *Granite Rock*, 561 U.S. at 297.

Granite Rock held that "the court must resolve any issue that calls into question the formation" of a contract containing an arbitration clause. *Id*. The Court's observation about contract formation reflects the broader principle that courts must decide questions about "the *existence* of a 'validly formed and enforceable arbitration agreement'" before they may compel arbitration. *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1120 (11th Cir. 2014) (emphasis added); *see, e.g.*, *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 743 (9th Cir. 2014); *Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013); *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638

F.3d 367, 375 (1st Cir. 2011); *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 738 (7th Cir. 2010).

That universally accepted principle long predates *Granite Rock*. *See, e.g.*, *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003) ("Where the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached …."); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 (2d Cir. 2002) ("It is 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.") (quoting *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 676 (2d Cir. 1972)). As Judge Easterbrook put it in an influential opinion, "as arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator." *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001).

The courts have not limited this principle to matters of contract formation narrowly construed, but have applied it to a range of issues going to the existence of a contractual obligation to arbitrate. For example, courts have held that the following issues, among others, must be decided by a court to determine the threshold question whether a contractual obligation to arbitrate exists:

- Whether a third party is bound by an agreement under state contract-law principles. *See*, *e.g.*, *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126–27 (9th Cir. 2013);
- Whether a contract with an arbitration agreement has been superseded or terminated by a

contract without one. *See*, *e.g.*, *Goldman, Sachs*, 747 F.3d at 735–36; *Dasher*, 745 F.3d at 1115–16; *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 523–24, 526 (2d Cir. 2011); *Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc.*, 516 F.3d 695, 699–700 (8th Cir. 2008).

- Whether a contract containing an arbitration clause survives a corporate restructuring or assignment of rights. *See*, *e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546–47 (1964); *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 399–400 (8th Cir. 1986).
- Whether a contract as a whole, including its arbitration provision, has expired. *See*, *e.g.*, *Nissan N. Am., Inc. v. Jim M'Lady Oldsmobile, Inc.*, 307 F.3d 601, 604 (7th Cir. 2002).
- Whether the signatory to an agreement had authority to bind the party against whom arbitration is sought. *See*, *e.g.*, *SBRMCOA, LLC v. Bayside Resort, Inc.*, 707 F.3d 267, 270–72 (3d Cir. 2013); *Sphere Drake*, 256 F.3d at 591.
- Whether a contract purportedly entered into by a minor, and containing an arbitration provision, has been ratified or disaffirmed as a whole by the minor. *See, e.g.*, *Lopez v. Kmart Corp.*, 2015 WL 2062606, at *4–7 (N.D. Cal. May 4, 2015); *Foss v. Circuit City Stores, Inc.*, 477 F. Supp. 2d 230, 235–36 (D. Me. 2007).
- Whether a party who signed an agreement containing an arbitration provision possessed the mental capacity necessary to enter into a binding contract. *See*, *e.g.*, *Spahr v. Secco*, 330 F.3d 1266,

1270-71 (10th Cir. 2003); *Rowan v. Brookdale Sr. Living Cmties., Inc.*, 2015 WL 9906264, at *4 (W.D. Mich. June 1, 2015); *In re Morgan Stanley & Co.,* 293 S.W.3d 182, 183 (Tex. 2009).

In contrast to these questions going to the *existence* of the contract containing the arbitration clause, claims that the contract is invalid for reasons unrelated to the arbitration agreement (such as the illegality of an interest rate specified in an agreement, fraud in the inducement not relating specifically to the arbitration clause, or unconscionability of the agreement's nonarbitration provisions) generally do not bar enforcement of an arbitration clause. Rather, under this Court's decision in *Prima Paint* and its progeny, the arbitration provision in such cases is "severed" from the challenged parts of the contract and enforced, relegating the questions of the validity of the remainder of the contract to arbitration. *Prima Paint*, 388 U.S. at 402–04; *see Buckeye*, 546 U.S. at 445–46; *see also Rent-A-Center*, 561 U.S. at 70–71; *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012).

In reaffirming this principle in *Buckeye*, however, this Court emphasized that issues concerning the validity of a contract are distinct from the question of its existence, *see Buckeye*, 546 U.S. at 444 n.1, and the Court specifically stated that the *Prima Paint* principle "does not speak to" issues of the latter sort, *id.*[6] Thus, both before and after *Buckeye*, courts have con-

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[6] The Court singled out three examples of such issues for mention: whether a party signed a contract, whether a signatory had authority to bind a party, and whether a party had mental capacity to assent. *See id.* (citing cases holding such issues are for courts to decide).

sistently recognized that the *Prima Paint* "severability" rule does not apply to issues that go to whether a contract exists at all. *See*, *e.g.*, *Janiga*, 615 F.3d at 741–42; *Will-Drill*, 352 F.3d at 218. This Court's subsequent decision in *Granite Rock* that a court must in every case "satisfy itself that such agreement exists" before compelling arbitration, 561 U.S. at 297, only underscores the point.

The issue ILG asks this Court to decide amounts to no more than whether an intermediate state appellate court erred in applying these well-established principles to the particular circumstances of this case. The state court correctly summarized both the *Granite Rock* principle and the *Prima Paint* severability rule. Pet. App. 11a–16a. It then ruled that a challenge to the existence of an agreement based on an attorney's failure to sign a retainer agreement and the client's exercise of his right under California law to nullify that agreement in its entirety is, under *Granite Rock*, an issue that a court must decide rather than a validity challenge that is subject to *Prima Paint*'s severability rule.

ILG's claim that the lower court placed this particular case in the wrong doctrinal pigeonhole is precisely the kind of issue that this Court's rules identify as inappropriate for review: a claim of "the misapplication of a properly stated rule of law." S. Ct. R. 10. Such an issue generally fails to provide a "compelling reason" for granting a petition for a writ of certiorari. *Id*.

That the decision is a nonprecedential ruling of an intermediate state court makes even more obvious that there is no compelling reason for review. California rules specifically prohibit citing an unpublished

opinion as authority, and the California Supreme Court's denial of review likewise "is to be given *no* weight" as precedent. *Trope v. Katz*, 902 P.2d 259, 268 n.1 (Cal. 1995). The decision therefore does not reflect the state court system's authoritative word on the issue, only on the outcome of this particular case. Should the issue arise again in the California courts, another appellate panel would decide the issue anew, and the California Supreme Court could take it up if appropriate. In this case, there is no need for intervention by this Court, which generally does not sit to correct claimed errors by intermediate state courts.

B. The issue is neither frequently recurring nor the subject of conflicting decisions warranting this Court's attention.

That review is not called for here is confirmed by ILG's own acknowledgment that the issue presented by this case has arisen very rarely and has not generated a conflict among federal courts of appeals and/or state courts of last resort that calls for resolution by this Court. *See* S. Ct. R. 10(a) & (b).

The unsavory facts presented here—a law firm's reliance on an unsigned retainer agreement to compel arbitration of claims of misconduct that have already resulted in another court's ordering $5.5 million in funds frozen based on apparent "egregious misconduct and bad faith," *Lofton*, 179 Cal. Rptr. 3d at 263—are obviously unusual. Moreover, the particular statutory requirement at issue here—that a retainer agreement be signed by the lawyers—has generated relatively little litigation.

Rarer still have been cases presenting the issue whether a violation of that requirement renders a retainer agreement nonexistent and prevents enforce-

ment of an arbitration clause within it. Indeed, that issue has apparently arisen in only one other case. *See* Pet. 16 (citing *Speetjens v. Larson*, 401 F. Supp. 2d 600 (S.D. Miss. 2005)). ILG acknowledges that *Speetjens*—which reflects a Mississippi federal court's effort to interpret California law—is "the one" other case that has presented the question of "the intersection of California Business and Professions Code section 6147 and the FAA." *Id.* An issue that has arisen twice in recorded legal history, with eleven years intervening between its two appearances in the case law, hardly demands this Court's attention.

ILG nonetheless relies on a supposed conflict between the result below and the decision in *Speetjens* as a reason for review here. ILG's assertion overlooks a critical distinction pointed out by the court below: The court in *Speetjens* enforced an arbitration agreement in an unsigned retainer agreement under circumstances where the client, unlike the client here, had *not* exercised the right to nullify the agreement, but merely argued that it was unenforceable. Pet. App. 16a–18a n.8. *Speetjens*, moreover, was decided without the benefit of this Court's later opinion in *Granite Rock*, which emphasized the principle that the existence of a contract containing an arbitration agreement is always a matter for a court to decide.

Even leaving those points aside, a conflict between a federal trial court decision and a state intermediate court decision is a far cry from the kinds of conflicts this Court sits to resolve: conflicts among federal courts of appeals and/or state courts of last resort. S. Ct. R. 10(a) & (b). While only this Court can resolve conflicts among federal appellate courts or state courts of last resort, a disagreement between a district

court in Mississippi and an intermediate California appellate court could—if the issue were to arise again—be resolved by the U.S. Court of Appeals for the Fifth Circuit or the California Supreme Court, obviating any need for this Court to devote its resources to considering the question.

C. ILG's arguments demonstrate no need for review by this Court.

Absent a conflict meriting review by this Court, ILG's plea for this Court's time and attention rests largely on string cites of cases standing for broad generalities that do nothing to establish a need for review of the lower court's application of settled law to unique facts.

1. ILG contends that the state courts' decision is "an impermissible deviation from the 'emphatic federal policy in favor of arbitral dispute resolution.'" Pet. 11 (citation omitted). ILG's citation of a long list of cases repeating the undisputed proposition that there is such a policy, however, overlooks the point that the policy comes into play only when the parties have an agreement "to arbitrate *some* matters," *Granite Rock*, 561 U.S. at 298, and stops at the point where there is no contractual obligation to arbitrate. *See*, *e.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 85–86 (2002). The relevant policy in such cases is that parties cannot be required to arbitrate "when they have not agreed to do so." *Volt*, 489 U.S. at 478.

Thus, as emphasized in *Granite Rock*, the Court has "never held that this policy [favoring arbitration] overrides the principle that a court may submit to arbitration 'only those disputes … that the parties have agreed to submit.'" 561 U.S. at 302 (quoting *First Op-*

tions of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)). And in determining whether a contractual obligation *exists*, courts must apply ordinary contract principles, *see id*. at 296, with no thumb on the scales favoring arbitration. ILG's invocation of "federal policy" thus does not to call into question the lower court's application of contract principles to determine whether the contract at issue here exists.

2. ILG further complains that the lower court "evaded FAA preemption of state law contract defenses generally" by "characterizing a client's challenge to a fee agreement as a challenge to its existence rather than to its validity." Pet. 12. That complaint is doubly wrong. First, far from being an improper attempt at "evasion," determining whether a challenge is properly treated as being to a contract's existence or to its validity is critical to determining whether the case is controlled by the *Granite Rock* principle or the *Prima Paint* severability rule. Second, regardless of whether the lower court's determination was correct, the effect of its ruling had nothing to do with avoiding "FAA preemption of state law contract defenses generally." The FAA does *not* preempt state-law contract defenses generally, but *incorporates* them. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Only contract defenses that disfavor, discriminate against, or are hostile to or incompatible with arbitration are preempted. *See id*. at 339, 341, 343. Nothing in a rule requiring attorneys to sign their contracts with clients singles out arbitration for disfavor or otherwise "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id*. at 343.

3. Finally, citing *Prima Paint*, *Buckeye*, *Nitro-Lift*, and lower-court cases applying their holdings to vari-

ous factual settings, Pet. 13–15, ILG contends that the state court's decision "vitiates" the *Prima Paint* severability doctrine. Pet. 16. But the decision below does nothing of the sort. The state court acknowledged that attacks on the *validity* of a contract that are not aimed at its arbitration clause do not prevent enforcement of the clause and thus may be referred to an arbitrator for resolution. At the same time, however, the court recognized that this Court's decisions in *Granite Rock* and *Buckeye*, and a host of lower federal court decisions implementing them, hold that where the requisites for any contractual obligation between the parties are absent, the *Prima Paint* principle cannot be invoked because the existence of a contract is essential to a court's decision to compel arbitration. As Judge Easterbrook has put it, it is only the presence of a contract between the parties that "control[s] the existence … of an arbitrator's power." *Sphere Drake*, 256 F.3d at 591. "No contract, no power." *Id*.[7]

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[7] ILG's amicus curiae New England Legal Foundation (NELF) acknowledges that issues falling within the *Granite Rock* principle fall outside the rule of *Prima Paint*, *see* NELF Br. 3, 9, but contends that that "narrow exception," *id*. at 3, is inapplicable here because it applies exclusively to contract formation, narrowly viewed, and "a contract can only be voided *after* it has been formed." NELF Br. 4. NELF's theory fails to account for the many cases that have applied *Granite Rock* to issues concerning whether a contract has expired or been superseded and like matters. *See supra* pp. 9–11. And NELF's obsession with the concepts of "voidness" and "voidability" overlooks that this Court held in *Buckeye* that *Prima Paint*'s application does not depend on those labels. 546 U.S. at 448. Mental capacity defenses to the existence of a contract, for example, are not subject to arbitration under *Prima Paint* merely because they are sometimes characterized as issues of "voidness" or "avoidance." *See Spahr*, 330 F.3d at 1272 n.7; *Morgan Stanley*, 293 S.W.3d at 187.

Determining that a case falls beyond the inherent limits of the *Prima Paint* rule by no means "vitiates" the rule. Nothing in the court's decision that there is no contract to enforce in the unusual circumstances here suggests that the court would refuse to apply *Prima Paint* to the kinds of garden-variety validity issues addressed by the cases ILG cites.[8] Nor do ILG's cases, none of which addresses facts similar to those here, suggest that the court below drew the line between challenges to a contract's validity and challenges to its existence in the wrong place.

4. Only a handful of the cases that ILG cites even arguably touch on the question whether the *Prima Paint* severability doctrine applies to claims that a contractual obligation does not exist. Those cases, however, involve very different circumstances and in no way suggest that the state court's decision in this case improperly located the boundary between the realms of *Granite Rock* and *Prima Paint*.

ILG cites *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469 (5th Cir. 2002), which applied *Prima Paint* to hold that the issue of a party's mental capacity to assent to a contract containing an arbitration clause could be referred to arbitration. *Primerica*'s holding was rejected by the Tenth Circuit in *Spahr v. Secco*, 330 F.3d at 1272, which held that a mental in-

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[8] The California courts regularly apply *Prima Paint* to sever and enforce arbitration clauses in the face of challenges to a contract's validity. *See Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1073–76 (Cal. 1996); *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St.*, 673 P.2d 251, 256–58 (Cal. 1983) (adopting *Prima Paint* as California law under the California Arbitration Act); *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 628 (Cal. Ct. App. 2014).

capacity defense involves whether any agreement exists and must therefore be resolved by the court. *See id*. at 1273. In *Buckeye*, this Court explicitly noted that its holdings about the scope of the *Prima Paint* rule did not control the issue in *Spahr*. *See* 546 U.S. at 444 n.1. And decisions addressing the mental capacity issue after *Buckeye* and, more recently, *Granite Rock*, have accordingly followed *Spahr*, rather than *Primerica*. *See*, *e.g.*, *Morgan Stanley*, 293 S.W.3d at 183; *Rowan*, 2015 WL 9906264, at *4. In short, after *Granite Rock* and *Buckeye*, *Primerica* is dubious authority even on the issue it addresses—mental capacity. *Primerica* suggests no need for review of the factually different issue presented here.

ILG also cites two decades-old cases holding that the propriety of a party's exercise of a contractual right to terminate a concededly extant contract, or to rescind such a contract based on claimed frustration of its purposes, is subject to arbitration if the allegedly terminated contract contains an arbitration clause. *See Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1271 (7th Cir. 1976); *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 528–29 (1st Cir. 1985). Leaving aside that the cases long predate *Granite Rock*, their holdings address a very different set of circumstances, and one where the application of the *Prima Paint* principle may make eminent sense: The determination whether the purported exercise of a power to terminate is consistent with the terms or purposes of a contract that both parties agree govern the issue is exactly the kind of question intended to be covered by a provision for arbitration of disputes arising from the contract. *See Commonwealth Edison*, 541 F.2d at 1271. That question has no bearing on the proper course of action

where, as here, a party establishes that, as a legal matter, it is subject to no contractual obligations to the other party at all.

D. The state court's decision is correct.

Review of the state court's application of settled law to the facts of this case would be particularly unwarranted because the court's ruling is correct. This Court's decision in *Granite Rock* leaves no doubt that where there is no contract between the parties at all, there can be no contractual obligation to arbitrate, and that a court must satisfy itself of a contract's existence before it can enforce it. 561 U.S. at 297. The lower court's determination that the defect here goes to the existence of any contract whatsoever follows directly from the statute at issue, which provides that the client may elect not to be bound by a contract that does not meet its requirements. Cal. Bus. & Prof. Code § 6147(b).

This case is not one, like *Buckeye*, where a state has simply attached the label "void" or "voidable" to what is in essence a challenge to a contract's validity rather than its existence. The statutory requirements at issue concern the formal requisites of an agreement that imposes contractual obligations, not the substantive validity of particular terms. As the Tenth Circuit explained in *Spahr*, it would make no sense to apply the *Prima Paint* severability principle to an issue relating to whether a contract exists at all because the "defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract." 330 F.3d at 1273.

Moreover, this case is different from the typical *Prima Paint* case because there is no actual contested issue as to the validity of the contract that ILG wants

an arbitrator to decide. Nowhere in ILG's petition is there any suggestion, let alone argument, that Maxon's repudiation of the contract was improper under the statute or that the contract is in fact still in existence. Indeed, even in the state appellate court, ILG made no cognizable legal argument that the contract had not been properly voided. *See* Pet. App. 17a–18a. Thus, what ILG seeks here is a ruling that it may invoke a provision in a *concededly void contract* to require arbitration, not of a dispute over the validity of the contract, but of noncontractual claims of breach of fiduciary duty and statutory violations.

In other words, here, a purported contract undisputedly imposes *no* binding obligations on the supposed parties—except, in ILG's view, an obligation to arbitrate. Although ILG concedes that, under principles of California contract law applicable to attorney-client fee agreements, an agreement not signed by the attorney may be treated by the client as a nullity, ILG argues that one and only one provision of such a claimed agreement is nonetheless enforceable: the arbitration provision. Under ILG's theory, an arbitration clause has a privileged status above that of any other part of an attorney-client retainer agreement. But that argument runs entirely counter to this Court's repeated admonitions that, under the FAA, agreements to arbitrate are "as enforceable as other contracts, *but not more so*." *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added); *accord EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *Volt*, 489 U.S. at 478.

II. ILG's contention that California Business and Professions Code § 6147 is preempted by the FAA as applied to agreements containing arbitration provisions was neither properly raised nor decided below and would not merit review in any event.

Beyond asking this Court to consider whether the FAA required the lower court to sever the arbitration clause in an agreement that the court found did not exist, ILG's petition purports to present a second, distinct question: "Whether the Federal Arbitration Act preempts California Business and Professions Code section 6147 when the latter is invoked to void a contract containing an arbitration agreement." Pet. i. ILG's petition devotes little analysis to the issue of preemption of the statute (as distinct from its argument about the application of the *Prima Paint* severability rule), but to the extent its argument on the point is discernible at all, it is not properly before this Court because the issue was not properly raised in, or decided by, the court of appeal.

ILG's petition for review in the California Supreme Court explicitly acknowledged that "[t]he Court of Appeal did not address the preemption argument." *Maxon v. Initiative Legal Grp. APC*, No. S230508, Pet. for Review 8 (Cal. filed Nov. 10, 2015). The reason the court of appeal did not consider that issue is that ILG did not properly raise it. Although ILG states in its petition for certiorari that it raised "FAA preemption" in its opening brief on appeal, Pet. 9, it correctly admitted in its petition for review below that it first argued that the *statute* was preempted in

its *reply* brief on appeal. Pet. for Review 8.[9] In California appellate practice, "[i]t is elementary that points raised for the first time in a reply brief are not considered by the court." *Levin v. Ligon*, 45 Cal. Rptr. 3d 560, 585 (Cal. Ct. App. 2006); *see*, *e.g.*, *Thompson v. Koeller*, 191 P. 927, 931 (Cal. 1920); *Tellez v. Rich Voss Trucking, Inc.*, 193 Cal. Rptr. 3d 403, 414 (Cal. Ct. App. 2015).[10] Because the issue of preemption of the statute was neither raised nor decided by the court of appeal, it is not properly before this Court. *See Adams v. Robertson*, 520 U.S. 83, 86–87 (1997).

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[9] ILG's opening appeal brief raised an FAA preemption argument only in the sense that its argument that the trial court had misapplied *Prima Paint* and *Granite Rock* ultimately rested on the preemptive effect of the FAA, on which those decisions are based. But the opening brief nowhere argued that the FAA preempted § 6147; indeed, it did not use the word "preempt" or any of its forms. *See Maxon v. Initiative Legal Grp. APC*, No. A139068, Appellants' Opening Br. (Cal. Ct. App. filed Dec. 20, 2013). The first appearance in ILG's appellate briefing of any reference to preemption of § 6147 came in its reply brief. *See Maxon v. Initiative Legal Grp. APC*, No. A139068, Appellants' Reply Br. 31–35 (Cal. Ct. App. filed June 20, 2014); *see also* Pet. for Review 8 ("[ILG] also argued that, to the extent that Business and Professions Code section 6147 requires the attorney to sign a fee contract, it is preempted by the FAA as applied to an arbitration provision within the fee agreement. (Reply br. on appeal pp. 31–35.)").

[10] In addition, ILG did not serve its briefs on the California Attorney General, as California appellate rules require when the constitutionality of a California statute is challenged. Cal. R. Ct. 8.29(c)(1). As this Court has recognized, a contention that application of a state law is preempted is a claim that the law is unconstitutional under the Supremacy Clause. *See*, *e.g.*, *Rose v. Rose*, 481 U.S. 619, 624 n.3 (1987).

In any event, the question whether California Business and Professions Code § 6147 is preempted by the FAA as applied to arbitration agreements does not merit review by this Court. ILG makes no claim that lower courts are divided on the issue, and indeed cites no cases that even address whether a state may even-handedly require that attorney-client agreements must be signed by attorneys whether or not they contain arbitration agreements.

Moreover, ILG provides no explanation of how a requirement that an attorney-client agreement be signed by the attorney could possibly pose "an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. The statute's requirements neither "apply only to arbitration" nor "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id*. at 339. Nor does the simple requirement of a signature by the contracting party "interfere[] with fundamental attributes of arbitration," *id*. at 344, by requiring procedures inconsistent with the nature of the arbitral process. *See id*. at 344–52. The FAA does not prevent states from requiring attorneys to sign their contracts.

III. This case would be a poor vehicle for addressing the issue ILG raises.

A. There are alternative state-law grounds for the same result.

Even if the lower court's decision that the voiding of an attorney-client agreement under California law renders the contract non-existent under *Granite Rock* and thus prevents application of the *Prima Paint* severability principle were debatable, resolving that question would not itself decide this case. Maxon argued in the lower courts that under applicable Cali-

fornia contract-law principles, no contract was formed to begin with when ILG did not execute its own proposed retainer agreement. The agreement itself contemplated that it would not be effective unless executed by the parties, and thus, irrespective of the client's right to void an unsigned contract under California law, no contract was formed. And under *Granite Rock*, a court must always decide an issue of contract formation before compelling arbitration.

The state court did not decide this issue because its decision that even if a contract was formed it no longer existed rendered decision of the formation issue unnecessary. But if this Court were to take up the case, it would either have to address the issue itself as an alternative ground for affirmance—adding another fact-specific, state-law issue to an already factbound case—or leave it for resolution on remand, creating the possibility that the Court's decision of the question presented would not be outcome-determinative. Either way, the presence of this additional issue heightens the unsuitability of this case for review.

B. The continued disagreement on this Court over whether the FAA applies in state courts makes a case arising in a state court a poor vehicle for deciding an FAA preemption issue.

ILG's claim that the FAA commanded a different outcome in this case presupposes that the FAA applies in state courts. A majority of this Court concluded in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that section 2 of the FAA applies to state-court actions, and thus preempts state courts from applying inconsistent standards. That decision, departing from the original intent of the FAA, drew dissent at the time it

was issued and continues to divide the Court. Most recently, in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), Justice Thomas made clear that he "remain[s] of the view that the Federal Arbitration Act … does not apply to proceedings in state courts" and "does not require state courts to order arbitration." *Id*. at 471 (Thomas, J., dissenting). As *Imburgia* illustrates, that view continues to determine the disposition that will command Justice Thomas's vote in a case where the issue is whether the FAA preempts a state court decision declining to compel arbitration.

The continuing disagreement on the Court over this question makes a case coming from a state court a very poor candidate for resolving any significant FAA issue (even assuming that this case presented a significant issue). Such issues have often closely divided the Court. *See*, *e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). For example, *Concepcion* was decided by a bare 5–4 majority. Had the case arisen from a state court, this Court would likely have divided 4–4 on the merits of the FAA preemption question, with the deciding vote resting on another basis entirely. Such a decision would have contributed nothing to the definitive resolution of any question of federal law.

Even if ILG's preemption arguments here were strong enough to command any votes, there would be a significant possibility of a similarly indecisive outcome. In such a case, the parties' investment of resources in briefing the question of federal law petitioners seek to present, and the Court's efforts to consider and resolve it, would be wasted. The case's

origin in the state courts thus makes it a very poor candidate for review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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