No. 22-102

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT IN REPLY

A trial court must decide arbitrability unless the parties "clearly and unmistakably" intended to delegate that decision to an arbitrator. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). This is a heightened standard; clear and unmistakable evidence is express and explicit. As Airbnb's Opposition demonstrates, there is nothing express or explicit about the agreement here. If deciphering a delegation clause requires a party to read hundreds of pages of collateral documents, Opp. 16-17, and to grapple with the existential question of when an arbitration proceeding truly "begins," Opp. 17-18, and to understand that an arbitral rule's nonexclusive grant of power to an arbitrator "implies" the exclusive grant of power, Opp. 18-19, then the delegation clause has fallen rather short of "clear and unmistakable."

Fortunately for Airbnb, this is a problem with an easy solution: Airbnb can simply draft an agreement that expressly gives an arbitrator the exclusive right to decide questions of arbitrability. This is not to say, as Airbnb suggests (at 18), that the word "exclusive" must be used. The concept of exclusivity can be articulated in other ways. For a good example of a clean articulation, Airbnb should look to . . . Airbnb; the 2022 version of its Terms and Conditions is quite clear. "If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue." Opp. 18-19.

See, that was not so hard. Now, Airbnb's agreement includes clear and unmistakable language, which can be found in the agreement itself rather than hidden away in "incorporated" procedural rules. The Does did not have the benefit, however, of this new and improved clickwrap agreement.[1] They entered an agreement that flunked this Court's clear-and-unmistakable test at every turn. The Florida Supreme Court still held that the Does intended to delegate the question of arbitrability to an arbitrator. That holding—which tracks the prevailing view among federal circuit courts—contradicts this Court's precedent and is in urgent need of correction.

I. That the federal courts of appeals have unanimously failed to follow this Court's precedent militates in favor of this Court's intervention, not against it.

The parties agree on a few things. For starters, we agree that 12 federal circuit courts of appeals have

[1] Airbnb claims that this new amendment applies to the Does, mooting their petition. Opp. 21-22. Airbnb offers no factual support for its contention that the Does have somehow opted into this new amendment. Nor has Airbnb offered any legal support for the notion that an amendment can retroactively apply to a party after a lawsuit has been filed, and after a motion to compel arbitration has already been adjudicated. And Airbnb is simply mistaken that the amended Terms and Conditions could make a difference. If this Court grants certiorari and reverses, the Does will be permitted to litigate their case in Florida, because the trial court already found the Does' claims were not arbitrable. *See* App. 26, 55. For this reason, on remand, Airbnb will be in no position to further advocate for compelling arbitration.

held that an agreement's bare reference to a set of arbitral rules counts as clear and unmistakable evidence of delegation. We also agree that this majority view can be traced back to *Apollo Computer v. Berg*, 886 F.2d 469 (1st Cir. 1989), a decades-old decision that devoted a single sentence to the matter of delegation. And we agree that other circuit courts adopted *Apollo*'s holding with little elaboration, and that the Sixth Circuit's decision in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 845, 844-46 (6th Cir. 2020), marked the first time a circuit court offered a robust defense of the view that boilerplate language incorporating arbitral rules could satisfy the clear-and-unmistakable standard.

The parties' agreement ends here. While Airbnb concedes that the pre-*Blanton* decisions' "analyses are brief," Airbnb contends that this brevity is a feature, not a bug, and is attributable to the "analytical simplicity" of the issue at hand. Opp. 14. Airbnb immediately undermines that contention, however, by pointing out that the Sixth Circuit, in *Blanton*, needed "nine pages of the Federal Reporter" to explain how referencing arbitral rules could satisfy the clear-and-unmistakable standard. Opp. 15. And even then, *Blanton* still required a "solid wall of [] authority" to buttress its ultimate holding. 962 F.3d at 845-46.

No matter how Airbnb tries to spin it, the reality is this: *Apollo* reached a conclusory holding, and other circuit courts followed that holding with little explanation—or, in some cases, no explanation at all, *see*, *e.g.*, *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017). Over time, the circuits' decisions

accreted into a federal consensus that later-arriving courts have been wary of contradicting.

Airbnb defends the consensus with a pithy line: "unanimity is not vacuity." Opp. 13. Perhaps so. But unanimity is not the same as being right, either. As this Court recently demonstrated—in the arbitration context, no less—even a well-entrenched view among the federal circuits will not pass muster when it strays from this Court's precedent. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1712 (2022) ("Nine circuits, including the Eighth, have invoked 'the strong federal policy favoring arbitration' in support of an arbitration-specific waiver rule demanding a showing of prejudice. Two circuits have rejected that rule. We do too.") (footnotes omitted).

That is the case here. The Florida Supreme Court's decision below—which adopted the federal-court view—runs headlong into this Court's precedent requiring "clear and unmistakable evidence" of a party's intent to delegate the question of arbitrability. *See First Options*, 514 U.S. at 944. And so Airbnb is wrong to think that unanimity among the federal circuits is a point in its favor. Really, the opposite is true: that the circuit courts are unanimous in misapplying the clear-and-unmistakable standard only emphasizes how badly this Court's intervention is needed.

Until this Court steps in to correct course, federal courts—and some state courts, too—will continue to delegate arbitrability questions to arbitrators even though the parties never intended for this to happen.

This is not a minor concern. To the contrary, issues of arbitrability "directly implicate the consent of the parties to arbitrate," which is nothing less than "the very foundation of the obligation to arbitrate." George A. Bermann, *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367, 372 (2012).

Also, while the federal courts may be in agreement, the state courts are not. Federal and state courts in Montana, New Jersey, South Dakota, California, and Texas that address the same delegation question will give different answers. *See* Pet. 19-20. Airbnb nitpicks at ways in which these state-court decisions are supposedly distinguishable, disputing whether those decisions "expressly" disagree with the federal-court position. Opp. 9-11. Airbnb cannot dispute, though, that parties in these states will have their delegation disputes decided differently depending on whether state or federal law applies. Nor can Airbnb dispute that the resulting state-federal conflict is one that only this Court can resolve.

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.

A. The agreement provides that the AAA rules do not come into play unless arbitration proceedings are already underway.

In the Petition, the Does' merits argument began with a simple enough proposition. The clear-and-unmistakable standard requires a "heightened" showing of the parties' intent to delegate arbitrability, and that standard cannot be satisfied by pointing to a single rule nestled within an entire set of rules. Airbnb's answer is to cite "black letter" contract law on how extraneous writings may be incorporated by reference. Opp. 16-17. But this is not a typical contract case. And Airbnb never explains how a single "incorporated" arbitral rule, which is not mentioned in the arbitration agreement itself, can be "clear and unmistakable" evidence of the Does' intent to delegate arbitrability.

At any rate, black letter contract law fully supports the Does' position here. As this Court recognized over a century ago, "a reference by the 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); *see* 11 Williston on Contracts § 30:25 (4th ed. May 2021 update). Under the agreement here, the parties agreed that arbitrable disputes

would be submitted to arbitration, and that the arbitration would be administered in accordance with the AAA rules. App. 5. Thus, the AAA rules are incorporated for one purpose: administering arbitration. But if a trial court declines to send a claim to arbitration, then the AAA rules are not incorporated and have no force.

Airbnb argues that the rules could not have been incorporated for this limited purpose, because "for an arbitration to begin, there must be a finding of arbitrability," and because the AAA rules give an arbitrator the power to decide arbitrability. Opp. 17. After making this point, Airbnb proceeds to accuse the Does of "try[ing] to explain away this intuitive conclusion." *Id*. But what conclusion, exactly, is Airbnb referring to? None is apparent from its argument. It is true that arbitrability is a threshold question, and that the AAA rules give an arbitrator the authority—if not the exclusive authority (more on that later)—to decide arbitrability. Neither of these things matters, though, unless the AAA rules apply to the parties' dispute. And the agreement here provides that the rules apply only to the administration of arbitration proceedings, and not before then.

On this point, Airbnb offers no further rejoinder, except to say that the Does' interpretation would mean that rule 7(a) "could never be enforced regarding arbitrability where a party (like Petitioners) files suit in court." Opp. 18. But so what? The agreement says what it says. As Airbnb rightly observes, parties "are generally free to structure their arbitration agreements as

they see fit." Opp. 18 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). If Airbnb wanted an arbitrator to decide arbitrability even when a plaintiff sues in court, then Airbnb could have put language to that effect in the agreement.

At any rate, the Does' interpretation of the agreement is not as "idiosyncratic" as Airbnb makes it out to be. *See* Opp. 17-18. Experts in international arbitration recognize the utility in allowing an arbitrator to decide arbitrability in already-commenced arbitration proceedings, even if trial courts are not divested of the power to make that same decision. *See* Amicus Br. of Prof. George A. Bermann at 14-15; George A. Bermann, *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367, 370-71 (2012). Indeed, a foundational aspect of American arbitration law, in comparison to other jurisdictions, is that an arbitrator is generally given permissive—but not exclusive—jurisdiction to decide arbitrability as a threshold matter. *See* Amicus Br. of Prof. George A. Bermann 15-17; *see also Blanton*, 962 F.3d at 849.

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

AAA rule 7 does not say that an arbitrator shall decide arbitrability. Instead, it says that an arbitrator "shall have the power" to decide arbitrability. The difference is meaningful. The phrase "shall have the power" is permissive; it is akin to stating that an arbitrator *may* decide arbitrability. But that is not the

same thing as saying that an arbitrator *must* decide arbitrability.

Airbnb does not address this point, except to argue, in conclusory fashion, that giving an arbitrator the authority to decide arbitrability "implies" that a trial court may not make this decision. As explained above, that implication does not square with well-understood principles of arbitration law, which accept the existence of concurrent arbitral and judicial jurisdiction over questions of arbitrability. More importantly, Airbnb's argument is simply contrary to the plain meaning of the phrase "shall have the power." Indeed, in their Petition the Does listed cases—including several from this Court—holding that the phrases "shall have the power" and "shall have the authority" confer a permissive but nonexclusive power to act. Pet. 31-32 (collecting cases); *see also Retfalvi v. United States*, 930 F.3d 600, 608-09 (4th Cir. 2019) (holding that while Constitution's Taxing Clause states "Congress shall have power" to collect taxes, that power is "not exclusive to Congress alone"); *Edwards v. Carter*, 580 F.2d 1055, 1057-58 (D.C. Cir. 1978) ("The grant of authority to Congress under the property clause states that 'the Congress shall have power . . . ,' not that only the Congress shall have power, or that the Congress shall have exclusive power.").

Airbnb does not distinguish, or even acknowledge, these cases. Airbnb does suggest (at 19) that its position is supported by *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). But *Henry Schein* does not help Airbnb. Rather the opposite. In *Henry*

Schein, this Court "express[ed] no view about whether the contract at issue . . . in fact delegated the arbitrability question to an arbitrator." *Id.* at 531. This Court did offer a reminder, however: lower courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* And several Members of this Court seemed skeptical, at oral argument, that the language here could pass the clear-and-unmistakable test. *See* Pet. 14-15.

III. To treat a reference to arbitral rules as a delegation clause is to read delegation language into most standard-form arbitration agreements.

That the Does are unsophisticated consumers should not matter here. Sophisticated or not, a contracting party cannot clearly and unmistakably intend to delegate arbitrability simply by agreeing to the arbitral rules that will govern future hypothetical arbitration proceedings. But as explained in the Petition (at 32-35), the true absurdity of the current state of the law is most apparent when it comes to unsophisticated parties like employees, consumers, and small businesses. These parties will have no idea that they are delegating away their right to have a trial court decide whether their claims are arbitrable.

And that is another, alternative reason for this Court to grant review. It is one thing to expect that sophisticated parties entering into an arm's-length

transaction will appreciate the significance of incorporating arbitral rules. It is quite another to expect that an unsophisticated party will reach the same conclusion, especially when doing so would require a close (and counterintuitive) reading of not just the agreement itself, but also of hundreds of "incorporated" pages from collateral writings.

As shown in the Petition (at 36), the issue presented here affects most Americans. In the United States, hundreds of millions of consumer arbitration agreements are currently in force. *See* Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019). Most of these agreements will refer to arbitral rules. And to treat that boilerplate reference as "clear and unmistakable" evidence of an intent to delegate is to read delegation clauses into *most* standard-form arbitration agreements, effectively reversing the "reverse" presumption created by this Court in *First Options*.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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