No. _____

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

PETITION FOR WRIT OF CERTIORARI

DAMIAN MALLARD
ALAN L. PEREZ
MALLARD PEREZ, PLLC
889 N. Washington Blvd.
Sarasota, FL 34236
Tel: (941) 952-1682

THOMAS J. SEIDER
Counsel of Record
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass St., Suite 200
Tampa, FL 33606
Tel: (813) 223-4300
tseider@bhappeals.com

Counsel for Petitioners

July 29, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

When parties enter into an arbitration agreement, it is presumed that they intend for a court, not an arbitrator, to decide whether any future disputes will be arbitrable under the agreement. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). That presumption can be overcome, but only when "clear and unmistakable" evidence shows the parties' intent to have an arbitrator decide the arbitrability question instead of a court. *Id*.

The question presented is: If a form arbitration agreement provides that an arbitration, if it occurs, will be administered using a particular set of procedural rules, and those rules say an arbitrator has the power to rule on the arbitrability of a claim, is that enough, on its own, to establish "clear and unmistakable evidence" of the contracting parties' intent to have an arbitrator decide the question of arbitrability?

PARTIES TO THE PROCEEDING

Petitioners are John Doe and Jane Doe, a married couple who were permitted to proceed anonymously below.

Respondent is Airbnb, Inc. Wayne Natt was a defendant in the trial proceedings below.

RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Florida Circuit Court, Florida District Court of Appeal, and Florida Supreme Court:

- *Doe v. Natt*, No. 2018-CA-2203 (Fla. Cir. Ct.), order issued Mar. 8, 2019, order denying reconsideration issued Apr. 5, 2019;
- *Doe v. Natt*, No. 2D19-1383 (Fla. Dist. Ct. App.), revised opinion issued July 10, 2020;
- *Airbnb, Inc. v. Doe*, No. SC20-1167 (Fla.), opinion entered Mar. 31, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App. 1-21) is reported at *Airbnb, Inc. v. Doe*, 336 So. 3d 698 (Fla. 2022). The opinion of the Second District Court of Appeal of Florida (App. 22-51) is reported at *Doe v. Natt*, 299 So. 3d 599 (Fla. Dist. Ct. App. 2020). The order of the Circuit Court of the Twelfth Judicial Circuit of Florida granting Respondent's motion to compel arbitration (App. 54-57) is unreported.

JURISDICTION

The Florida Supreme Court's judgment was entered on March 31, 2022. The Petitioners submitted a timely application for an extension of time, on June 16, 2022, which was granted by Justice Thomas, on June 21, 2022, up to and including July 29, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-14, which is reproduced at App. 58-67.

INTRODUCTION

Arbitration is, at bottom, a creature of contract. An arbitrator may resolve only those claims "that the

parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). At issue here is the "rather arcane" question of *who* should decide whether a claim is arbitrable. This Court has emphasized that a trial court, and not an arbitrator, should decide arbitrability unless "clear and unmistakable" evidence shows that the parties intended otherwise. *Id*. This is a heightened standard: To qualify as clear and unmistakable, contractual language must be express, explicit, and unequivocal.

So if a party drawing up a contract wants to delegate the who-decides question to an arbitrator, that party should be crystalline in their drafting. It is not a difficult task. A single sentence will do the trick. Something like this: "An arbitrator, and not a judge, will decide whether a dispute is subject to arbitration under the terms of this agreement."

That sentence is missing from Respondent Airbnb's Terms of Service. In fact, Airbnb's agreement says nothing—*nothing*—about who will decide whether a claim is arbitrable. All the agreement says is that the parties agree they will arbitrate certain claims, and that any arbitration proceedings will be "administered" by the American Arbitration Association ("AAA") in accordance with the AAA rules. Most arbitration agreements contain "administration" language just like this, which is meant to identify what arbitral rules will apply *if* an arbitration proceeding is initiated. And nearly all arbitral rules, including the AAA rules, contain some statement, somewhere, about how an

arbitrator "shall have the power" to decide the question of arbitrability. It is boilerplate.

Most federal circuit courts of appeals have held that boilerplate is enough—that referencing arbitral rules satisfies the clear-and-unmistakable standard. But these holdings cannot be squared with this Court's precedent. An agreement's bare reference to an entire set of arbitral rules does not clearly and unmistakably show the parties' intent to rely on one particular rule. That is especially so here, because Airbnb's agreement does not provide for the AAA rules to apply in all events. Instead, the agreement says that certain claims are arbitrable and must be submitted to arbitration, and that *arbitrable* claims will be governed by the AAA rules. Stated differently: the rules will come into play if—and only if—a claim is deemed arbitrable and submitted to arbitration. The rules provide no answer on how to decide whether a claim must be submitted to arbitration in the first place.

And even if the AAA rules did apply, they are hardly clear and unmistakable. The rules state that an arbitrator "shall have the power" to decide whether claims are arbitrable. As this Court has recognized in other contexts, the phrase "shall have the power" signifies a permissive but nonexclusive authority to act. A common-sense reading of the AAA rules, then, is that an arbitrator *may* decide arbitrability. But in the decision below, the Florida Supreme Court arrived at a different reading: that an arbitrator, and not a court, *must* decide arbitrability.

To arrive at this interpretation, the Florida Supreme Court leaned heavily on federal courts of appeals decisions that found similar contractual language to be clear and unmistakable. And to be sure, these federal decisions represent the prevailing view on the issue presented here. But this view, while widely held, has no real analytical foundation. Many decades ago, one federal circuit held, in conclusory fashion, that a reference to the AAA rules was clear and unmistakable evidence; a second court adopted that holding; and a third court adopted *that* holding. And so on. As a result, the law in the federal courts has developed, through little more than forward momentum, into its current state, in which a majority of courts have agreed on a conclusion that is both largely unreasoned and entirely wrong.

In state courts, by contrast, parties resisting arbitration have fared better. Three state courts of last resort, and other state appellate courts, have held that a mere reference to arbitral rules cannot satisfy the heightened clear-and-unmistakable standard, creating a state-federal judicial conflict that only this Court can resolve. And this Court's intervention is badly needed. The federal courts' consensus directs arbitrability questions to arbitrators even when the parties did not intend that result—an outcome that contradicts this Court's precedent and the Federal Arbitration Act's overarching purpose.

STATEMENT OF THE CASE

A. Background.

The Federal Arbitration Act ("FAA"), Pub. L. No. 68-401, 43 Stat. 883 (1925), allows contracting parties to agree to resolve their disputes through arbitration rather than in court. *See* 9 U.S.C. §§ 1-14. Under the FAA, an arbitrator may decide claims that the parties agreed to arbitrate. But the FAA does not give arbitrators authority to decide whether a party's claims should be sent to arbitration in the first place. Instead, a trial court should decide gateway arbitrability decisions. 9 U.S.C. §§ 3-4; *see Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("[T]he purpose behind [the FAA's] passage was to ensure judicial enforcement of privately made agreements to arbitrate.").

This Court's precedent echoes the FAA's statutory language. The default rule, this Court has explained, is that "the question of arbitrability . . . is undeniably an issue of judicial determination." *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649-50 (1986). This rule follows logically from the "foundational FAA principle" that an arbitrator lacks the authority to resolve a dispute without the parties' contractual say-so. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1411-12 (2019). By deciding arbitrability as a threshold matter, "the court avoids the risk of forcing the parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 77, 83-84 (2002).

That risk is especially high when it comes to the "rather arcane" question of who decides arbitrability. *First Options*, 514 U.S. at 945. "A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id*. For this reason, courts "must presume that parties have *not* authorized arbitrators to resolve" questions of arbitrability. *Varela*, 139 S. Ct. at 1417 (emphasis in original).

To be sure, parties may contract around that presumption. But they cannot be halfhearted about it. As this Court set forth in *First Options*, "[c]lear and unmistakable evidence" is required before a court may accept "that the parties agreed to arbitrate arbitrability." 514 U.S. at 943. The clear-and-unmistakable standard "reverses" the favorable treatment normally afforded arbitration so that "unwilling parties" are not forced "to arbitrate a matter they reasonably would have thought a judge . . . would decide." *Id*. at 945. To overcome that presumption, a party must satisfy a "heightened standard," which requires "clear and unmistakable evidence" that the contracting parties intended for an arbitrator to decide arbitrability. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

In *Rent-A-Center*, this Court encountered a delegation clause that met this heightened standard. There, the parties' agreement provided that an "[a]rbitrator and not any federal, state, or local court, shall have exclusive authority to resolve any dispute relating to the interpretation, *applicability*, enforceability or formation of this Agreement[.]" *Id*. at 66 (emphasis

added). That language was clear and unmistakable: it expressly stated that an arbitrator, and not a trial court, would decide whether the arbitration agreement applied to a dispute. *Id*. at 66 & 69 n.1.

An agreement that simply incorporates AAA rules by reference, by comparison, says nothing about who will decide whether a dispute is arbitrable. And what such an agreement does say—that an arbitration proceeding will be governed by the AAA rules—addresses only *how* an arbitration will proceed and not *whether* a dispute should be arbitrated. And in any event, the AAA rules do not give an arbitrator the exclusive authority to decide arbitrability or take away a trial court's power to make the same decision.

Even so, many federal courts of appeals have held that such language is enough to show a clear and unmistakable intent to delegate the question of arbitrability. In the decision below, the Florida Supreme Court aligned itself with that view. Other state appellate courts have disagreed. This Court has yet to address which view is correct.

B. The Does' claims.

In the summer of 2016, Mr. and Mrs. Doe, the Petitioners, came to Florida for a beach vacation. App. 3. They stayed in a condominium they rented through Airbnb, an online home-sharing business that allows owners to rent out their property on a short-term basis. *Id*. Before the Does arrived, the condo's owner installed hidden cameras throughout the premises. *Id*.

The owner secretly recorded the Does' entire stay, including their private, intimate moments in the bedroom. *Id*.

After they learned about the recordings, the Does sued the owner and Airbnb, bringing claims for constructive intrusion and loss of consortium. App. 3-4. The Does alleged that Airbnb knew about previous invasions of privacy on Airbnb-hosted properties, and that Airbnb had failed to warn the Does accordingly. *Id*. The Does also alleged that Airbnb had failed to take reasonable steps to prevent future invasions of privacy. App. 4.

Airbnb moved to compel arbitration under the FAA, relying on an arbitration provision in Airbnb's Terms of Service. App. 4, 24-25.

C. Airbnb's arbitration agreement.

The Does had agreed to Airbnb's Terms of Service through a "clickwrap agreement"—an online contract formed when a user is presented with a prompt to agree to a website's terms and conditions. App. 4, 24 n.2. Airbnb's clickwrap agreement consisted of a link to its Terms of Service and an "Agree" button that users needed to click if they wanted to keep using Airbnb's platform. App. 4, 24. Both Does, when prompted, clicked that they would "Agree" to the Terms of Service. *Id*.

The Terms of Service was a 22-page-long agreement. A. 19. Within the agreement, however, were

references to many other collateral documents. App. 14, 19. The agreement directed the Does to read Airbnb's Payment Terms of Service, its Guest Refund Policy, its Content Policy, its Community Policy, its Copyright Policy, its Host Guarantee, its Privacy Policy, and its Referral Program Terms and Conditions, as well as the terms of service for Google Maps and the Apple App Store. App. 19.

At the end of the agreement was a multi-paragraph arbitration provision, which stated that "any dispute, claim, or controversy arising out of or relating to these Terms . . . will be settled by binding arbitration[.]" App. 5-6, 25. The arbitration provision did not say who would decide—an arbitrator or a judge—whether a dispute was "related" to the agreement's "Terms." App. 5-6. The agreement did make clear, however, that arbitrable disputes would be handled by the AAA, not some other arbitral body:

> The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this "Dispute Resolution" section. (The AAA Rules are available at www.adrorg/arh_med or by calling the AAA at 1-800-778-7879.)

App. 6.

The AAA rules are a comprehensive set of procedures. There are 58 separate rules, which span 46

pages and cover all aspects of the arbitration process. *See* AAA, *Commercial Arbitration Rules and Mediation Procedures* (effective Oct. 1, 2013), https://perma.cc/2UKW-WQVT. Rule 7 is titled "Jurisdiction," and its subsection (a) states that an "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 the arbitrability of any claim or counterclaim." *Id.* at 13; App. 6. This is the sentence that, according to Airbnb, reflects clear and unmistakable evidence of the Does' intent to delegate arbitrability.

D. The proceedings below.

Airbnb moved to compel arbitration. App. 4. Airbnb first argued that an arbitrator, and not the trial court, should decide whether the Does' claims were arbitrable, because, it argued, the arbitration agreement contained an enforceable delegation clause. App. 4, 25-26. Airbnb next argued that even if arbitrability could be judicially decided, the trial court should find the Does' claims arbitrable because those claims relate to the agreement. App. 25-26.

The trial court disagreed on the second argument. App. 26, 55. In the trial court's opinion, the Does' claims do not relate to the agreement and are thus not arbitrable. *Id*. But the trial court found that its thoughts on the matter were immaterial, because the agreement's reference to the AAA rules was clear and unmistakable evidence that the Does intended to have

an arbitrator decide whether their claims were arbitrable. App. 26-27, 55-57.

On appeal, Florida's Second District Court of Appeal reversed, holding that Airbnb had not satisfied the clear-and-unmistakable standard, for a few reasons. App. 23-45. For starters, "conspicuously missing" from the agreement was any mention of "who should decide arbitrability." App. 36. And while the agreement directed that arbitration "will be administered" under the AAA rules, that "directive is necessarily conditional on there being an arbitration" already underway. App. 37. Also, even if the agreement's reference to the AAA rules "sufficiently showed an intent that those rules (whatever they may say) *could* supplant the trial court's presumed authority to decide arbitrability," the rules only give an arbitrator "the power" to decide arbitrability without "remov[ing] that adjudicative power from a court[.]" App. 38. In short, Florida's Second District found that the agreement had failed to satisfy the clear-and-unmistakable standard at every turn:

> In the case at bar we have 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. That is not "clear and unmistakable evidence" that these parties agreed to delegate the "who decides" question of arbitrability from the court to an arbitrator.

App. 43.

Florida's Second District acknowledged that its holding was an "outlier," but noted that no other court had "ever examined how or why the mere 'incorporation' of an arbitration rule" could satisfy the heightened clear-and-unmistakable standard. App. 40, 42. The Second District's decision persuaded another Florida district court of appeal to follow suit in holding that a "general reference to the 'AAA rules'" could not satisfy the clear-and-unmistakable standard. *Fallang Family Ltd. P'ship v. Privcap Companies, LLC*, 316 So. 3d 344, 351 (Fla. Dist. Ct. App. 2021).

But the Florida Supreme Court was unpersuaded; it reversed the Second District's decision and held that Airbnb's agreement clearly and unmistakably delegated arbitrability to an arbitrator. App. 1-17. To arrive at that holding, the court deferred to federal appellate decisions that had addressed similar contractual language. App. 11-15. The Florida Supreme Court's substantive analysis, however, was cursory. As far as the court was concerned, the case turned on the agreement's "incorporation" of the AAA rules, which the court took as a signal that the Does had agreed to be bound by all of those rules, including rule 7(a). App. 13-14.

The court was unconvinced by the argument that the AAA rules only applied after a claim was found to be arbitrable. In the court's view, this reading would render rule 7(a) "superfluous," because the court thought (wrongly) that arbitrability decisions must always be made before arbitration is commenced. App. 16. The court also disagreed that the phrase "shall

have the power" could give an arbitrator the nonexclusive authority to decide arbitrability, because "the power to decide *is* the power to decide." *Id*. (emphasis in original). The court did not elaborate on this point. *Id*. Nor did the court address the many cases in which the phrase "shall have the power" has been interpreted as providing a nonexclusive power. *Id*.

One of the Florida Supreme Court's Justices issued a dissenting opinion. App. 18-21. The dissent highlighted how, as a practical matter, it was unreasonable to expect unsophisticated parties like the Does to navigate Airbnb's Terms and Conditions, *and* the "more than 100 pages of policies, rules, and conditions incorporated by reference" into the agreement, *and* all of the AAA rules. App. 19. "Unsuspecting consumers," reasoned the dissent, "should not be expected to find the proverbial needle in the haystack in order to make a clear and unmistakable decision about arbitrability." *Id*. And because "consumers' access to the courts should be carefully guarded," the dissent concluded that "the arbitration provision should have been conspicuously included in the text of the clickwrap agreement itself." App. 21.

REASONS FOR GRANTING THIS PETITION

A trial court must decide whether a claim is arbitrable unless the parties clearly and unmistakably delegated that decision to an arbitrator. This is a heightened standard requiring evidence that is

express, explicit, and unequivocal. The question presented here is whether that standard can be satisfied by a general reference to arbitral rules.

Most federal circuits, and now the Florida Supreme Court, have answered this question in the affirmative. A number of state appellate courts, in contrast, have taken the opposite view. This Court has yet to weigh in. The opportunity to do so was presented in two recent (and related) cases. This Court decided the first case on a basis not at issue here, while "express[ing] 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 I*), 139 S. Ct. 524, 531 (2019). In the second case, this Court granted review of a different issue before ultimately dismissing the petition as improvidently granted—apparently at least in part because members of this Court were uncomfortable assuming, for the purposes of deciding the case, that the incorporation of AAA rules constituted a delegation clause.[1] *Henry Schein, Inc. v. Archer & White Sales, Inc.* (*Henry Schein II*), 141 S. Ct. 113 (2020).

Indeed, the issue of delegation-by-incorporation was the subject of extensive questioning during oral argument in *Schein II*. *E.g.*, Tr. of Oral Arg. at 9, *Henry Schein II*, No. 19-963 (Justice Thomas asking petitioner to identify purported delegation clause); *id.* at

[1] This Court also denied a cross-petition that *did* raise the issue presented here. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021).

16-17, 47-48 (Justice Alito addressing case's "artificial posture" which asked the Court to assume the contract at issue "provides for the arbitration of the who decides question across the board"); *id*. at 32-33 (Justice Barrett asking, "Is it enough just to incorporate and invoke the AAA rules?"). The issue was also discussed during oral argument in *Schein I*. *See* Tr. of Oral Arg. at 7-11, *Henry Schein I*, No. 17-1272 (Justice Ginsburg asking about interpretation that "the arbitrator has this authority to decide questions of arbitrability, but it is not exclusive of the court?"); *id*. at 43 (Justice Gorsuch asking, "Isn't your real complaint . . . that there's just maybe a really good argument that clear and unmistakable proof doesn't exist in this case of—of a desire to go to arbitration and have the arbitrator decide arbitrability?").

Unlike in *Henry Schein I* and *II*, the question here is presented cleanly, providing an excellent vehicle for this Court to address the split of authority that has developed. This Court should grant review. Not just to settle the federal-state conflict—although that would be reason enough—but also to correct the Florida Supreme Court's misapplication of this Court's precedent on the clear-and-unmistakable standard. The agreement here contains no statement, let alone a clear and unmistakable one, that addresses who will decide whether a dispute is arbitrable. And although the agreement references the AAA rules, the rules themselves do not divest the trial court of its presumed authority to decide whether claims are arbitrable. At best, the agreement and the AAA rules are

ambiguous—which confirms that a trial court, and not an arbitrator, should decide arbitrability.

The question presented here is no small matter. Most Americans—that is, regular people unfamiliar with arbitration—will enter into standard-form arbitration agreements using similar "incorporation" language. From their perspective, this incorporation language would not be clear and unmistakable. And yet unsophisticated parties are regularly required to arbitrate arbitrability, even though that was not their intention.

Take the Does as an example. After reading Airbnb's agreement, they could not possibly have known that an arbitrator, and not a trial court, would decide whether their invasion-of-privacy claims should be sent to arbitration. But the Does were forced into arbitration anyway. That result, while supported by a large body of case law, simply cannot be right. Arbitration is supposed to be a "matter of consent, not coercion." *Volt Info. Scis. Inc. v. Stanford Univ.*, 489 U.S. 468, 479 (1989). And there was no consent here.

I. The prevailing rule in the federal courts of appeals, as adopted by the Florida Supreme Court, has no analytical grounding and conflicts with decisions of state appellate courts.

Airbnb's clickwrap agreement references the AAA rules. Most federal courts of appeals have held that a bare reference such as this can serve as clear and

unmistakable evidence of the parties' intent to delegate the question of arbitrability to an arbitrator. *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 845, 844-46 (6th Cir. 2020); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1282-84 (10th Cir. 2017); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015); *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

These decisions, however, are "thinly reasoned," with virtually nothing to say about *how* the contractual language at issue satisfies the clear-and-unmistakable standard. *See* David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 Minn. L. Rev. 619, 664 (2020). Instead, the circuits have relied, almost exclusively, on the fact that earlier federal appellate decisions had reached the same conclusion. One would hope that this line of cases, if traced far enough, would yield an early decision explaining its underlying reasoning. But that decision never reveals itself. Each case is as unsupported as the last. It "is turtles all the way down." *See Rapanos v. United States*, 547 U.S. 715, 754 & n.14 (2006).

Start with the Sixth Circuit's decision in *Blanton*, which did provide some rare analysis, discussing the law of incorporation-by-reference and whether an arbitrator would need a grant of exclusive authority to make arbitrability decisions. 962 F.3d at 848-50. In the end, though, *Blanton* deferred to the "solid wall of [] authority" from its sister circuits, *id*. at 851, and to preexisting (and possibly binding) precedent from the Sixth Circuit itself, *id*. at 845-46.

The decisions before *Blanton* had even less to offer. When the Ninth Circuit addressed the who-decides question, it simply announced—without further explanation—that it would follow the "prevailing view" that "incorporation of the [AAA] rules constitutes clear and unmistakable evidence." *Oracle*, 724 F.3d at 1074-75; *see also Simply Wireless*, 877 F.3d at 527-28 (following *Oracle* and other circuits); *Belnap*, 844 F.3d at 1283-84 (same); *Chevron Corp.*, 795 F.3d at 207-08 (same). The Fifth and Eighth Circuits took the same shortcut, *see Petrofac*, 687 F.3d at 675; *Fallo*, 559 F.3d at 878, adopting the holdings of the Federal and Eleventh Circuits. The Federal and Eleventh Circuits, *see Qualcomm*, 466 F.3d at 1373; *Terminix*, 432 F.3d at 1332, in turn looked to the Second Circuit's holding in *Contec*, 398 F.3d at 208. And the Second Circuit, for its part, relied on the First Circuit's holding in *Apollo Computer v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989).

But *Apollo* is a poor foundation for a "wall" of authority. For one thing, *Apollo* is outdated: It came before this Court's decision in *First Options*, 514 U.S. 938, which established the clear-and-unmistakable standard.

For another, *Apollo* is itself conclusory: it held that the parties' agreement referenced arbitral rules, and that the rules established the parties' intent to "allow the arbitrator to determine her own jurisdiction." 886 F.2d at 473. That was it. "In place of evidence of intent the court offered an *ipse dixit*." Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not "Clear and Unmistakable*," 17 Am. Rev. Int'l Arb. 545, 548 (2006). (*Apollo*'s lack of analysis on this issue can be explained, it would seem, by the plaintiff's failure to even brief the issue. 886 F.2d at 476.)

It is little wonder that many state appellate courts have declined to follow *Apollo* and its progeny. The Montana Supreme Court, for example, rejected the so-called "general rule" that a "mere reference to administering an arbitration pursuant to AAA rules" is clear and unmistakable evidence. *Glob. Client Sols., LLC v. Ossello*, 382 Mont. 345, 369 (2016). An agreement's reference to arbitral rules, the court found, "suggests implementation of procedural and logistical rules; it declares nothing concerning delegation." *Id*.

The high courts in New Jersey and South Dakota have reached similar holdings. *See Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016) (finding no delegation in contract that referenced arbitral rules)*; Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 434-37 (S.D. 2005) (same). So too have intermediate appellate courts in California and Texas—states in which the high courts have yet to address this issue. *See Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 790 (Cal. 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).

All these states—Montana, New Jersey, South Dakota, California, and Texas—are located in federal circuits in which the federal courts have issued contrary holdings. In those states, therefore, whether a trial court or an arbitrator decides arbitrability will depend on whether a case is filed in state or federal court—making it impossible, as a practical matter, for contracting parties to predict how their agreements will be interpreted. This Court should grant review to right this disarray.

II. The decision below follows a line of cases that conflict with this Court's decision in *First Options* by inferring an intent to delegate in the absence of clear and unmistakable evidence.

In the decision below, the Florida Supreme Court did not examine what it means for evidence to be "clear and unmistakable." So let us start there.

This Court has explained what clear-and-unmistakable evidence is *not*: an arbitration agreement's "silence or ambiguity" on the subject of arbitrability cannot satisfy the heightened clear and unmistakable standard. *Varela*, 139 S. Ct. at 1417 (emphasis in original). And in other contexts, this Court has discussed what clear and unmistakable evidence looks like: it is

statutory or contractual language that is "explicit" or "express" in what it is trying to convey. *See*, *e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (plurality) (requiring an "express delegation"); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (requiring an "explicit" direction); *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273-77 (1908) (requiring "express" language).[2]

Airbnb's clickwrap agreement was neither express nor explicit on the question of arbitrability, for three main reasons. ***First***, the clickwrap agreement merely references the AAA rules as a general body of arbitral procedures without mentioning the specific rule that supposedly controls. ***Second***, the agreement, even if it incorporated the AAA rules, does so under limited circumstances—namely, when arbitration is already underway. And ***third***, the AAA rules use only permissive language: They grant an arbitrator the power to decide arbitrability without displacing the trial court's presumptive authority to make the same decision.

---

[2] Florida law is much the same; for a contract to be "clear and unmistakable," it must be "express," *City of Miami v. Fraternal Order of Police, Miami Lodge 20*, 511 So. 2d 549, 551 (Fla. 1987), or "explicit[ ] and specific[ ]," *Selim v. Pan Am. Airways Corp.*, 889 So. 2d 149, 156 (Fla. Dist. Ct. App. 2004).

A. The agreement's general reference to the AAA rules is not clear and unmistakable evidence of intent.

To delegate arbitrability, an agreement must include "clear and unmistakable" language. One would expect, therefore, that Airbnb's relied-on delegation language could be located *somewhere* in Airbnb's clickwrap agreement. But this language is nowhere to be found. Even if the Does had read every word of the 22-page agreement, they still would not have an answer on the question of who decides arbitrability. There is nothing explicit and express about that. A contract's silence—or ambiguity—on the question of who decides arbitrability is not enough to delegate that threshold question to an arbitrator. *First Options*, 514 U.S. at 945.

For good reason. A foundational principle of arbitration is that parties cannot be forced to submit a dispute to arbitration unless they have agreed to do so. *Id*. at 943. Parties are unlikely, however, to think about the "rather arcane" question of who decides arbitrability. *Id*. at 945. That is why this Court created, through the clear-and-unmistakable standard, a "reverse" presumption in favor of a trial court deciding arbitration—so that "unwilling parties" would not be forced "to arbitrate a matter they reasonably would have thought a judge . . . would decide." *Id*. at 945.

All this to say: Parties looking to delegate the often-overlooked question of arbitrability need to be obvious about it. The "law is solicitous of the parties

actually *focusing* on the issue." *Gilbert Street*, 174 Cal. App. 4th at 1191-92 (emphasis in original). It follows, then, that a party drafting contractual language should put delegation language front and center, where it cannot be missed. To do that, the language must be in the agreement itself, not buried in a separate document among an entire set of arbitral rules.

Adding clear and unmistakable language to the agreement would not take much. A single sentence would do the trick. For example: "The arbitrator(s) shall have the exclusive authority to determine the arbitrability of any dispute[.]" *Reyna v. Int'l Bank of Commerce*, 839 F.3d 373, 378 (5th Cir. 2016). If this seems like an easy fix, that's because it is. Other corporations—such as Postmates,[3] Ford,[4] Amazon,[5] Papa John's[6], Amway,[7] and Uber,[8] to name a few—have managed to draft express contractual language that gives an arbitrator "exclusive authority" to decide arbitrability. Airbnb can do it, too. And Airbnb should want to do so: "It is perplexing that a party who has thought about

---

[3] *Immediato v. Postmates, Inc.*, 2021 WL 828381, at *1 (D. Mass. Mar. 4, 2021).

[4] *Woellecke v. Ford Motor Co.*, 2020 WL 6557981, at *2 (E.D. Mich. Nov. 9, 2020).

[5] *Dewey v. Amazon.com, Inc.*, 2019 WL 3384769, at *1 (Del. Super. Ct. July 25, 2019).

[6] *Frazier v. Papa John's USA*, 2019 WL 4451155, at *1 (E.D. Mo. Sept. 17, 2019).

[7] *Long v. Amway Corp.*, 306 F. Supp. 3d 601, 604 (S.D.N.Y. 2018).

[8] *West v. Uber Techs.*, 2018 WL 5848903, at *3 n.1 (C.D. Cal. Sept. 5, 2018).

this issue would not spell it out in such a way that would put all doubts to rest." Joseph L. Franco, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 443, 479-80 (2006).

Airbnb instead chose to put its (supposed) delegation language within a subsection of AAA rule 7 that addresses an arbitrator's jurisdiction. But Airbnb's agreement does not direct the reader to consider that rule—or any other. So, to unearth rule 7(a), a consumer would have to click a hyperlink embedded in the agreement, read all 46 pages of the AAA's commercial rules, and then comprehend the significance of rule 7(a) stating that an arbitrator has the jurisdiction to decide questions of arbitrability. This is several interpretive steps (leaps, really) beyond what could be considered "clear and unmistakable." Indeed, if the goal here was to make it as hard as possible to find rule 7(a), Airbnb could have hardly done a better job.

In sum, if Airbnb's agreement is "clear and unmistakable," then those words no longer have any real meaning. And if the "*First Options* presumption can be overcome so easily"—through a non-specific cross-reference to a set of arbitration-specific procedural rules—then "it is far from the strong presumption that [this Court] portrayed it as being and almost certainly intended it to be." George A. Bermann, *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367, 377 (2012).

What's more, nearly all arbitration agreements will refer to a set of arbitral rules, and most arbitral

rules contain a jurisdictional provision much like rule 7(a); it is standardized, boilerplate language. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (2019); Consumer Financial Protection Bureau ("CFPB"), *Arbitration Study: Report to Congress* (2015) § 2, at 42. That will not get the job done here. A "general contractual provision" cannot serve as "clear and unmistakable" evidence of the parties' intentions. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79-81 (1998).

At a minimum, an agreement's general reference to the AAA rules cannot serve as clear and unmistakable evidence that the parties intended to bind themselves to a *particular* rule, which was but "a single provision of a comprehensive set of rules of arbitral procedure." George A. Bermann, *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367, 377 (2012).

B. The agreement provides that the AAA rules apply only to arbitration proceedings already underway.

The Florida Supreme Court found that Airbnb's clickwrap agreement "incorporated" the AAA rules. The agreement accomplished the incorporation, according to the court, with this sentence: "The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes." App. 6. But this statement does not at all answer who will be deciding

arbitrability. As Florida's Second District Court of Appeal observed below:

> [I]f the question were put, 'Who should decide if this dispute is even subject to arbitration under this contract?' to respond, 'The arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes,' is not a very helpful answer and not at all clear.

App. 37.

At most, the agreement provides that the AAA rules *might* apply to the parties' dispute. But only sometimes. The agreement states that any dispute "relating to these Terms" will be submitted to arbitration. App. 5. And then, the agreement states that arbitration proceedings will be administered in accordance with the AAA rules. *Id*. Thus, the agreement lays out a two-step process. Step one: decide whether a parties' dispute "relates to" the agreement and is therefore arbitrable. Step two: if the claim is arbitrable, send the claim to an AAA arbitrator.

Step two implicates the AAA rules. But that step is never reached unless it has already been decided, under step one, that a claim is arbitrable. Put another way, "the arbitration" has to exist before the rules for administering it apply; and the agreement provides for an arbitration only if there is a dispute that is arbitrable. If that question is disputed in court before there is

an arbitration, the agreement says nothing about who will resolve it.

The most reasonable interpretation of the agreement, therefore, is that a party's claim, *if arbitrable*, will be governed by the AAA rules. But if a claim is not subject to arbitration, then the AAA rules do not apply to the parties' dispute. *Cf. Foster Wheeler Energy Corp. v. An Ning Jiang MV*, 383 F.3d 349, 359 (5th Cir. 2004) (finding contract incorporated U.S. law but only when international rules did not apply).

This interpretation matches up with general principles of contract construction. Incorporation by reference, while "often framed in terms which suggest the complete absorption of one document into another," is not an all-or-nothing proposition. 11 Williston on Contracts § 30:25 (4th ed. May 2021 update). Incorporation may be done conditionally, and an agreement's reference "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). "[F]or all other purposes," the extraneous writing "should be treated as irrelevant." *Town of Cheswold v. Cent. Delaware Bus. Park*, 188 A.3d 810, 819 (Del. 2018) (citations omitted). Here, the AAA rules are incorporated for one purpose: to govern "the arbitration." For all other purposes, including deciding whether to direct the parties to commence an arbitration, the AAA rules are irrelevant.

In the decision below, the Florida Supreme Court found this interpretation unpersuasive, reasoning that

an arbitrability decision must be made "before the commencement of arbitration. . . . Otherwise the AAA rule delegating arbitrability determinations to an arbitrator would be superfluous." App. 16; *see also Blanton*, 962 F.3d at 847 (reaching a similar conclusion on superfluousness). There are a few problems here.

For starters, the Florida Supreme Court was simply mistaken: the Does' reading of rule 7(a) would not render the rule superfluous. At the most, rule 7(a) would be limited to certain situations, like the following: Two parties have a contractual dispute, and they agree that the bulk of that dispute belongs in arbitration. One of the parties initiates an arbitration in which the other willingly participates. But they disagree over whether a small piece of the dispute is arbitrable, or whether a single aspect of the arbitration agreement is unconscionable or unenforceable. Rule 7(a) allows the parties the option of having an arbitrator decide that disagreement without the parties needing to file a separate court proceeding. Read this way, rule 7(a) is not superfluous. To the contrary, it neatly serves the principal goal of arbitration. It allows for an arbitrator to efficiently resolve the parties' disputes, but only when the parties have *agreed* that those disputes should be arbitrated.

But even if the Florida Supreme Court were right about rule 7(a) being made superfluous, it would not matter. The clear-and-unmistakable standard is not concerned with ensuring that each of the AAA's rules is given full effect. Instead, its aim is ensuring that an arbitrator does not decide arbitrability unless clear

and unmistakable evidence shows that this was the parties' intent. Here, the agreement states that the AAA rules—including rule 7(a)—apply during arbitration but not before then. If the arbitrator's jurisdictional powers are lessened as a result, then so be it. The agreement's plain meaning should control.

The Florida Supreme Court elevated harmonizing the rules and the agreement over what the agreement says. In doing so, the court stretched the clear-and-unmistakable standard beyond its breaking point. The standard's animating purpose is protecting contracting parties who are unlikely to understand the nuances of arbitration or the significance of an arbitrator deciding arbitrability in the place of a court. The Florida Supreme Court, however, expects Airbnb's customers to grasp not just the concept of an arbitrator deciding arbitrability, but also to appreciate the interplay between an arbitration agreement and arbitral rules.

At this point, though, we have ranged far beyond what would be "clear and unmistakable" to any normal person. If someone reading the clickwrap agreement must wrestle with whether particular cross-referenced arbitral rules would be rendered superfluous, then the agreement is not explicit and express.

C. The AAA rules are not clear and unmistakable, either.

Finally, even if an agreement's reference to the AAA rules fully incorporated AAA rule 7(a) into the

agreement, the rule itself still fails to delegate arbitrability to the arbitrator clearly and unmistakably. Rule 7(a) states, "The arbitrator shall have the power to rule on his or her own jurisdiction, including . . . the arbitrability of any claim or counterclaim." App. 6. Missing from rule 7(a) is mandatory language. The rule does not state that an arbitrator *must* or *will* decide arbitrability—only that an arbitrator has the power to make that decision. Of course, the law presumes that "a court *also* has power to decide such issues." *Ajamian*, 137 Cal. Rptr. 3d at 789 (emphasis in original). And neither the rule nor the clickwrap agreement states that an "arbitrator, as opposed to the court, *shall* determine those threshold issues, or has *exclusive* authority to do so." *Id*. (emphasis in original). That is why the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has endorsed the view that a reference to the AAA rules is not clear or unmistakable: because "nothing in the language of [the] rules indicates that the authority of the arbitrators to determine their competence is exclusive of the courts' authority to do so." Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (2019).

In short, the rule permits an arbitrator to decide questions of arbitrability. That is it. To interpret the rule as *requiring* an arbitrator to make that decision is to read words into the rule (and the parties' agreement) that do not exist. This Court should decline to do so, and should instead enforce the agreement's plain meaning. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The

words of a governing text are of paramount concern, and what they convey, in their legal context, is what the text means.").

The language used here—"shall have the power"—is not unique to the arbitration context; many statutes and contracts use this wording in granting authority. And courts, including this Court, have consistently interpreted this phrase as granting a permissive but nonmandatory authority to act. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (concluding that the phrase "Congress shall have the power" is permissive); *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 555 (9th Cir. 1988) ("Congress easily could have mandated a hearing, but instead stated that the Secretary 'shall have the power' to conduct such investigations."); *Curry v. C.I.R.*, 158 F.2d 344, 346 (7th Cir. 1946) (holding trust documents gave nonmandatory direction by stating that trustee "shall have the power" to perform specific duties).

Another analogue can be found in statutory schemes providing that federal courts "shall have" jurisdiction over specific disputes. For instance, "the enforcement provisions of Title VII provide that" federal district courts "shall have jurisdiction of actions brought under this subchapter." *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 823 (1990) (discussing 42 U.S.C. § 2000e-5(f)(3) (1982 ed.)). This Court held that this statutory provision allows for federal jurisdiction over Title VII claims but "contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction."

Id.; *see Litgo N.J. Inc. v. Comm'r N.J. Dep't of Envtl. Protection*, 725 F.3d 369, 396 (3d Cir. 2013) (finding phrase "shall have jurisdiction" is "merely a grant of authority" and not "inconsistent with concurrent jurisdiction").

The same reasoning applies with en force here. Rule 7(a) grants arbitrators the authority to determine their own jurisdiction. But that grant is not exclusive, and it does not oust trial courts of their presumptive authority to decide arbitrability.

At the very least, a reasonable interpretation of the rule, and thus the agreement, is that it confers nonexclusive, concurrent authority. That is enough to carry the day for the Does. If the Florida Supreme Court's interpretation were *also* colorable, it would make the agreement ambiguous. And ambiguous language cannot satisfy the clear-and-unmistakable standard. *Varela*, 139 S. Ct. at 1417.

III. Unsophisticated parties cannot clearly and unmistakably agree to delegate arbitrability based on nothing more than an agreement's reference to procedural rules.

This Court created the clear-and-unmistakable standard to protect contracting parties unlikely to appreciate—or to even think about—the question of who would decide whether a dispute was arbitrable. The Does fit this description. They were everyday consumers, looking to book a vacation rental.

The Florida Supreme Court, like other courts before it, did not seem to think that any sophistication was necessary to understand Airbnb's agreement. After all, the agreement incorporated the AAA rules, and so the Does should have realized that they were delegating arbitrability to an arbitrator under rule 7(a). But it is not as simple as that. As discussed above, the Florida Supreme Court's interpretation is one that has eluded lawyers specializing in international arbitration. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (2019). If lawyers at this level of expertise cannot puzzle rule 7(a) out, then what chance did the Does have?

No chance at all. The Does would not have understood, from reading Airbnb's agreement, that they were giving up a right to have a trial court decide arbitrability. The Does are not unique in this respect. Many Americans with the same level of sophistication—employees, consumers, and small business owners—will enter into an arbitration agreement with similar standardized language. Currently, in most federal jurisdictions, and in Florida, those Americans will have unwittingly forfeited their right to have a court decide whether a dispute should be sent to arbitration.

To pretend that the reality is otherwise—to assume, as the Florida Supreme Court did, that an everyday person presented with this language would understand that they are "clearly and unmistakably" agreeing to delegate arbitrability—is to defy logic and common-sense. No consumer, unsophisticated or otherwise, could navigate the interpretive maze that Airbnb

set out for them. Take Mrs. Doe as an example. When she clicked to "Agree" to Airbnb's terms, she was on her smartphone. For her to reach rule 7(a)—the rule that is held out here as "clear and unmistakable"—she would need take a series of increasingly unlikely interpretive steps.

First, she would need to click on Airbnb's hyperlinked Terms of Service, which were underlined in small text on the bottom of Airbnb's sign-in page.

Second, she would need to read the 22-page Terms of Service on her smartphone and note the section discussing arbitration and the AAA rules.

Third, she would need to appreciate that the AAA rules did not just address *how* an arbitration would proceed, but also *whether* a dispute would be arbitrated in the first place.

Fourth, she would need to track down the AAA rules. The agreement said those rules were "available at www.adrorg/arh_med or by calling the AAA at 1-800-778-7879." The odds of someone choosing to call the AAA by phone seem vanishingly small. For that option to work, Mrs. Doe would need to dial the number provided in the agreement—using a second phone, presumably—to see if someone at the AAA could send her a set of the rules or (even less likely) if they could explain the substance of the rules to her over the phone. So that leaves the website, which Mrs. Doe could visit by clicking on a hyperlink, leaving the sign-in page so she could visit an online version of the AAA rules.

That brings us to the ***fifth*** step: Mrs. Doe, still on her smartphone, would need to read 58 individual AAA rules with an eye for a rule that might affect her rights under her agreement with Airbnb.

Sixth, Mrs. Doe would need to find rule 7(a) and understand that the rule—which was titled "Jurisdiction"—allowed an arbitrator to decide whether her claims were arbitrable, even if an arbitration proceeding had not yet been filed.

Finally, ***seventh***, having located rule 7(a), Mrs. Doe would need to glean that the rule—despite stating that an arbitrator "shall have the power" to decide whether disputes are arbitrable—was in fact divesting a trial judge of the power to make that same decision.

No ordinary consumer could manage all of that. Nor should they have to. Airbnb could easily put clear delegation language in its agreement. Had Airbnb done so, Mrs. Doe could have spotted the delegation language while scanning the other boilerplate provisions in Airbnb's Terms of Service. It might have been difficult for her. But it would have been possible. Not so here. Incorporating 46 pages of arbitral rules into the 22-page Terms of Service "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." *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 428-29 (E.D. Pa. 2016).

Even worse, the boilerplate language here is ubiquitous. Most standard-form arbitration agreements will reference arbitral rules. *See* CFPB, *Arbitration Study: Report to Congress* (2015) § 2, at 42, https://perma.cc/K92R-REZN. Thus, to treat a reference to arbitral rules as a delegation clause is to read delegation language into nearly every standard arbitration agreement in the country.

That is a *lot* of agreements. More than 60 million American workers have entered into employer-written arbitration agreements. *See* Alexander J.S. Colvin, Economic Policy Institute, *The Growing Use of Mandatory Arbitration* (2018). Over 80 million consumers are bound by arbitration provisions written by their credit-card company, and "tens of millions of households are subject to arbitration on one or more checking accounts." CFPB, *Arbitration Study: Report to Congress* (2015) § 4, at 63-64. All of this adds up to a staggering number of arbitration agreements. "In 2018, at least 826,537,000 consumer arbitration agreements were in force, based on estimates from just a few companies for which information was readily available. . . . For a point of comparison, the U.S. population is about 328,000,000." Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019).

In sum, forced arbitration is now a matter of daily life. And if the prevailing view adopted by the Florida Supreme Court continues to gain traction, then most Americans will find themselves, at one point or another, bound by a nonexistent delegation clause. As a

practical effect, delegation will no longer require a heightened showing; instead, delegation will be the default presumption in most instances—in direct contradiction to the "reverse presumption" created by this Court—with no regard for the parties' actual intent. Neither this Court's precedent nor the FAA allows for such a result.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

DAMIAN MALLARD
ALAN L. PEREZ
MALLARD PEREZ, PLLC
889 N. Washington Blvd.
Sarasota, FL 34236
Tel: (941) 952-1682

THOMAS J. SEIDER
Counsel of Record
BRANNOCK HUMPHRIES
& BERMAN
1111 W. Cass St., Suite 200
Tampa, FL 33606
Tel: (813) 223-4300
tseider@bhappeals.com

Counsel for Petitioners

July 29, 2022