No. 19-963

IN THE

Supreme Court of the United States

HENRY SCHEIN, INC.,
Petitioner,

v.

ARCHER AND WHITE SALES, INC.,
Respondent.

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

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AND PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its more than 70-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice, P.C. is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice operates a special project devoted to fighting abuses of mandatory arbitration. Through this project, Public Justice has reviewed hundreds of state and federal cases involving enforcement of mandatory arbitration clauses.

AAJ and Public Justice file this brief first and foremost to highlight that this case can be resolved simply: Regardless of what presumptions or other considerations might apply in another case, under the plain text of this contract, the question whether the parties' dispute falls

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

within the scope of the arbitration clause is for a court and not an arbitrator. Because that is enough to resolve this case, this Court can leave the other issues raised by the parties for another day.

But because this Court should address the arbitral rules incorporation issue when the right vehicle comes before it, *amici* also submit this brief to provide missing context. As the brief explains, this is not the typical case. Arbitration clauses like this one typically appear in take-it-or-leave-it contracts presented to consumers, employees, and even schoolchildren, who must check a box on a website or "agree" to lengthy fine-print terms as a condition of accessing important services or keeping their jobs. A bare reference to the American Arbitration Association (AAA) rules in a contract formed under these circumstances falls far short of clear and unmistakable evidence that the ordinary consumer or worker who was required enter into it intended to give up the right to have a court hear threshold arbitrability questions. The courts that have concluded otherwise have misapplied this Court's precedents and misunderstood the text of the AAA rules.

Based on their experience with costly threshold litigation over issues of arbitrability—and their organizational concern for the development of the law on those issues—AAJ and Public Justice are well positioned to offer a unique perspective on these questions.

INTRODUCTION & SUMMARY OF ARGUMENT

Over and over again, this Court has held that a court, not an arbitrator, must decide disputes about whether parties are required to arbitrate their claims—unless there is clear and unmistakable evidence that the parties agreed otherwise. Thus, if a company wants an arbitrator to decide the scope of its arbitration provision (or any

other gateway question about whether the parties must arbitrate their dispute), it must include clear and unmistakable evidence of that intent in its arbitration clause. That's not hard. All that company needs to do is include a statement in its arbitration provision that says so: For example, the arbitrator "shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, [or] enforceability" of the arbitration clause. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66, 69 n.1 (2010). Easy. Companies routinely include this or similar language in their arbitration clauses, and courts routinely enforce it.

Here, Henry Schein seeks to enforce an arbitration clause that does not include this language—or any other language that says that an arbitrator, and not the court, shall decide disputes about the scope of the arbitration clause. Nevertheless, the company argues that the arbitration clause still somehow requires that an arbitrator decide whether arbitration is required in the first place, even though nowhere does it actually say that. The parties have spent eight years—and now two trips to the Supreme Court—fighting about this gateway question. That's eight years and two trips to the Supreme Court before reaching the merits of Archer and White's claims, or even determining whether those claims will be decided by a court or in arbitration.

Arbitration is supposed to "reduc[e] the cost and increas[e] the speed of dispute resolution." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). This Court's requirement that delegation provisions be clear and unmistakable helps ensure that arbitration accomplishes this goal. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Henry Schein's quest,

on the other hand, to unearth some hidden intent to delegate gateway questions to the arbitrator in an arbitration clause that does not say that has been both costly and lengthy. This Court should not countenance such quests. If it does, the years-long battle between the parties here will become a common feature of arbitration disputes.

Instead, this Court should hold that clear and unmistakable means just that. If an arbitration clause clearly states that an arbitrator shall decide gateway issues, the arbitrator shall decide gateway issues. If an arbitration clause does not do so, the ordinary presumption that the court decides such issues remains.

That principle is all that is required to decide this case. The arbitration clause here does not state that an arbitrator shall decide the scope of the arbitration clause. So the ordinary presumption that a court shall decide the issue governs. Henry Schein argues that the arbitration clause incorporates the American Arbitration Association's rules, but the clause is clear that those rules only apply to disputes that have already been determined to fall within the scope of the arbitration clause. They can't therefore be used to decide who makes that determination.

Thus, this Court need not decide whether the incorporation of the AAA rules could ever clearly and unmistakably delegate scope questions to the arbitrator. The text of the arbitration clause makes clear that the rules cannot do so here.

At some point, this Court should decide whether a bare statement that arbitration shall be conducted under the AAA rules is sufficient to overcome the presumption that a court—not an arbitrator—decides whether a dispute

must go to arbitration in the first place. Many lower courts have gotten this issue wrong, ignoring or misinterpreting this Court's requirement that clear and unmistakable evidence is required before a party will be forced to give up the right to have a court decide whether an arbitration clause is enforceable. But this Court should address that issue in the context in which it most frequently arises—lengthy form contracts imposed as a condition of employment or purchase on workers and consumers. It need not resolve the question here, in a unique factual situation where that resolution is not necessary to decide the case.

If the Court does reach the issue, however, it should hold that the statement that arbitration will be conducted under the AAA rules does not count as clear and unmistakable evidence that the parties intended to give up their right to have a court decide threshold arbitrability questions. The AAA rules say nothing of the sort. And a mere reference to them gives no indication that they might. A worker whose company requires arbitration as a condition of employment, or a consumer who must click a box acknowledging lengthy terms of service on a pinpad at a store, cannot possibly know that, just because the arbitration clause states that the AAA rules will apply to any arbitration, they are giving up their right to have a court decide whether the arbitration clause is enforceable. That is not what clear and unmistakable means. And when a vehicle presenting this question comes before this Court, the Court should make that clear.

ARGUMENT

I. "Clear and unmistakable" means clear and unmistakable—explicit, not inferred.

Ordinarily, when there is a dispute about whether a claim must be arbitrated, a court—not an arbitrator—decides that dispute. *Rent-A-Center*, 561 U.S. at 69 n.1. But just as parties may agree to arbitrate the merits of a dispute, they may also agree to arbitrate questions of "arbitrability"—that is, disputes about the scope or enforceability of an arbitration clause. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). They do so by including in their contract a "delegation provision," which is "simply an additional, antecedent agreement" that an arbitrator will decide such gateway questions. *Rent-A-Center*, 561 U.S. at 68–70.

But this Court has instructed that courts may not lightly assume that parties have delegated threshold questions to an arbitrator. *See First Options*, 514 U.S. at 944–45. After all, the question of who decides gateway arbitrability issues is "rather arcane." *Id.* at 945. And parties typically do not focus on that question—or on "the significance of having arbitrators decide the scope of their own powers." *Id.* A court, therefore, may only require that parties arbitrate disputes about arbitrability if there is "clear and unmistakable evidence" that they agreed to do so. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).[2]

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[2] This "heightened standard" is the opposite of the presumption that applies in determining whether merits disputes must be arbitrated. *Rent-A-Center*, 561 U.S. at 69 n.1; *First Options*, 514 U.S. at 944–45. When the question is whether a merits dispute falls within the scope of the arbitration clause, there's a presumption in favor of

"Clear and unmistakable" is a stringent, or "heightened," standard. *Rent-A-Center*, 561 U.S. at 69 n.1. It cannot be met by "silence or ambiguity." *First Options*, 514 U.S. at 944. If, for instance, the parties' agreement leaves "doubts" about who should decide arbitrability, those doubts should be resolved in favor of a court, not an arbitrator. *See id.* at 945. (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

This Court has long held that a contractual waiver is clear and unmistakable if and only if it is expressed in explicit terms that admit of no other reasonable interpretation. For instance, this Court has held that a waiver of statutorily protected labor rights in a collective bargaining agreement is only "clear and unmistakable" if it is "explicitly stated." *See, e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). This means that it is not enough if a waiver is "very general" or fails to clarify key terms. *See Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79–81 (1998).

Similarly, this Court has repeatedly made clear that a statutory waiver of sovereign authority is only clear and unmistakable if it contains an "express command." *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273–77 (1908); *see also United States v. Winstar Corp.*, 518 U.S. 839, 880 (1996) (plurality). For example, this Court held that the government has only clearly and unmistakably surrendered its power to tax if it has used "terms which admit of no other reasonable interpretation." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (quoting

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concluding that it does. *See First Options*, 514 U.S. at 944–45. When, however, as here, the question is whether the parties agreed to arbitrate threshold disputes about arbitrability, there's a strong presumption that the court decides. *See id.*

St. Louis v. United Rys. Co., 210 U.S. 266, 280 (1908)). A waiver "inferred [] from silence" or buried in an "ambiguous term," it is not clear or unmistakable. *Id.*; *Winstar*, 518 U.S. at 878.

Across the board, this Court's meaning is itself unmistakable: A contract does not clearly and unmistakably mean more than it states in express terms. If a party's contract interpretation argument turns on a convoluted set of inferences from silent or ambiguous text, it falls short of this standard.

II. There is no delegation provision here.

By its terms, the arbitration clause at issue here requires only that the parties arbitrate certain merits questions—not disputes about arbitrability. The clause says:

> Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes relating to trademarks, trade secrets or the intellectual property of [a specific manufacturing company]) shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

JA114.[3]

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[3] To be clear, there is no actual arbitration contract between the parties in this case. Rather, Henry Schein relies on an arbitration clause in a contract between Archer and White and *another company*. The Fifth Circuit nevertheless permitted Henry Schein to take advantage of the arbitration clause under an equitable estoppel theory. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 277, 279 (5th Cir. 2019). That decision was almost certainly incorrect. *See Gore v. Myrtle/Mueller*, 653 S.E.2d 400, 405 (N.C. 2007) (noting that equitable estoppel requires, among other things, detrimental reliance, which is conspicuously absent here); *see also*

Nowhere does this provision state that an arbitrator shall decide the scope of the arbitration clause—that is, whether a dispute falls within the exception for actions seeking injunctive relief or intellectual property claims. Nor does it state that an arbitrator shall decide any other gateway question. Recognizing this omission, Henry Schein attempts to create a delegation provision where there is none. According to Henry Schein, because the contract requires that any arbitration that does take place be governed by the AAA rules, those rules should also govern whether a dispute falls within the scope of the arbitration clause in the first place. But that's not what the contract says.

The clause establishes a two-step procedure. *First*, determine whether a dispute falls within the scope of the clause by (a) assessing whether it arises under or relates to the contract and, if so, (b) confirming that the dispute is not an action seeking injunctive relief or a dispute relating to one of the specified intellectual property issues. *Second*, if the dispute falls within the scope of the clause, send it to binding arbitration—which will proceed in accordance with the rules of the AAA. In other words, the contract states that the AAA rules only apply to disputes that fall within the scope of the arbitration clause. Those rules, therefore, can't be used to determine which disputes fall within that scope. Henry Schein's argument to the contrary puts the cart before the horse and is contrary to the terms of the contract.

Arbitration is a matter of contract, that is, "a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First*

JA114 (North Carolina choice of law clause). But because that question is not before this Court, we have not addressed it here.

Options, 514 U.S. at 943. In this case, Archer and White agreed to arbitrate disputes that arise out of or relate to the contract, except for actions involving injunctive relief or certain intellectual property disputes. It did not agree to arbitrate questions about the scope of the arbitration clause.

Henry Schein suggests that merely referencing the AAA rules was enough to incorporate them into the arbitration clause for any purpose. But incorporation by reference is not all or nothing. A reference by contracting parties "to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified." *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916); 11 Williston on Contracts § 30:25 (4th ed. May 2020 update); *see also, e.g.*, *Arrow Sheet Metal Works v. Bryant & Detwiler Co.*, 61 N.W.2d 125, 130 (Mich. 1953); *Starr v. Union Pac. R.R. Co.*, 75 P.3d 266, 269 (Kan. Ct. App. 2003). And the purpose specified here is to govern *how* arbitration is conducted. Nowhere does the contract even hint that the rules should govern *whether* arbitration occurs in the first place. To nevertheless treat the AAA rules as incorporated for that purpose conflicts with the text of the contract, ordinary contract interpretation rules, and this Court's mandate that a delegation be clear and unmistakable.

If a company wants to delegate arbitrability disputes to an arbitrator, it's long been clear how to do so. In *Rent-A-Center*, for instance, this Court noted that the parties' contract did just that: "The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."

561 U.S. at 66, 69 n.1. Companies across the country have adopted this or similar language, and courts routinely enforce it. *See, e.g.*, *Reyna v. Int'l Bank of Commerce*, 839 F.3d 373, 378–79 (5th Cir. 2016); *Arrigo v. Blue Fish Commodities, Inc.*, 704 F. Supp. 2d 299, 302–03 (S.D.N.Y. 2010); *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 113–14 (Mo. 2018) (en banc). But the company that drafted this clause did not do so. This Court should enforce the arbitration clause as it was written—not as Henry Schein wishes it had been.

Because the plain text of the arbitration clause makes clear that the arbitral rules do not apply to determining the scope of the arbitration clause, the Court need not address the implications of those rules. The Court can simply affirm on that basis.

III. Although there is no need for this Court to decide the issue here, a bare reference to an arbitration provider's rules does not constitute clear and unmistakable evidence of intent to arbitrate arbitrability.

Although this Court need not address the delegation-by-reference-to-arbitral-rules issue, it should, in the appropriate case, hold that a reference to the AAA (or any other provider's) rules does not constitute clear and unmistakable evidence that the parties agreed to delegate questions of arbitrability to an arbitrator. The cases that have concluded otherwise conflict with this Court's precedent and the plain language of the AAA rules. When the right vehicle comes before it, this Court should correct this error.

A. This issue is ubiquitous in take-it-or-leave-it consumer and employment contracts.

Unlike this case, most cases that implicate this issue arise when companies impose lengthy form contracts on workers or consumers as a condition of employment or purchase. To see why a reference to an arbitration provider's rules falls far short of a clear and unmistakable delegation, consider the following examples.

1. Consumers who apply for a credit card at a large department store are often required to acknowledge the terms of the card on a pinpad device at the point of sale. *See, e.g.*, *Edwards v. Macy's Inc.*, 2015 WL 4104718, at *6 (S.D.N.Y. June 30, 2015). The pinpad device might display a box with long, fine-print terms, somewhere including a clause that requires that disputes arising from use of the credit card be resolved in binding arbitration in accordance with the rules of the AAA. *Cf., e.g.*, *Nat'l Fed. of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 75–77 (1st Cir. 2018) (blind consumers required to accept pinpad terms including a similar arbitration clause).

Suppose the consumer purchases a defective product from the store and files suit, alleging that the store engaged in deceptive marketing of the good, and the retailer then seeks to compel arbitration of the dispute. The case presents a clear threshold arbitrability issue: Do the consumer's deceptive marketing allegations arise out of use of the credit card?

From the consumer's perspective, the answer to that question might be the whole ballgame. She might have a strong argument that a dispute about a retailer's *product* in no way arose out of or related to her use of the *credit card* she obtained from that retailer. She might have made her purchase on the card precisely because the point seemed obvious. But if she had to first persuade an

arbitrator that the issue was outside the scope of the arbitration clause, the additional time and resources it would take to do so might discourage her from attempting to vindicate her rights in the first place. And it's difficult to imagine that a consumer who sees terms on a pinpad saying that arbitration will take place under a particular arbitration association's rules would understand that to mean that she was giving up the right to have a court decide whether that arbitration clause was enforceable in the first place.

2. A similar setup is ubiquitous in online transactions. For instance, online merchants frequently require consumers about to complete their purchase to click a box acknowledging lengthy fine-print terms of service. *See, e.g.*, *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002) (Sotomayor, J.). In one case, for example, a vacationing couple who signed up for a short-term condo rental via AirBnB was required to click a box acknowledging lengthy terms that included an arbitration clause, which stated that any arbitration would be "administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes." *See Doe v. Natt*, 299 So. 3d 599, 600–01 (Fla. Dist. Ct. App. 2020). When the condo owner secretly recorded the couple's stay, the couple sued the owner and included constructive intrusion and loss of consortium claims against AirBnB. *See id.* AirBnB invoked the arbitration clause in its website terms of service to try to send the parties' dispute against it—and any threshold arbitrability issues—to an arbitrator. *Id.*

If a court agreed, the couple might find itself in a difficult bind. Like the retail consumer, it could have a strong argument that its claims against AirBnB were

outside the scope of the contract. *See id.* at 601. But the couple was trying to sue AirBnB and the condo owner at the same time. If the couple had to pause its lawsuit against the condo owner to go sort out the scope question in arbitration, it might have to decide whether to litigate in both forums simultaneously—or to pick only one claim to pursue. Or the owner might insist that its claims against him should happen in arbitration, too—adding further delay and expense.

3. Workers required to enter take-it-or-leave-it employment contracts referring to the AAA rules find themselves in the same position. An employer might, for instance, ask an employee to sign an acknowledgement that she had read a company's policies and procedures manual that included the same, AAA-referencing arbitration clause. *See Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 776 (2012). If the employee later filed an employment discrimination action, her employer would argue that her signature on the acknowledgement form meant she had agreed to arbitrate all merits and arbitrability disputes. Like the consumers described above, the employee might be discouraged from pursuing her claims—or pay a higher premium for doing so if she had to participate in a sideshow about scope in front of an arbitrator before she would have any opportunity to pursue her claims in court.

4. Companies have even invoked the AAA incorporation principle against minors with learning disabilities. One recent case concerned the ACT, the most commonly taken college admissions exam. Before taking the test—a test required for these students to go to college—the students were required to check a box indicating that they agreed to test terms, which included an arbitration clause mandating that any arbitration

would be conducted in accordance with the AAA rules. *See Bloom v. ACT, Inc.*, 2018 WL 6163128, at *1 (C.D. Cal. Oct. 24, 2018). When a group of students with learning disabilities sued ACT, alleging that the test preparation company impermissibly sold information about their disabilities, the company moved to compel arbitration. Although there are serious questions about the enforceability of its arbitration clause, the company argued that the court could not decide those issues simply because the arbitration clause referenced the AAA rules. That mere reference, the company insisted, meant that the students had given up their right to have a court assess whether the arbitration clause was enforceable. *See id.*

B. As these contexts make clear, contracts that incorporate arbitral rules do not clearly and unmistakably disclose that parties are giving up their right to have a court decide threshold arbitrability questions.

Signing one of these take-it-or-leave-it contracts does not provide clear and unmistakable evidence of an intent to arbitrate arbitrability. Take the consumer getting a store credit card, who might have checked a box acknowledging the following terms of service on the store's pinpad at checkout:

> Any dispute arising under or related to this credit card agreement shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.

To conclude that this clause, or any of those described above, conveyed an intent to arbitrate arbitrability requires daisy-chaining together a long list of assumptions.

First, on the tiny pinpad before her, the consumer would need to find the arbitration clause amidst pages of fine print and identify a cursory reference to the AAA rules in that agreement.

Second, she would need to realize that that reference incorporated the AAA rules into the arbitration clause for any purpose—not just the specific purpose of providing ground rules for the arbitration of the types of disputes the parties agreed to arbitrate (the more obvious interpretation). Specifically, she would need to understand that the AAA rules might govern not just how any arbitration that did occur would proceed, but who would decide any threshold questions of arbitrability—such as whether the arbitration agreement was valid in the first place, or whether a dispute fell within the scope of the agreement.

Third, she would then need to navigate to the AAA's website (how she would be expected to do this while in line at a store is anyone's guess). Once there, she would need to figure out which of the dozens of different sets of arbitral rules that AAA lists is the one that the company had in mind. Not only would she need to choose among the AAA's "commercial" rules and its "consumer" rules, but she would need to figure out which edition of those sets of rules applied.

Fourth, she would need to download and read a copy of those rules.

Fifth, she would need to figure out which specific rule set forth an arbitrator's authority to hear arbitrability disputes.

And sixth, she would need to understand that that rule constituted a delegation provision—and that a delegation provision waived her right to ask a court to decide whether she was required to arbitrate in the first place.

And all this assumes that there even is an AAA rule that constitutes a delegation provision. There is no such rule. Henry Schein points to Rule 7(a) of the latest version of the AAA's Commercial Rules. That rule, labeled "Jurisdiction," provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures*, 13 (effective Oct. 1, 2013), https://perma.cc/2UKW-WQVT.

But what, exactly, does that mean? Even a savvy consumer who took all the steps described above would be hard pressed to interpret this rule as delegating arbitrability disputes to an arbitrator. The rule says the arbitrator "shall have the power" to decide such disputes. But a court, too, has that power. *See Ajamian*, 203 Cal. App. 4th at 788. The AAA rule does not say the arbitrator's power is exclusive. By its terms, then, the rule does not delegate arbitrability disputes to an arbitrator. It merely empowers arbitrators to decide such disputes if those disputes are before them—which they would be, for example, if the dispute was filed in arbitration rather that in court.

Any other interpretation would be contrary to how those words are ordinarily used. Providing that an entity has the "power" or "jurisdiction" to act conveys only that the body *may* act—not that it has the sole authority to do so. *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (holding that the constitutional phrase "Congress shall have the power" is permissive); *Bouman v. Block*, 940 F.2d 1211, 1230 (9th Cir. 1991) (concluding that a California statute providing

that state superior courts "shall have jurisdiction" over claims under the act did not preclude federal courts from exercising their own jurisdiction); *People ex rel. Oak Supply & Furniture Co. v. Dep't of Rev.*, 342 N.E.2d 53, 55–56 (Ill. 1976) (interpreting Illinois statute providing that state department "shall" issue subpoenas as providing that the department "may" or "shall have the power" to do so).

Thus, to conclude that a bare reference to the AAA rules waives the right to have a court determine arbitrability disputes, a consumer would have to take multiple unlikely (and in some cases impossible) steps to even ascertain the relevant rule—and she would then have to interpret that rule differently from the ordinary meaning of its words. That is not what "clear and unmistakable" means.

C. The courts that have ruled otherwise have ignored this Court's cases and the text of the AAA rules.

Most courts that have held that merely referencing arbitral rules is sufficient to delegate arbitrability disputes to an arbitrator have done so with almost no analysis.

The first court to address this issue was the First Circuit in *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989). There, two corporations had entered into a distribution agreement, which required that the parties settle any disputes "arising out of or in connection with the agreement . . . by binding arbitration in accordance with the rules of arbitration of the International Chamber of Commerce." *Id.* at 473. One of those rules, the First Circuit noted, specified that "any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself." *Id.* (quotation omitted). Therefore, the First

Circuit concluded that the parties' mere reference to the ICC rules was sufficient to delegate arbitrability disputes to an arbitrator. *See id.*

This opinion—decided before this Court's decision in *First Options*—was wrong to begin with. The First Circuit did not explain how the mere statement that arbitration will take place in accordance with a particular set of rules could possibly provide clear and unmistakable evidence that the parties intended to give up their right to have a court hear arbitrability questions. The party opposing arbitration hadn't even briefed the issue. *See id.* at 473.

Nevertheless, many courts have over the last three decades uncritically followed *Apollo*. Worse, they have applied it where even, by its terms, it does not make sense—to terms unilaterally imposed on unsophisticated parties that reference arbitral rules that, unlike the rules in *Apollo*, do not themselves clearly delegate arbitrability disputes to an arbitrator. While the ICC rule at issue in *Apollo* at least provided that decisions as to jurisdiction "shall be taken by the arbitrator himself," *id.*, courts have applied *Apollo* to cases in which the rules say only that the arbitrator *may* decide jurisdiction—not that the arbitrator *must* do so, *see, e.g.*, *Contec Corp. v. Remote Sol'n, Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

As discussed above, for example, the AAA rule provides only that arbitrators shall have the power to decide arbitrability issues—not that they must do so. Yet in their haste to extend the *Apollo* rule, many courts have not stopped to consider this difference. *See, e.g.*, *id.* (extending the rule from the ICC to AAA context); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA rules . . . into their agreement, the parties clearly and

unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.").

And those courts have also ignored this Court's repeated mandate that courts must decide arbitrability questions unless there is clear and unmistakable evidence that the parties intended otherwise. *See, e.g.*, *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013). Increasingly they relied on nothing more than the fact that other courts have come to the same conclusion. *See, e.g.*, *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) ("We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.").

Over time, however, it's become clear that the *Apollo* decision and its progeny do not accord with this Court's case law. And courts have begun to reject the contention that there is some "general rule" that the incorporation of the AAA rules into an arbitration clause constitutes clear and unmistakable agreement to arbitrate arbitrability. *See, e.g.*, *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016).

And, where they can, courts have tried to narrow the breadth of the incorporation rule. For instance, after the Ninth Circuit reserved judgment on the question whether the *Apollo* incorporation principle applied to contracts involving unsophisticated parties, *see Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015); *Oracle*, 724 F.3d at 1075, 1075 n.2, district courts in that circuit have routinely held that a bare reference to the AAA rules is insufficient to establish delegation when contracts involved at least one unsophisticated party. *See, e.g.*, *Calzadillas v. Wonderful Co.*, 2019 WL 2339783, at *4

(E.D. Cal. June 3, 2019) (explaining that seasonal agricultural workers were poorly positioned to understand the "frequently esoteric terms" of an arbitration agreement, especially one that referenced additional rules); *Meadows v. Dickey's Barbecue Restaurants Inc.*, 144 F. Supp. 3d 1069, 1078 (N.D. Cal. 2015) ("[A]n inquiry about whether the parties clearly and unmistakably delegated arbitrability by incorporation should first consider the position of those parties.").

These courts have emphasized the failure of courts adopting the *Apollo* rule to pay "attention to the basic analysis" laid down by this Court for evaluating whether such a delegation has occurred: Delegation requires clear and unmistakable evidence. *See, e.g.*, *Richardson v. Coverall N. Am., Inc.*, 2018 WL 4639225, at *3–4 (D.N.J. Sept. 27, 2018), *rev'd in part*, 811 F. App'x 100 (3d Cir. 2020); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1194 (2009). As one court explained, it is already a "difficult proposition to say that the text of an arbitration clause itself, when found among contract boilerplate," represents the parties' intent. *Allstate Ins. Co. v. Toll Brothers, Inc.*, 171 F. Supp. 3d 417, 429 (E.D. Pa. 2016). "But incorporating forty pages of arbitration rules into an arbitration clause is tantamount to inserting boilerplate inside of boilerplate, and to conclude that a single provision contained in those rules amounts to clear and unmistakable evidence of an unsophisticated party's intent would be to take 'a good joke too far.'" *Id.*

If a company wants to require that arbitrability disputes be heard by an arbitrator, it can easily do so, simply by saying so explicitly in its terms. It should not be able to impose that result merely through an oblique

reference to arbitral rules that no ordinary worker or consumer would understand as waiving their rights.

Although this case does not squarely present the issue, at some point this Court will need to step in to resolve it. When it does so, it should take one of the typical cases described above, and it should explain that a bare reference to the AAA rules cannot, in and of itself, provide clear and unmistakable evidence of the parties' intent to give up their right for a court to decide questions of arbitrability.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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