NO. A-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN DOE and JANE DOE,

Petitioners,

v.

AIRBNB, INC.,

Respondent.

On Petition for Writ of Certiorari to the Florida Supreme Court

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APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

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APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Under this Court's Rule 13.5, Petitioners, John Doe and Jane Doe, respectfully request a 60-day extension of time, to and including August 29, 2022, to file their Petition for Writ of Certiorari to the Florida Supreme Court. The Florida Supreme Court entered its opinion on March 31, 2022 (**Exhibit A**), and accordingly the Petition for Writ of Certiorari is due on or before June 29, 2022. Petitioners are filing this motion for extension of time more than ten days before the current due date for the Petition for Writ of Certiorari. Jurisdiction is proper in this Court as set forth in 28 U.S.C. Section 1257(a).

1. This case concerns arbitrability; that is, what claims the parties agreed to arbitrate. More specifically, the question here is *who*—a trial court or an arbitrator—should decide whether a claim is arbitrable. The law presumes that a trial court should make this decision. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995). This Court has instructed that this presumption can be overcome only with "clear and unmistakable" evidence to the contrary. *Id.* Here, the parties' arbitration agreement stated that arbitration would be administered in accordance with the rules of the American Arbitration Association ("AAA"). And one of the

AAA rules stated that an arbitrator "shall have the power" to rule on arbitrability. Florida's Second District Court of Appeal held that this rule language was not clear and unmistakable. *Doe v. Natt*, 299 So. 3d 599, 609 (Fla. Dist. Ct. App. 2020). Instead, the rule was "an arguably permissive and clearly nonexclusive conferral of an adjudicative power to an arbitrator, found within a body of rules that were not attached to the agreement, that itself did nothing more than identify the applicability of that body of rules if an arbitration is convened." *Id.* at 609. The Florida Supreme Court reversed, holding that the language in question was clear and unmistakable. *Airbnb, Inc. v. Doe*, 336 So. 3d 698, 705-06 (Fla. 2022).

2. This Court's review would be warranted because the Florida Supreme Court's decision conflicts with this Court's arbitration jurisprudence, runs contrary to decisions from other state courts of appeal, and misapplies the plain language of the AAA rules. Indeed, the arbitration agreement here does not mention who will decide arbitrability. What the agreement does say about arbitration—that it will proceed under the AAA rules—provides only that the rules apply to arbitration proceedings already underway. And the AAA rules, even if they *did* apply, were not clear and unmistakable either. The rules do not give an arbitrator exclusive authority to decide arbitrability or take away a trial court's power to make the same decision.

This Court has not yet addressed whether the incorporation of arbitral rules can stand as clear and unmistakable evidence under *First Options.* This issue was

presented in two recent (and related) decisions, but this Court granted certiorari on different bases. *See Henry Schein, Inc. v. Archer & White Sales, Inc.* (*Henry Schein I*), 139 S. Ct. 524, 531 (2019) ("We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator."); *Henry Schein, Inc. v. Archer & White Sales, Inc.* (*Henry Schein II*), 141 S. Ct. 113 (2020). In both cases, though, the delegation-by-incorporation issue was a subject of debate during oral argument. *See* Tr. of Oral Arg. at *9, *Henry Schein, Inc. v. Archer & White, Inc.* (*Henry Schein II*), No. 19-963, 2020 WL 7229731 (Thomas, J., asking petitioner to point to the supposed delegation language in the agreement); Tr. of Oral Arg. at *7, *Henry Schein, Inc. v. Archer & White Sales, Inc.* (*Henry Schein I*), No. 17-1272, 2018 WL 5447972 (question from Ginsburg, J., on same topic); *id.* at *42 (question from Gorsuch, J.).

And although most federal circuit courts of appeal have found that mere incorporation of arbitral rules qualifies as clear and unmistakable evidence, *see Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 845, 844-46 (6th Cir. 2020) (collecting cases), state appellate courts have disagreed, presenting a split of authority that would warrant this Court's review. *Glob. Client Sols., LLC v. Ossello*, 382 Mont. 345, 355 (2016); *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016); *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 434-37 (S.D. 2005) (same); *Ajamian v. Cantor-CO2e, L.P.*, 137 Cal.

Rptr. 3d 773, 790 (Ct. App. 2012); *Gilbert St. Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1195-96 (Cal. Ct. App. 2009); *Burlington Res. Oil & Gas Co. LP v. San Juan Basin Royalty Tr.*, 249 S.W.3d 34, 41 (Tex. App. 2007).

3. A 60-day extension of time in this case is necessary to permit counsel to research the issues implicated by the Florida Supreme Court's decision and to draft a petition for a writ of certiorari that will be helpful to this Court. Also, undersigned counsel has been preoccupied with other matters, including: (1) a response to petition for writ of certiorari filed in *Mendoza v. Green*, Case No. 2D22-1171 (Fla. Dist. Ct. App. June 14, 2022); (2) an answer brief on jurisdiction in *Fields Motorcars of Florida, Inc. v. Romero*, Case No. SC22-351 (Fla. June 13, 2022); (3) a complicated response to a summary judgment motion in *Sickel v. Philip Morris USA Inc.*, Case No. 2007-CA-16177 (Fla. Cir. Ct., May 31, 2022); (4) an oral argument in *Marinec v. Progressive Select Ins. Co.*, Case No. 2D20-3351 (Fla. Dist. Ct. App. May 17, 2022); (5) a reply brief in *Dilworth v. LG Chem, Ltd.*, Case No. 2021-CA-629 (Miss. May 11, 2022); (6) an oral argument in *Massage Envy Franchising, LLC v. Doe*, Case No. 5D20-1794 (Fla. Dist. Ct. App. Apr. 11, 2022); (7) assisting in the trial of *In Re: Engle Progeny Cases Tobacco Litigation, Pertains to Hancock*, Case No. 09-CA-18859 (Fla. Cir. Ct. Apr. 4 – Apr. 14, 2022). No prejudice will be suffered by any party as a result of this extension of time.

For these reasons, Petitioners respectfully request that an order be entered extending the time to file a petition for writ of certiorari by 60 days, to and including August 29, 2022.

June 16, 2022

Respectfully submitted,

/s/Thomas J. Seider

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