IN THE SUPREME COURT OF FLORIDA

AIRBNB, INC.,

Petitioner,

vs.

JOHN DOE and JANE DOE,

Respondents.

Case No. SC20-1167

L.T. Case Nos. 2D19-1383
2018-CA-2203

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

ANSWER BRIEF ON MERITS

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INTRODUCTION

This appeal involves arbitrability; that is, what claims the parties agreed to arbitrate. The law presumes that a trial court—not an arbitrator—will decide arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Overcoming that presumption requires "clear and unmistakable" evidence that the parties intended otherwise. *Id.* At the trial court, Airbnb offered one piece of evidence: its terms of service, which had been presented to Mr. and Mrs. Doe as a take-it-or-leave-it "clickwrap" agreement. (R. 28).

The agreement did not say that an arbitrator would decide arbitrability. Instead, it said that arbitration would be administered in accordance with rules of the American Arbitration Association ("AAA"). That is it. The agreement offered no other detail, except for a hyperlink to the AAA rules. (R. 28). Thus, even after reading the entire 22-page agreement, the Does would have known nothing on the who-decides-arbitrability question. Airbnb does not disagree. Its argument, below and on appeal, is that the Does should not have stopped there. More interpretative steps were needed.

Step one, in Airbnb's view, was realizing that the clickwrap agreement, by stating that arbitration would be "administered" un-

der the AAA rules, was incorporating those rules. (R. 28). To reach this conclusion, consumers like the Does would need to discard a more common-sense interpretation: that the parties' claims, *if sent to arbitration*, would be governed by the AAA rules.

Putting that interpretation aside, the next step (according to Airbnb) would be to peruse the AAA rules. On page 13 is rule (7)(a), which provides that an arbitrator "shall have the power" to rule on arbitrability. (R. 257). Airbnb reads this rule as requiring an arbitrator, and not a trial court, to decide arbitrability. But again, arriving at this reading means ignoring the rule's plain meaning (that an arbitrator *may* decide arbitrability) in favor of a less-intuitive reading (that an arbitrator *must* decide arbitrability).

The question for this Court is whether the clickwrap agreement—and, by extension, rule 7(a)—is clear and unmistakable. In the decision below, the Second District gave its answer: No. *Doe v. Natt*, 299 So. 3d 599 (Fla. 2d DCA 2020). Rule 7(a), held the Second District, 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 Second District recognized that its holding was an outlier, but noted that contrary decisions had neglected to offer any analysis on how a mere reference to arbitral rules could be clear and unmistakable. *Id.* at 607-09. And so the Second District broke with that contrary—and nonbinding—authority. The Fourth District later followed suit. *See Fallang Family Ltd. P'ship v. Privcap Companies, LLC*, 316 So. 3d 344 (Fla. 4th DCA 2021).

STATEMENT OF THE CASE AND FACTS

A. The Does are secretly recorded in an Airbnb condo.

In the summer of 2016, Mr. and Mrs. Doe came to Florida for a beach vacation. (R. 69-71, 84-85, 264-65). They stayed on Longboat Key, near Sarasota, in a condominium that they rented through Airbnb. (R. 69-71, 84-86).

Airbnb is a home-sharing business; its online booking system allows property owners to rent their living space to potential guests on a short-term basis. (R. 80). The Does booked the Longboat Key condo using Airbnb's website, which assured its potential customers that "your safety is our priority," and that all property owners

were fully vetted and investigated before being allowed to use Airbnb's platform. (R. 86-86, 264-65, 283-85).

A man named Wayne Natt owned the condo. (R. 69, 85-86). Before the Does arrived, Natt had installed hidden cameras throughout the premises. (R. 70-71). Natt secretly recorded the Does' entire stay, including their private, intimate moments in the bedroom. (R. 70-71, 264).

The Does did not find out about the recordings until months later, when they were contacted by the police. (R. 70, 264). Natt had been caught recording other renters, and the police, while investigating Natt, had discovered videos taken of the Does. (R. 70, 264). Natt would later be prosecuted for voyeurism. (R. 264).[1]

The Does sued Natt and Airbnb, bringing claims for intrusion and loss of consortium. (R. 67-77). The Does alleged that Airbnb failed to adequately conduct background checks into property owners, and that Airbnb had failed to adequately warn the Does about the possibility of recording devices. (R. 72-75).

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[1] *See* Carlos R. Munoz, *Longboat Key Airbnb Host Charged With Video Voyeurism*, Sarasota Herald-Tribune (Oct. 12, 2017), https://perma.cc/E25Q-964L.

The Does later filed an amended complaint, adding counts against Airbnb for negligence and breach of fiduciary duty. (R. 361-62, 372-74). The amended complaint is not part of the record on appeal. While some details about the complaint can be gleaned from context, *see* (R. 372-74), the Does' specific factual allegations are altogether absent.

B. Airbnb moves to compel arbitration.

Airbnb moved to compel arbitration under the Federal Arbitration Act, relying on an arbitration provision in Airbnb's terms of service. (R. 78-101). The Does had agreed to the terms of service through what is commonly known as a "clickwrap agreement,"[2] in which consumers are required to assent to a wide range of conditions and policies before using a company's product or services. (R. 90-92). Airbnb's clickwrap agreement consisted of a link to its terms of service—all 22 pages of them (R. 117-39)—and an "Agree" button

[2] "The term 'clickwrap agreement' is borrowed from the idea of 'shrinkwrap agreements,' which are generally license agreements placed inside the cellophane 'shrinkwrap' of computer software boxes that, by their terms, become effective once the 'shrinkwrap' is opened." *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1080 n.11 (C.D. Cal. 1999).

that users had to click in order to keep using Airbnb's platform. (R. 81-83, 140-41).

Here, the Does logged into Airbnb through their respective Facebook profiles (rather than creating standalone Airbnb accounts). (R. 81-83, 116). Mr. Doe used his personal computer to access Airbnb's platform. (R. 81). Mrs. Doe used her smartphone. (R. 84). Both of the Does, when prompted, clicked that they would "Agree" to Airbnb's terms of service. (R. 81-82, 84). Within those terms of service was a multi-paragraph arbitration provision; it stated that any dispute "relating to these Terms" would be submitted to arbitration. (R. 137-38).

In its motion to compel, Airbnb argued that the Does' claims were "related" to the terms of service and, as a result, should be sent to arbitration. (R. 96-98). The Does disagreed. They argued that their claims were outside the scope of, and had no significant relationship to, the terms of service, which addressed issues relating to booking and using Airbnb's services. (A. 268-79). The Does acknowledged that arbitration would be appropriate if, for example, they were suing Airbnb for mishandling their payment, or for misrepresentations relating to a listed property. (R. 276). But "[n]othing

in Airbnb's terms of service contemplate intrusion, invasion of privacy, video recording, voyeurism, or fiduciary duties," which were torts that implicated common law duties owed "independent of any contract." (R. 272, 276).

The Does further argued that their amended complaint—which, again, is not part of the record on appeal—raised additional claims falling outside the clickwrap agreement. Some of those claims were based on representations that Airbnb had made, via its website, before any contract had been formed. (R. 264-65, 361-62, 372-74). And those representations, argued the Does, created a duty that Airbnb owed independent of the clickwrap agreement. (R. 264-65, 361-62, 372-74).

The trial court, after holding a hearing on this issue, sided with the Does on "whether an arbitrable issue exists," because "their claims are based upon representations and obligations to the general public that do not specifically arise from the parties' contractual relationship." (R. 333-34). But that did not resolve Airbnb's motion to compel. Airbnb had also argued that the trial court lacked the authority to decide whether the Does' claims were arbi-

trable. According to Airbnb, the clickwrap agreement's arbitration provision had delegated that question to the arbitrator. (R. 95-96).

C. The clickwrap agreement does not say who decide arbitrability.

Airbnb claimed that the clickwrap agreement's arbitration provision evinced the Does' intent to have an arbitrator, and not a trial court, decide whether their claims were arbitrable. (R. 95-96). The clickwrap agreement itself did not say who decides arbitrability. What it did say was this:

> 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.)

(R. 138).

The AAA rules are a comprehensive set of procedures—spanning 58 separate rules and 46 pages—which cover all aspects of the arbitration process. *See* (R. 495) (providing a link to current rules: www.adr.org/sites/default/files/Commercial%20Rules.pdf). Airbnb maintained that the Does should have tracked down and

then read the AAA rules; and that the Does, had they done so, would have found Rule 7. (R. 95-96).

Rule 7 is titled "Jurisdiction," and subsection (a) stated: "The 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." (R. 319). This was the sentence that Airbnb pointed to as clear and unmistakable evidence of the Does' intent to delegate arbitrability. (R. 319).

D. The trial court compels arbitration under then-binding case law.

The trial court found that the agreement's reference to the AAA rules was clear and unmistakable. (R. 333-35). The trial court noted that this result was required under then-binding case law from Florida district courts of appeals, which had compelled arbitration based on virtually identical contractual language. (R. 333-35).

The Does moved for reconsideration, arguing that these Florida decisions—along with similar federal decisions cited by Airbnb—could be distinguished because the Does, unlike the plaintiffs in most of Airbnb's relied-on cases, were not sophisticated corpora-

tions or businesses entering into commercial contracts. (R. 337-45). The Does argued that it was still an open question whether referencing arbitral rules constitutes clear and unmistakable evidence of an *unsophisticated* party's intent to delegate arbitrability. (R. 337-45). The Does also reminded the trial court that the default rule, according to United States Supreme Court, is that courts should decide whether claims are arbitrable. (R. 337-39). And Airbnb, as the party looking to compel arbitration, had the burden to provide clear and unmistakable evidence to the contrary. (R. 337-39).

The trial court declined to reconsider its earlier ruling. (R. 357). The Does filed a timely notice of appeal within 30 days of the trial court's original order compelling arbitration. (R. 445-51); *see* Fla. R. App. P. 9.130(b).

E. The Second District reverses, holding that the agreement was not clear and unmistakable.

On appeal, the Does raised one issue: whether the clickwrap agreement had delegated the arbitrability decision to an arbitrator. (R. 41). The Does did not need to raise whether their claims were, in fact, arbitrable. As the Does observed in their initial brief, the trial court had ruled in their favor on that issue. (R. 37-38, 41, 60). In its

answer brief, Airbnb accepted that "[t]he sole issue on appeal is whether the trial court or the arbitrator should decide whether the [Does'] claims are arbitrable." (R. 480). Airbnb did not argue, as an alternate basis for affirmance, that the Does' claims were not arbitrable. *See* (R. 446-500).

The Second District Court of Appeal reversed the trial court's order granting Airbnb's motion to compel arbitration. *Natt*, 299 So. 3d at 609-10. The Second District found that the order was "noteworthy in two respects. First, the [trial] court seemed to be persuaded by the Does' argument that their claims would have been outside the scope of the clickwrap agreement's arbitration provision." *Id.* at 602. And second, the trial court "conclude[d] that it was powerless to make that determination because the issue of arbitrability had to be decided by the arbitrator, not the court." *Id.*

The Second District disagreed on this second point (having no reason to address the first) and held that Airbnb's "arbitration provision and the AAA rule it references . . . did not, in themselves, arise to 'clear and unmistakable' evidence that the parties intended to remove the court's presumed authority to decide such ques-

tions." *Id.* at 609-10. As a result, the trial court "retained its presumed authority to decide the arbitrability dispute." *Id.* at 610.

The Second District analyzed the clickwrap agreement in detail. It started with the obvious: "conspicuously missing" from the agreement was *any* mention of "who should decide arbitrability." *Id.* at 606. And while the agreement provided that arbitration "will be administered . . . in accordance" with the AAA rules, that "directive is necessarily conditional on there being an arbitration" already underway. *Id.*

And 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, there is then the added uncertainty of whether the AAA Rules, in fact, *did so*." *Id.* at 607 (emphasis in original). Rule 7(a) provides that an arbitrator has "the power" to decide arbitrability but does not "make that power exclusive" or "remove that adjudicative power from a court of competent jurisdiction." *Id.* In support of that interpretation, the Second District noted that "in most interpretive contexts, the statement, 'shall have the power,' does not

even constitute a mandatory directive." *Id.* Instead, it is permissive, allowing that an action "may" be taken. *Id.*

For these reasons, the Second District held that the clickwrap agreement was not clear and unmistakable:

> 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 . . . . It is at best ambiguous.

Id. at 609.

The Second District acknowledged that its holding was an "outlier," but noted that no other court—Florida or federal—had "ever examined how or why the mere 'incorporation' of an arbitration rule" could satisfy the Supreme Court's heightened standard. *Id.* at 607-09. The Second District then certified conflict with the Fourth and Fifth District Courts of Appeal, "[b]ecause we disagree with the conclusion those courts appeared to reach concerning what constitutes sufficient clarity and unmistakability of intent to have an arbitrator, rather than a court, resolve

questions of arbitrability." (A. 19) (certifying conflict with *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278 (Fla. 5th DCA 2017); *Younessi v. Recovery Racing, LLC*, 88 So. 3d 364 (Fla. 4th DCA 2012)).

Airbnb invoked this Court's discretionary jurisdiction to review the Second District's decision. (R. 639-40). This Court granted review based on the certified conflict.

F. The Fourth District follows the Second District's lead, deepening the inter-district split.

A few weeks after this Court granted review, the Fourth District Court, in *Fallang*, 316 So. 3d 344, adopted the Second District's reasoning. Distinguishing its past decision in *Younessi*, 88 So. 3d 364, the Fourth District held that an agreement's general reference to the AAA rules was not clear and unmistakable evidence of the parties' intent to delegate arbitrability. *Fallang*, 316 So. 3d at 347-51.

Like the Second District, the Fourth District found that this reference, even if "sufficient to show an intent that the trial court's authority *could* be supplanted," still left open "whether the parties *did* intend to supplant the trial court's authority. *Id.* at 350 (em-

phasis in original). That is because the AAA rule "stating that the arbitrator 'shall have the power' does not grant *exclusive* authority to the arbitrator." *Id.* (emphasis in original). Accordingly, *Fallang* "agree[d] with the Second District that it is questionable whether the opinions by the Third and Fifth Districts . . . comport[] with the Supreme Court's" clear and unmistakable standard. *Id.* at 351.

Following the Second District's lead, *Fallang* certified conflict with the Third and Fifth District Courts of Appeal. *Id.* (certifying conflict with *Miami Marlins, L.P. v. Miami-Dade Cty.*, 276 So. 3d 936, 940 (Fla. 3d DCA 2019); *Guimaraes*, 221 So. 3d 1278)).

SUMMARY OF THE ARGUMENT

I. A trial court must decide arbitrability unless the parties clearly and unmistakably intended to delegate that decision to an arbitrator. This is a heightened standard; clear and unmistakable evidence is express, explicit, and unequivocal. The question for this Court is whether the clickwrap agreement's general reference to the AAA rules satisfies that heightened standard.

A. Florida's district courts of appeal are split on this question. Federal courts of appeal, in contrast, have found that a bare reference to arbitral rules is sufficiently clear and unmistakable. Airbnb spends most of its pages discussing the federal courts' view (while ignoring contrary state-court decisions). But that view, while widely held, has no real analytical foundation. Instead, it is the product of inertia. One federal court held, in conclusory fashion, that a mere 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.

B. Airbnb's initial brief is similarly threadbare. Indeed, Airbnb dodges a large part of the Second District's reasoning, *see* (I.B. at 36), and avoids the salient question here: How, exactly, was

the clickwrap agreement clear and unmistakable on the question of who will decide arbitrability? In truth, the clickwrap agreement fails the clear-and-unmistakable standard at every turn. Not once does the agreement 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.

C. Nothing about the agreement, therefore, was clear or unmistakable. Especially not to the Does, who were unsophisticated consumers ill-equipped to navigate a byzantine set of arbitral rules.

II. Airbnb devotes the last few pages of its brief to asking this Court to find that the Does' claims are not arbitrable. But this issue is not preserved for review, because Airbnb did not raise it at the Second District, and because the record on appeal does not include the Does' operative complaint—an indispensable part of any arbitrability analysis. Even so, Airbnb fares no better on the merits, because the Does' claims fall outside the scope of the agreement.

STANDARD OF REVIEW

The Second District's decision below reverses an order granting a motion to compel arbitration. "This Court reviews the decision of the district court on this issue de novo." *Hernandez v. Crespo*, 211 So. 3d 19, 24 (Fla. 2016).

ARGUMENT

I. The clickwrap agreement's reference to the AAA rules was not clear and unmistakable evidence that the Does intended to delegate the question of arbitrability to the arbitrator.

We begin with first principles. This appeal is governed by the Federal Arbitration Act ("FAA"), Pub. L. No. 68-401, 43 Stat. 883 (1925). *See* 9 U.S.C. §§ 1-14. The FAA allows contracting parties to agree to resolve their disputes through arbitration rather than in court. Under the FAA, arbitration is a creature of contract: an arbitrator may resolve "only those disputes . . . that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943.

While the FAA empowers arbitrators to resolve arbitrable claims, it does not give arbitrators the authority to decide whether a party's claims *are* arbitrable; that is, whether the claims fall within the scope of the parties' arbitration agreement. Under the FAA, that gateway "arbitrability" decision is for the trial court, not an arbitra-

tor. *See* 9 U.S.C. §§ 3-4; *see also 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.") (emphasis added).

The United States Supreme Court's precedent echoes the FAA's statutory language. The default rule is that "the question of arbitrability . . . is undeniably an issue of judicial determination." *AT&T Techs., Inc. v. Communications Workers,* 475 U.S. 643, 649-650 (1986). This rule follows logically from the overarching and "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); *see also AT&T Techs., Inc.*, 475 U.S. at 648-49. 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).

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. In *First Options*, the Supreme Court held that courts cannot accept "that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." 514 U.S. at 943. This standard "reverses" the favorable treatment normally afforded arbitration, *id.* at 945, and puts the burden of establishing clear and unmistakable evidence on the party moving for arbitration, *ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers Intern. Union*, 741 F.3d 627, 630 (5th Cir. 2014).

So that was the starting position here: it was presumed that the Does and Airbnb intended for a court to decide whether the Does' claims were arbitrable. To overcome that presumption, Airbnb had to satisfy a "heightened standard," which required "clear and unmistakable evidence" that the parties intended for an arbitrator to make that decision. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010).

A. Courts are split on this issue.

The bulk of the initial brief's argument is devoted to listing decisions that have reached holdings contrary to the Second District's holding below. (I.B. at 22-36). Airbnb claims that "[e]very other court to consider this [AAA] language—Florida, federal and the

courts of other states—has held that the parties to the contract had unambiguously agreed . . . the arbitrator—not the trial court—would decide arbitrability." (I.B. at 22).

Airbnb is wrong. The law is not nearly so settled as that. Start with Florida. Florida's district courts of appeal are now evenly split on the issue before this Court. *Compare Natt*, 299 So. 3d 599; *Fallang*, 316 So. 3d 344; *with Miami Marlins*, 276 So. 3d at 940; *Guimaraes*, 221 So. 3d 1278.

Most recently, in *Fallang*, the Fourth District "confront[ed] . . . whether contract language incorporating a set of arbitration rules by general reference . . . 'clearly and unmistakably' supplants a court's statutory power to decide what is arbitrable." 316 So. 3d at 349. *Fallang* disregarded contrary federal authority and held that an agreement's "general reference to 'AAA rules' did not 'clearly and unmistakably' supplant the trial court's authority to decide what is arbitrable." *Id.* at 349. Airbnb does not acknowledge *Fallang* in the initial brief.

Nor does Airbnb acknowledge that the supreme courts of Montana, South Dakota, and New Jersey—also untethered from federal-court precedent—have arrived at similar holdings, rejecting 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, 355 (2016); *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. *See Ajamian v. CantorCO2e, 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).

Thus, Airbnb hangs its arguments on a loose nail. Courts are not "uniform" on the issue before this Court. It is an open question, with nonbinding decisions on both sides.

It is true that federal courts have held that a reference to arbitral rules serves as clear and unmistakable evidence of an intent to delegate. *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 845, 844-46 (6th Cir. 2020); *Oracle Am., Inc. v. Myriad Grp. A.A.*,724 F.3d 1069, 1074-75 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petro-*

leum 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 Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005). Florida's Third and Fifth District Courts of Appeal have followed these federal decisions. *See Miami Marlins*, 276 So. 3d at 940; *Guimaraes*, 221 So. 3d 1278.

In the initial brief, Airbnb discusses all these cases—in exhaustive detail—to make the simple point that the Second District's holding is to the contrary. But this has never been disputed. The Does recognized these decisions in the briefing below, *see* (R. 513), and the Second District acknowledged that its holding was an outlier when compared to federal circuit decisions that addressed the same contractual language. *Natt*, 299 So. 3d at 608-09.

The Second District, however, was not obligated to apply the law as conceived by federal courts. Its obligation was to follow the holdings of the United States Supreme Court. *See Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So. 2d 32, 33-34 (Fla. 2d DCA 2005). And the Supreme Court has held—pointedly—that a higher stand-

ard is required for questions of arbitrability. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

The Second District followed this precedent, looking to the plain language of the clickwrap agreement and analyzing, in detail, whether that language could suffice as "clear and unmistakable" evidence of the Does' intent to delegate arbitrability.

That the Second District provided this detailed analysis adds to its outlier status. Indeed, the majority-view cases cited by Airbnb 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 Rule-making by Arbitration Providers*, 105 Minn. L. Rev. 619, 664 (2020). Instead, the federal circuit courts have relied, exclusively, on the fact that earlier circuit courts had concluded that the language was clear and unmistakable enough. Those decisions have accreted, over the years, into what Airbnb calls "a sea of contrary authority." (I.B. at 16). But if it is a sea, it is a shallow one indeed.

Start with the Sixth Circuit's decision in *Blanton*, which did provide some rare analysis, discussing the law of incorporation and whether an arbitrator needed a grant of exclusive authority over ar-

bitrability decisions. 962 F.3d at 848-50. In the end, though, *Blanton* reached its ultimate holding by leaning on the "solid wall of contrary authority" from its sister circuits. *Id.* at 851.

The circuit decisions preceding *Blanton* are even more cursory. For instance, the Ninth Circuit, when presented with the same question, simply followed the "prevailing view" that "incorporation of the [AAA] rules constitutes clear and unmistakable evidence." *Oracle*, 724 F.3d at 1074-75. 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).

Apollo is a poor foundation for a "wall" of authority. For one thing, *Apollo* is outdated: it came before *First Options*, 514 U.S. 938, which established the present-day contours of the clear-and-unmistakable standard. For another, *Apollo*'s reasoning is conclusory. *Apollo* held that an arbitrator should decide arbitrability be-

cause the agreement at issue referenced arbitral rules that (supposedly) "clearly and unmistakably allow the arbitrator to determine her own jurisdiction." 886 F.2d at 473. That is all *Apollo* had to say. "Apparently, the court simply deemed the requisite clarity to have been self-evident." *See Natt*, 299 So. 3d at 609. The plaintiff in *Apollo* had not even briefed the issue. *Apollo*, 886 F.2d at 476.

This Court need not follow *Apollo* or its progeny cases, which have only persuasive value (and not much of that). *See Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007); *Mora*, 913 So. 2d at 33-34. On questions of federal law, this Court is bound only by the United States Supreme Court, *see id.*, which has yet to address whether a reference to arbitral rules can satisfy the clear-and-unmistakable standard. The "majority view" position, then, is hardly set in stone. *Cf. Mount Lemmon Fire Dist. v. Guido,* 139 S. Ct. 22, 24-25 (2018) (unanimously adopting minority view in a 4-1 circuit-court split).

Yet Airbnb implies that this Court, no matter what it may think, should not disturb the status quo. In its amicus brief, the Miami International Arbitration Society is less subtle, arguing that international parties rely on the law's (supposed) uniformity, and

that this settled law has created a new baseline for contracting parties' expectations. *See* (MIAS Amicus Br. 9-10, 13-17).

But that is exactly backwards. In *First Options*, the Supreme Court has directed that "courts should *not* assume that the parties agreed to arbitrate arbitrability." 514 U.S. at 944. The premise of *First Options* is that most people do not think about arbitrability *at all*; they surely do not closely follow federal precedent on the issue. *Id.* at 945. This is particularly true for less sophisticated parties like consumers, small-business owners, and employees. For them, arbitrability will be a foreign concept. That is why the clear-and-unmistakable standard exists: to guard against parties unknowingly giving away their right to have a judge decide arbitrability. And that is why the Supreme Court created a "reverse" presumption, directing courts not to presume that arbitrability has been delegated.

That directive should not be ignored simply because other courts have been consistent in misapplying it. Especially when the FAA—the governing statute here—provides that a judge will decide questions of arbitrability. *See* 9 U.S.C. §§ 3-4. Airbnb's relied-on cases deviate from that plain statutory text and from binding precedent, and they should not be followed accordingly. *See Henry*

Schein, 139 S. Ct. at 530 (disapproving of judicially created exception to enforcing arbitration provisions because "[t]he exception is inconsistent with the statutory text and with our precedent").[3]

B. The clickwrap agreement was not clear and unmistakable: it did not expressly and explicitly state that an arbitrator will decide arbitrability.

At long last, on page 36 of the initial brief, Airbnb gets to the meat of the argument: how the clickwrap agreement's language could be considered clear and unmistakable. Not much is said, however, about what the clear-and-unmistakable standard entails for the party moving to compel arbitration.

So we will start there. As the words "clear and unmistakable" suggest, an arbitration agreement's "silence *or* ambiguity" on the subject of arbitrability will not suffice. *Varela*, 139 S. Ct. at 1417

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[3] In fact, the Supreme Court's precedent is itself contrary to the FAA's plain text, which allows for only the judicial determination of arbitrability. *See* 9 U.S.C. §§ 3-4; *see also* David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 Va. L. Rev. In Brief 1 (2010). That precedent is well-entrenched and must be followed. *See Henry Schein*, 139 S. Ct. at 530 (noting that the "ship has sailed" on plain-text arguments). Even so, this Court should decline to read further exceptions into the statutory text, and should hew close to the narrow statutory exception created by the Supreme Court. *See Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946 (Fla. 2020) (noting that Florida courts "follow the supremacy-of-text principle").

(emphasis in original). Clear and unmistakable is supposed to be an exacting standard. *See Jackson*, 561 U.S. at 69 n.1.

The United States Supreme Court has held that contractual or statutory language is only clear and unmistakable if it is "explicit" or "express." *See, e.g.*, *United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996) (plurality) (holding that waivers of sovereign authority are only "clear and unmistakable" if they include an "express delegation"); *id.* at 920-21 (Scalia, J., concurring); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (holding that waiver must be "explicit" to be "clear and unmistakable"); *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 273-77 (1908) (holding that ordinances must be "express" to be "clear and unmistakable").

Florida law is much the same. For instance, this Court has held that the Legislature can grant municipalities extraordinary powers, but only if done so through a "clear and unmistakable" directive, which requires "nothing less than a grant in *express terms*." *Meeks v. Fink*, 89 So. 543, 544 (Fla. 1921) (emphasis added). Similarly, in the collective-bargaining context, this Court has recognized that employees can "clearly and unmistakably" waive their right to bargain, but only through "express" contractual language. *City of*

Miami v. Fraternal Order of Police, Miami Lodge 20, 511 So. 2d 549, 551 (Fla. 1987). Florida's district courts of appeal have likewise found that language is clear and unmistakable if "express or unequivocal," *Am. Motors Corp. v. Abrahantes*, 474 So. 2d 271, 274 (Fla. 3d DCA 1985), or "explicit[] and specific[]," *Selim v. Pan Am. Airways Corp.*, 889 So. 2d 149, 156 (Fla. 4th DCA 2004).

Airbnb's clickwrap agreement was none of these things. It was not express, explicit, specific, or unequivocal 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 Airbnb says controls here. *Second*, the agreement, even if it incorporates the AAA rules, does so under limited circumstances—namely, when arbitration proceedings are 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 power to make the same decision.

1. The agreement's general reference to all the AAA rules was not clear and unmistakable.

To delegate arbitrability, a contract must include "clear and unmistakable" language. One would expect, therefore, that Airbnb's relied-on delegation language could be found *somewhere* in Airbnb's clickwrap agreement. But this language is "conspicuously missing." *Natt*, 299 So. 3d at 606. Even if they had read every word of the 22-page agreement, the Does 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, "or the significance of having arbitrators decide the scope of their own powers." *Id.* at 945. Recognizing this, the Supreme Court created a "reverse" presumption in favor of a trial court deciding ar-

bitration. *Id.* at 944-45. That way, "unwilling parties" are not 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 containing a full set of arbitral rules.

Here, Airbnb's (supposed) delegation clause—taken from AAA rule 7(a)—was well-buried. As the Second District noted, the clickwrap agreement neither attached the AAA rules it generally referenced nor "specif[ied] any particular provision or rule, such as [rule 7]." *Natt*, 299 So. 3d at 606. The agreement instead gave the Does an AAA website and phone number that could help them learn more about the rules—"a rather obscure way of evincing 'clear and unmistakable evidence' that the parties intended to preclude a court

from deciding an issue that would ordinarily be decided by a court." *Id.*

Exactly so. Airbnb had an obligation to show that the arbitration agreement was clear and unmistakable to the Does on the arbitrability issue. But directing the Does to AAA's website—and to a comprehensive set of arbitral rules—does not "explicitly state[]" anything about arbitrability. *See Wright*, 525 U.S. at 80. "There are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability." *Ajamian*, 137 Cal. Rptr. 3d at 790.

What is more, arbitration agreements commonly refer to a set of arbitral rules that will govern the administration of any arbitration proceeding. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (2019); Consumer Financial Protection Bureau, Arbitration Study, Report to Congress, §1028(a) § 1.4.2 (2015). It is standard, general language.

That will not get the job done here. A "general contractual provision" cannot, as a matter of law, 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, a 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).

In the initial brief, Airbnb declines to engage on this point, dismissing the Second District's incorporation-by-reference reasoning as "rejected by every other court to address this issue." (I.B. at 36). As already noted, this is not true, and this Court is not bound by Airbnb's relied-on decisions anyway.

Still, Airbnb relies entirely on this nonbinding authority to make the question-begging argument that the Second District's rationales "must fall if this Court agrees that clickwrap agreements are enforceable on this issue if the language they incorporate is clear and unambiguous." (I.B. at 36). But Airbnb does not stop to share why it thinks that "incorporating" the AAA rules was, in and of itself, clear and unmistakable evidence.

It is revealing that Airbnb ducks this issue. If the clickwrap agreement's reference to arbitral rules were truly clear and unmis-

takable, then Airbnb could muster something—*something*—by way of explanation. That is the nature of "clear and unmistakable" language; it is express, explicit, and easily articulated. The clickwrap agreement's reference to the AAA rules is none of these things. Which is why Airbnb has nothing to say.

Including clear and unmistakable language in the clickwrap agreement would not be difficult. All it would take is adding a single sentence. Something like this: "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) (enforcing delegation clause using this language).

If this seems like an easy fix, that's because it is. Other corporations—such as Postmates, Ford, Amazon, Papa John's, Amway, and Uber, to name a few—have managed to draft express contractual language that gives an arbitrator "exclusive authority" to decide arbitrability. *See Immediato v. Postmates, Inc.*, 2021 WL 828381, at *1 (D. Mass. Mar. 4, 2021); *Woellecke v. Ford Motor Co.*, 2020 WL 6557981, at *2 (E.D. Mich. Nov. 9, 2020); *Dewey v. Amazon.com, Inc.*, 2019 WL 3384769, at *1 (Del. Super. Ct. July 25, 2019); *Frazier v. Papa John's USA*, 2019 WL 4451155, at *1 (E.D. Mo. Sept.

17, 2019); *Long v. Amway Corp.*, 306 F. Supp. 3d 601, 604 (S.D. N.Y. 2018); *West v. Uber Techs.*, 2018 WL 5848903, at *3 n.1 (C.D. Cal. Sept. 5, 2018).

The Miami International Arbitration Society concedes that this is the most sensible approach when drafting an agreement. Its amicus brief highlights "practical resources" that advise "the best choice" for parties who "want an arbitrator to decide the arbitrability of a dispute," is to "write that into the arbitration clause." (MIAS Amicus Br. at 11). We agree: this is exactly how arbitration agreements should be drafted.

Especially take-it-or-leave-it agreements like the one here. Airbnb has total control over the language used in its clickwrap agreement. Requiring Airbnb to write an express and explicit delegation clause does not ask too much. Indeed, "[i]t is perplexing that a party who has thought about 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).

2. The agreement provided that the AAA rules would not come into play until arbitration proceedings were already underway.

Airbnb argues that the AAA rules were "incorporated" into the clickwrap agreement. The agreement accomplished the incorporation, according to Airbnb, 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." (A. 33-34, 76). But this statement does not at all answer who will be deciding arbitrability. As the Second District observed,

> [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.

Natt, 299 So. 3d at 606.

What is more, the clickwrap agreement does not even inform the Does that they would necessarily be bound by the AAA rules. Instead, the agreement provides that the AAA rules will come into play only during arbitration proceedings. This would have made

sense to the Does: their claims, *if already in arbitration*, would be governed by the AAA rules. But if the Does' claims were not subject to arbitration, then the AAA rules would not apply. *See 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).

That interpretation accords 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). 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 particular purpose of the AAA rules is clear: they will govern arbitral proceedings. The AAA rules are irrelevant unless and until the parties are sent to arbitration. As the Second District

put it: "the agreement's reference to the AAA Rules and AAA's administration addresses an arbitration that is actually commenced . . . . the directive is necessarily conditional on there being an arbitration." *Natt*, 299 So. 3d at 606. And other state appellate courts have interpreted this language in the same way, *see, e.g.*, *Fallang*, 316 So. 3d at 349-51; *Glob. Client Sols.* 367 P.3d at 369; *Ajamian*, 137 Cal. Rptr. 3d at 782-83; which belies Airbnb's argument that the language has a single clear and unmistakable meaning.

Airbnb offers its own interpretation of this language in the initial brief. In Airbnb's view, arbitrability decisions are part of an arbitration proceeding. So when the agreement says that "arbitration will be administered . . . in accordance with the [AAA rules]," the word "administration" is meant to encompass threshold decisions on whether a claim is arbitrable in the first place. (I.B. at 37-38).

There are a few problems with that interpretation. For starters, it is wrong. By challenging arbitrability, the Does were disputing whether their claims fell under the arbitration agreement. If the claims were not arbitrable, then "the arbitrator ha[d] no authority to determine anything." *CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc.,* 201 So. 3d 85, 92 (Fla. 3d DCA 2015). As

a result, arbitrability is a gateway question that, if answered in the negative, prevents any arbitration proceeding from getting started.

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 the existential question of what makes an arbitration proceeding an arbitration proceeding, the agreement has failed to be explicit and express.

3. The AAA rules themselves were not clear and unmistakable, either.

For the sake of argument, assume that Airbnb is right, and that the clickwrap agreement's reference to the AAA rules was enough to incorporate AAA rule 7(a) into the agreement. Even then, the rule itself does not clearly and unmistakably delegate arbitrability to the arbitrator. Rule 7(a) says, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including . . . any claim or counterclaim."

Missing from rule 7(a) is a "mandatory directive." *Natt*, 299 So. 3d at 607. The rule does not state that an arbitrator *must* decide arbitrability, only that an arbitrator has the power to make that decision. Of course, "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 was the conclusion recently reached by the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, which endorsed the view that a reference to the AAA rules (and other arbitral rules) does not satisfy the Supreme Court's clear and unmistakable test. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (2019). "[N]othing 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." *Id.*

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 hold itself to "the plain meaning of the contract's text." *State Farm Mut. Auto. Ins. Co. v. Menendez,* 70 So. 3d 566, 569 (Fla. 2011).

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. As the Second District observed, courts have consistently interpreted this phrase in the same way: as granting permissive but nonmandatory authority to act. *Natt*, 299 So. 3d at 607 (citing *Sony Corp.*, 464 U.S. at 456 (concluding that the phrase "Congress shall have the power" is permissive)); *see also, e.g.*, *U.S. 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 that trust documents gave nonmandatory direction in stating that trustee "shall have the power" to perform specific duties).

For example, the Constitution's Property Clause states that "Congress shall have the power" to convey property to foreign nations, but it does not say "that *only* the Congress shall have power or that the Congress shall have *exclusive* power." *Edwards v. Carter*, 580 F.2d 1055, 1057-58 (D.C. Cir. 1978) (emphasis added). As a result, this grant of authority does not stop the Senate—which

also has the power to convey property through self-executing treaties—from concurrently performing the same function. *Id.*

Likewise, while the Taxing Clause provides that "Congress shall have power" to collect taxes, that power is "not exclusive to Congress." *Retfalvi v. United States*, 930 F.3d 600, 609 (4th Cir. 2019); *see also Made in the USA Found. v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (holding that while the President "shall have Power" to enter into treaties, this is not "the only manner in which a treaty may be enacted").

Another analogue can be found in statutory schemes providing that federal courts "shall have" jurisdiction over specific disputes. For instance, one statute provides that federal "district court[s] . . . shall have jurisdiction over actions brought [under Title VII]." 42 U.S.C. § 2000e-5(f)(3). The Supreme Court held that this language was permissive: it 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." *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 823 (1990); *see also 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 state court jurisdiction).

The same reasoning applies with equal 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.

This might seem like a lot of ink spilled over a four-word phrase. But "arbitration is a creature of contract," *Larsen v. Citibank FSB*, 871 F.3d 1295, 1302 (11th Cir. 2017), and when it comes to a contract's intended meaning, "[t]he tiniest words can have the greatest consequence," *Famiglio v. Famiglio*, 279 So. 3d 736, 737 (Fla . 2d DCA 2019). Here, Airbnb, burdened with proving the Does' intent, stakes its case on a single sentence. That sentence, in turn, hinges on the plain meaning of the phrase "shall have the power." And courts agree this phrase signals a permissive, nonmandatory act. Which leads to a single conclusion: the rule does not divest the trial court of its authority to decide whether Plaintiffs' claims were arbitrable.

At the very least, the Does' reading of rule 7(a) is a reasonable one. And that is enough. Even if able to come up with a competing

reading, Airbnb would manage to show only that the rule is ambiguous; that is, capable of supporting "more than one reasonable interpretation." *Nicarry v. Eslinger*, 990 So. 2d 661, 664 (Fla. 5th DCA 2008). That does not help Airbnb. Rather the opposite. Any "ambiguity regarding who determines the questions of arbitrability is insufficient to give that authority to the arbitrators." *Morton v. Polivchak*, 931 So. 2d 935, 939 (Fla. 2d DCA 2006) (Canady, J.) (citation omitted). In the initial brief, Airbnb tries to paint the Does' reading of rule 7(a) as impractical. Airbnb claims that "neither the Does nor the District Court ever explained how [their interpretation] would work." (I.B. at 39).

So we will explain. Rule 7(a) empowers an arbitrator to decide arbitrability questions arising in arbitration if that is the parties' preference. Imagine, for instance, the following scenario: two parties have a contractual dispute, and they agree that the bulk of that dispute belongs in arbitration. 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 needing to file a separate court proceeding.

In other words, Rule 7(a) very neatly serves the principal goals 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.

C. The clickwrap agreement surely would not have been clear and unmistakable to the Does.

An agreement must be clear and unmistakable to the people reading it. Here, that was the Does. They were consumers looking to book a vacation rental. It was in this context that they would have viewed the arbitration agreement and its reference to the AAA rules. As already noted, Airbnb's interpretation of the AAA rules—that they give an arbitrator an absolute, first-priority right to decide arbitrability—is one that has confounded lawyers specializing in international arbitration. *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. § 2.8 (2019). If that is true, what chance did the Does have? The answer, of course, is that they had no chance at all. The rule would not have been clear and unmistakable to the Does: two consumers who could not possibly have navigated the interpretive maze the clickwrap agreement set out for them.

The Does' level of sophistication is significant not just as a practical matter. As discussed above, federal circuit courts have concluded—albeit without supporting analysis—that a contract's reference to AAA rules may constitute clear and unmistakable evidence of intent. "But this apparent consensus among the circuits is not as clear as it seems. Nearly every circuit to have addressed the issue . . . addressed the question in the context of arbitration agreements entered into by organizations, not unsophisticated individuals." *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 427-28 (E.D. Pa. 2016).

It is thus an "open question" whether incorporating arbitral rules can serve as clear and unmistakable evidence of an unsophisticated party's intent. *Id.* at 427-28; *see also Stone v. Wells Fargo Bank, N.A.*, 2019 WL 247540, at *11 (D. Md. Jan. 17, 2019); *DeVries v. Experian Info. Sols., Inc.*, 2017 WL 733096, at *10 (N.D. Cal. Feb. 24, 2017).

And many federal district courts to address this question have answered it in the negative, holding that "incorporation of the AAA rules [is] insufficient to establish delegation in consumer contracts involving at least one unsophisticated party." *DeVries*, 2017 WL

733096, at *10; *Calzadillas v. Wonderful Co., LLC*, 2019 WL 2339783, at *4 (E.D. Cal. June 3, 2019) ("issue of arbitrability was not clearly and unmistakably delegated" based on "level of sophistication of the parties"); *Chong v. 7-Eleven, Inc*, 2019 WL 1003135, at *10 (E.D. Penn, Feb. 27, 2019) ("reference to the AAA rules is not clear and unmistakable evidence of" unsophisticated plaintiff's intent); *Stone*, 2019 WL 247540, at *11 (same); *Toll Bros*, 171 F. Supp. 3d at 427-28 (same).[4]

Airbnb tries to distinguish these district-court cases by claiming that none "involve[d] an e-commerce company." (I.B. at 48). Not so. *See Ingalls v. Spotify USA, Inc.*, 2016 WL 6679561, at *3 (N.D. Cal. Nov. 14, 2016) (holding that unsophisticated plaintiffs did not intend to delegate arbitrability by entering into online agreement with defendant e-commerce company); *Dupler v. Orbitz, LLC*, 2018 WL 6038309, at *3 n.1 (C.D. Cal. July 5, 2018) (same).

[4] *See also, e.g.*, *Takiedine v. 7-Eleven, Inc.*, 2019 WL 934994, at *10 (E.D. Pa. Feb. 25, 2019); *Bell-Sparrow v. SFG Proschoicebeauty*, 2019 WL 1201835, at *3 n.5 (N.D. Cal. Mar. 14, 2019); *Ingalls*, 2016 WL 6679561, at *4; *Mikhak v. Univ. of Phoenix*, 2016 WL 3401763, at *5 (N.D. Cal. June 21, 2016); *Money Mailer, LLC v. Brewer*, 2016 WL 1393492, at *2 (W.D. Wash. Apr. 8, 2016); *Vargas*, 2016 WL 946112, at *7; *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014).

This is an empty distinction anyway. A party's sophistication is important because it speaks to that party's intent. And while a sophisticated party might understand the significance of 43 pages of cross-referenced arbitral rules, an unsophisticated party would not. That is true regardless of a defendant's identity, which is why courts have not limited their holdings to a specific type of defendant or industry. *See Stone*, 2019 WL 247540, at *11 (defendant was a bank); *Bell-Sparrow,* 2019 WL 1201835, at *3 n.5 (credit-card company); *Chong*, 2019 WL 1003135, at *10 (franchisor); *Ingalls*, 2016 WL 6679561, at *3 (e-commerce company); *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112 (N.D. Cal. Mar. 14, 2016) (employer); *Toll Bros.*, 171 F. Supp. 3d at 428-29 (insurance company).

In all these situations, what mattered was that the plaintiffs were unsophisticated and would not have understood the "rather arcane" issue of delegating arbitrability. *See First Options,* 514 U.S. at 945. On this point, Airbnb suggests, somewhat halfheartedly, that perhaps the Does *were* sophisticated. (I.B. at 44). This is not serious. Nothing in the record supports this suggestion, or implies that the Does were anything besides what they appeared to be—"two ordinary consumers who could not be expected to appreciate

the significance of incorporation of the AAA rules." *See Ingalls*, 2016 WL 6679561, at *4.

And, significantly, other courts have found parties to be unsophisticated under similar circumstances. In *Ingalls*, for example, the district court treated the plaintiffs as unsophisticated because they were "two consumers—a music teacher and an architect—who have not been shown to have any business or legal acumen," and because it was the defendant's "burden to establish that the delegation clause is enforceable." *Id.*; *see also DeVries,* 2017 WL 733096, at *10 (N.D. Cal. Feb. 24, 2017) (assuming lack of sophistication where defendant did not argue plaintiff was "a sophisticated party rather than an ordinary consumer").

This only makes sense. Airbnb had the burden of proving that the Does clearly and unmistakably intended to delegate arbitrability. *See ConocoPhillips, Inc.*, 741 F.3d at 630. If the record lacks sufficient facts to support a finding of clear and unmistakable intent, that favors the Does, not Airbnb.

At bottom, the Does simply would not have understood that they were delegating the question of arbitrability to an arbitrator. The Does, already tasked with reading the 22-page clickwrap

agreement, would not have recognized that they also needed to read all the AAA rules, or that one particular rule was meant to take the question of arbitrability away from the trial court. As one federal court found:

> [I]t may be a difficult proposition to say that the text of an arbitration clause itself, when found among contract boilerplate, may constitute clear and unmistakable evidence of an unsophisticated party's intentions. 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*.

Toll Bros., Inc., 171 F. Supp. 3d at, 428-29 (emphasis added).

The law allows Airbnb, by virtue of inserting boilerplate into its clickwrap agreement, to bind its customers to a host of terms. But Airbnb must *say what those terms are*. What Airbnb did instead was vaguely cross-reference an entire set of impenetrable rules, counting on the Does to track down, and then decipher, a specific rule that addressed, ambiguously, the "rather arcane" question of who decides arbitrability.

Airbnb can do better than that. In the future, Airbnb should include a single sentence in its clickwrap agreement providing that an arbitrator, and not a court, will decide whether claims are arbitrable. Imposing this requirement will not be the disaster that Airbnb (and its amicus) make it out to be. After all, clarity is one of *First Options*' guideposts, and contracting parties should, in all events, endeavor to remedy less-than-crystalline provisions. As noted above, other companies have managed to include clear and unmistakable language. Airbnb can do it, too.

II. Airbnb failed to preserve its second issue on appeal for review and, in any event, the Does' claims are not arbitrable.

This Court need not review Airbnb's second issue on appeal, which is fact- and case-specific and lacks any statewide import. *See* Art. V, § 3(b)(3)-(4), Fla Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv)-(vi); *see also Sanchez v. Wimpey*, 409 So. 2d 20, 21 (Fla. 1982). But even if this Court did consider it, this issue fails for a lack of preservation and on the merits.

A. Airbnb did not preserve this issue for review.

Airbnb never raised this issue at the Second District. Airbnb skirts this fact in the initial brief. But it is inescapable. The trial

court found that the Does' claims were not arbitrable. (R. 333-34); *see Natt*, 299 So. 3d at 602. Airbnb did not challenge that finding on appeal—not as an alternative basis for affirmance (as it now does), and not as an issue on cross-appeal. (R. 446-500).

It is too late now. This Court's "precedent requires that an argument for reversal be specifically preserved in the trial court and *then be specifically raised and briefed to the appellate court* in order for that appellate court or a higher appellate court to consider it." *D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 888 (Fla. 2018) (Canady, J., dissenting) (emphasis added); *see also Coolen v. State,* 696 So .2d 738, 742 n.2 (Fla. 1997) (noting that the "failure to fully brief and argue" a point "constitutes a waiver").

To be sure, "[h]aving accepted jurisdiction, [this Court] may review the district court's decision *for any error*." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 912 (Fla. 1995) (emphasis added). But there was no error here. The Second District can hardly be faulted for not addressing an issue that Airbnb chose not to raise. *See D.H.,* 271 So. 3d at 888-89. "Indeed, it is not the role of the appellate court to act as standby counsel for the parties." *Id.*; *see also Johnson v. State,* 660 So. 2d 637, 645 (Fla. 1995) ("The law

is well settled that failure to raise an available issue constitutes an admission that no error occurred.").

If that were not enough, Airbnb has also failed to make a record demonstrating error. At issue is whether the Does' claims are arbitrable under the clickwrap agreement. That makes the Does' complaint centrally important: "[W]hen deciding whether a claim falls within the scope of an arbitration agreement, courts focus on factual allegations in the complaint rather than the legal causes of action asserted." *Club Mediterranee, S.A. v. Fitzpatrick*, 162 So. 3d 251, 252 (Fla. 3d DCA 2015) (internal quotations omitted). "This Court's review of an order dismissing an action and compelling arbitration is limited to the four corners of the complaint and its . . . attachments." *Jackson v. The Shakespeare Foundation, Inc.,* 108 So. 3d 587, 592–93 (Fla. 2013); *see also Jones v. Halliburton Co.,* 583 F.3d 228, 240 (5th Cir. 2009) (noting that arbitrability analysis is a "fact-specific" inquiry based on allegations of complaint).

At the trial court, the Does amended their originally filed complaint to add counts. (R. 330, 361-62, 372-74). And at the hearing on Airbnb's motion to compel arbitration, the Does argued that these new counts contained factual allegations falling outside the

scope of the clickwrap agreement's arbitration provision. (R. 361-62, 372-74). But that amended complaint is not part of the record before this Court. Nor was it before the Second District.

That dooms Airbnb's arguments here. As the petitioner, Airbnb has the burden of presenting a record that "demonstrate[s] reversible error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *see also Mollinea v. Mollinea*, 77 So. 3d 253, 254 (Fla. 1st DCA 2012). Airbnb cannot carry that burden without the amended complaint: the "focus" of the trial court's ruling. *See Club Mediterranee*, 162 So. 3d at 252; *see also Panzer v. Pers. One, Inc.*, 754 So. 2d 800 (Fla. 2d DCA 2000) (affirming under *Applegate* because salient document "not part of the record provided" and had not "been considered by the appeals referee" below).

B. The Does' claims do not fall within the scope of the clickwrap agreement.

Airbnb's merits arguments are no more availing. The Does' amended complaint—although not a part of this record—made factual allegations in support of counts for constructive intrusion, negligence, and breach of fiduciary duty. (R. 263, 330). The narrow is-

sue presented here is whether those allegations fall under the clickwrap agreement's arbitration provision.

In resolving that question, the mere existence of an arbitration provision is not dispositive. *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 639 (Fla. 1999). Instead, the intent of the parties is controlling, and courts examine the plain language of an agreement to decide whether the parties intended for the claims to be resolved by arbitration. *Jackson*, 108 So. 3d at 593.

A truly warped reading of the clickwrap agreement is necessary to reach Airbnb's position that the claims "literally arise under" the agreement. *See* (I.B. at 51-52). The clickwrap agreement addresses everything from property damage to security deposits to cancellation policies.[5] (R. 314). But the agreement's express terms simply do not cover the Does' claims brought here. *See Seifert*, 750 So. 2d at 642-43 (holding that arbitration clause in contract for sale of home did not "contemplate[] the existence and arbitration of future tort claims for personal injuries" for common-law negligence).

[5] The arbitration clause reaches any "dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site, Application or Collective Content." (R. 314).

Even under a "broad" arbitration provision, the Does' claims are arbitrable only if they are a "fairly direct result of the performance of contractual duties." *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001). Put another way: their claims must have a "significant relationship" to the parties' agreement. *See Seifert*, 750 So. 2d at 638. For a significant relationship to exist, the Does must "raise some issue" that cannot be resolved without referencing "the contract itself," *see Terminix Intern. Co., L.P. v. Michaels*, 668 So. 2d 1013, 1014 (Fla. 4th DCA 1996), and their claims must "emanate[] from an inimitable duty created by the parties' unique contractual relationship," *see Jackson*, 108 So. 3d at 59.

The Does' allegations do not have a significant relationship to the clickwrap agreement. Far from stemming from any unique contractual relationship between the Does and Airbnb, the Does' claims—that Airbnb failed to conduct background checks, to verify personal details of hosts and properties, or to implement policies to protect privacy rights—turn on common-law duties separate from any that Airbnb owed under the agreement. *See Seifert*, 750 So. 2d at 639. In fact, some of the Does' allegations involved representa-

tions that Airbnb made *before* the Does entered the agreement. *Cf. Dr. Kenneth Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 252 (5th Cir. 1998) (holding that false advertising claim did not arise out or relate to medical-services contract).

Seifert is instructive here. In *Seifert*, a couple contracted with a construction company to build a home. 750 So. 2d at 635. After a carbon monoxide leak killed the husband, the wife brought a wrongful death claim against the construction company. *Id.* Because the claim stemmed from duties independent of those specifically created by the contract, there was no significant relationship between the claim and the contract, which did not "contemplate[] the existence and arbitration of future tort claims for personal injuries based on a party's common law negligence." *Id.* at 642.

Just as in *Seifert*, the Does' claims arise not from any unique duty created by the Agreement, but rather from common law duties that Airbnb owed the public. Highlighting this conclusion is the fact that if the Does' guests had been harmed rather than the Does themselves, "obviously" the claims would not be subject to arbitration. *Seifert*, 750 So. 2d at 641. Thus, the trial court was right to find that the Does' claims were outside the agreement.

CONCLUSION

The law presumes that arbitrability should be judicially decided absent clear and unmistakable evidence of delegation. There is no evidence like that here. As the Second District held, "the provision Airbnb relies upon is two steps removed from the agreement itself, hidden within a body of procedural rules, and capable of being read as a permissive direction." *Natt*, 299 So. 3d at 609. That holding may be an outlier—for now, at least—but it has the advantage of being right. This Court should affirm and allow the Does' case to proceed at the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on all counsel in the Service List below on this 9th day of July 2021.

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I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the

word limitation requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B). This brief contains 11646 words.

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