**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC20-1167
L.T. CASE NO. 2D19-1383
L.T. CASE NO. 412018CA002203CAAXMA

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AIRBNB, INC.,
PETITIONER,

v.

JOHN DOE AND JANE DOE,
RESPONDENTS.

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# AMICUS CURIAE BRIEF OF THE MIAMI INTERNATIONAL ARBITRATION SOCIETY IN SUPPORT OF THE POSITION OF THE PETITIONER, AIRBNB, INC.

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## PREFACE

The Miami International Arbitration Society ("MIAS") submits this amicus brief having been granted leave to do so under Florida Rule of Appellate Procedure 9.370(a) pursuant to the Court's Order dated May 10, 2021.

## INTEREST OF AMICUS

MIAS promotes international arbitration and mediation as well as parties' selecting Miami and Florida as the situs for international arbitration proceedings related to resolving cross-border commercial and investment disputes. Comprised of arbitrators, practitioners, and law firms, MIAS includes former Florida appellate judges, globally recognized arbitrators and practitioners, and academics.

MIAS works to maintain and enhance the extensive infrastructure developed by the Florida Legislature and the Florida Courts to encourage parties engaging in international arbitration to select Florida as the venue and provides a forum for the international arbitration community to exchange ideas and information.

## SUMMARY OF THE ARGUMENT

The Second District Court of Appeal held that a contract's arbitration provision's adoption of arbitration rules that expressly grant the arbitrator authority to decide his or her own jurisdiction does not constitute "clear and unmistakable" evidence that the parties intended to empower the arbitrator to do just that. In this regard, the Second District is virtually alone, not only in Florida, but throughout the country.

By its own admission, the district court's decision stands contrary to almost every court – both Federal and State – that has addressed the issue.[1] If allowed to stand, the district court's decision would decrease legal stability and predictability, undermine parties' expectations when entering into arbitration agreements, and make the arbitration process far less efficient and more costly. As a result, it would have a chilling effect on arbitration in Florida and fundamentally undermine decades of legislative and judicial efforts aimed at making arbitration a viable alternative to litigation in Florida.

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[1] *See Doe v. Natt*, 299 So. 3d 599, 607 (Fla. 2d DCA 2020) ("We recognize that our decision may constitute something of an outlier in the jurisprudence of arbitration.")

The Court should reverse the opinion of the Second District Court of Appeal and hold that adopting arbitration rules which empower the arbitrator to decide his or her own jurisdiction constitutes "clear and unmistakable" evidence that the parties agreed to arbitrate arbitrability.

## ARGUMENT

### I. Incorporating Arbitration Rules that Delegate to the Arbitrator the Power to Decide His or Her Own Jurisdiction is the Clear Majority Rule.

In their Initial Brief, Petitioners have provided the Court with an exhaustive overview of the Federal and State courts that have addressed the very same question at the core of this case. On nearly identical facts, virtually every court that has considered this issue has decided that by expressly agreeing to arbitration rules that include such an unambiguous delegation of authority to the arbitrator to decide his or her own jurisdiction, the parties have agreed that the arbitrator and not a court would do so.

Within Florida, the Third, Fourth, and Fifth District Courts of Appeal have taken this view based on exactly the same arbitration

rules in this case – the AAA Rules.[2] The Federal Circuit Courts of Appeals, including the Eleventh Circuit, also are nearly unanimous in this view.[3] The Sixth Circuit's analysis in its recent decision in

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[2] *See, e.g., Miami Marlins, LP v. Miami-Dade Cnty.*, 276 So. 3d 936 (Fla. 3d DCA 2019) ("[T]his AAA rule makes the arbitration panel the gateway for determinations regarding arbitrability."); *Younessi v. Recovery Racing, LLC*, 88 So. 3d 364, 365 (Fla. 4th DCA 2012) ("Where language of the contract clearly indicates that AAA rules govern, they are expressly incorporated into the contract."); *Reunion W. Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1280 (Fla. 5th DCA 2017) ("[T]he parties' contract expressly incorporates the [AAA ]Construction Industry Arbitration Rules, and those rules provide that the arbitrator is authorized to rule on the arbitrability of the instant contract."); *but cf. Fallang Fam. Limited Partnership v. Privcap Companies,* Case No. 4D20-548, 46 Fla. L. Weekly D639e (Fla. 4th DCA Mar. 2021) (generally adopting but distinguishing *Doe v. Natt* and limiting *Younessi*).

[3] *See, e.g., Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) ("These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction."); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("[T]he incorporation [of arbitration rules] serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *Petrofac, Inc. v. DynMcDermott Petroleum*, 687 F. 3d 671, 675 (5th Cir. 2012) ("[T]he express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Blanton v. Domino's Pizza Franchising LLC*, 962 F. 3d 842, 846 (6th Cir. 2020) ("[T]he AAA Rules . . . provide[] clear and unmistakable evidence that the parties agreed to arbitrator arbitrability."); *Fallo v. High-Tech Inst.*, 559 F. 3d 874, 880 (8th Cir. 2009) ("[T]he parties' incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer that question."); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("[I]ncorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence

*Blanton v. Domino's Pizza Franchising LLC*, 962 F. 3d 842, 846 (6th Cir. 2020), thoroughly examines the landscape and noted, with particular reference to the AAA Rules, that "every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."[4] In the face of this broad consensus, the Second District cited only one decision of an intermediate appellate court in California in support

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that the parties agreed to arbitrate arbitrability."); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1290 (10th Cir. 2017) ("a finding of clear and unmistakable intent to arbitrate arbitrability . . . may be inferred from the parties' incorporation in their agreement of rules that make arbitrability subject to arbitration."); *Terminix Intern. Co. LP v. Palmer Ranch Ltd. P'ship*, 432 F. 3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); *Qualcomm Incorporated v. Nokia Corp.*, 466 F. 3d 1366 (Fed. Cir. 2006) ("We . . . conclude that [incorporating] the AAA Rules . . . clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator.").

[4] *Blanton*, 962 F. 3d at 846 (internal quotations omitted).

of its position.[5] Amici are aware of only four other state courts that have adopted this contrary view.[6]

The district court's decision is an outlier and contradicts the broad consensus that has emerged on this issue among the courts in Florida throughout the United States. Adopting this minority view would make Florida an outlier as well, in the company of only a few other states, and would create significant confusion by requiring State courts to adopt a wholly different approach than Federal courts in Florida based on a contradictory interpretation of the very same legal concept.

## II. Parties Rely on the Incorporation Doctrine in Arbitration Clauses.

Given the uniformity of decisions on point, parties now justifiably expect that incorporation by reference of institutional rules will be found to constitute "clear and unmistakable" evidence

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[5] *See Doe*, 299 So. 3d at 607 (citing *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 137 Cal. Rptr. 3d 773, 790 (Cal. Ct. App. 2012)).

[6] *Glob. Client Sols., LLC v. Ossello*, 367 P.3d 361, 369 (Mont. 2016); *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1181-82 (N.J. 2016); *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005); *Fallang Fam. Limited Partnership v. Privcap Companies,* Case No. 4D20-548, 46 Fla. L. Weekly D639e (Fla. 4th DCA Mar. 2021).

of their agreement to delegate threshold questions of arbitrability to an arbitrator.

### a. Courts Consistently Rely on Uniformity on This Issue.

In holding that incorporation of institutional rules constitutes clear and unmistakable evidence of delegation, many, if not most, courts reference the nationwide state of the law on this issue. For example, as recently as January of this year, the District of Massachusetts explained that, "[a]lthough the Supreme Court has not taken a position on whether the incorporation of the AAA's rules is clear and unmistakable evidence of intent to delegate arbitrability, the federal courts of appeals . . . have consistently (and recently) concluded that it does."[7] The court expanded on this point further in a footnote, noting that, after the Fifth Circuit decided on remand in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019):

> Both parties sought further Supreme Court review, Schein regarding the Fifth Circuit's holding with respect to the contractual carve-out provision, and Archer and White regarding whether incorporation

[7] *In re: Intuniv Antitrust Litig.*, Civil Action No. 1:16-cv-12653-ADB, 2021 U.S. Dist. LEXIS 26012, at *13-14 (D. Mass. Jan. 29, 2021).

> of the AAA's rules is clear and unmistakable evidence of intent to arbitrate arbitrability. The Supreme Court [initially] granted Schein's petition, but denied Archer and White's, *suggesting that it was not troubled by the state of the law regarding the significance of incorporating the AAA's rules*.[8]

Federal and state courts across the country routinely make observations like the foregoing in adopting the delegation principle.[9]

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[8] *Id.* at *36 (emphasis added) (citations omitted).

[9] *See, e.g.*, *Promptu Sys. Corp. v. Comcast Corp.*, No. 2:16-cv-06516, 2017 U.S. Dist. LEXIS 217378, at *12 (E.D. Pa. May 18, 2017) (applying Delaware law) ("[Plaintiff's] argument [that the parties did not explicitly agree to send the issue of arbitrability to the arbitrator] is undercut by the weight of authority at the time of contract concluding that incorporation of the AAA rules is sufficient to establish clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Diverse Enters., Co., LLC v. Beyond Int'l, Inc.*, No. SA-16-CV-1036-RCL, 2017 U.S. Dist. LEXIS 156967, at *13-14 (W.D. Tex. Sep. 22, 2017) ("Most federal courts have held that the 'clear and unmistakable' standard is met 'when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability.'"); *Way Servs., Inc. v. Adecco N. Am.*, LLC, No. 06-CV-2109, 2007 U.S. Dist. LEXIS 44206, at *15, *17 (E.D. Pa. June 18, 2007) ("[T]he prevailing rule across jurisdictions is that incorporation by reference of rules granting the arbitrator the authority to decide questions of arbitrability--especially the AAA rules--is clear and unmistakable evidence that the parties agreed to submit arbitrability questions to the arbitrators."); *Ali v. Vehi-Ship*, No. 17 CV 02688, 2017 U.S. Dist. LEXIS 194456, at *9 (N.D. Ill. Nov. 27, 2017) ("The 'consensus view' of federal case law is that the incorporation by reference of the AAA Rules is clear and unmistakable evidence of an intention to arbitrate arbitrability."); *Terra Holding GmbH v. Unitrans Int'l, Inc.*, 124 F. Supp. 3d 745, 748 (E.D. Va. 2015) ("[I]t appears from well-reasoned opinions in other circuits that the 'clear and unmistakable' standard is met when, in

The significance of this is at least twofold. First, it serves to impress upon the reader that the law on this point is settled to a critical degree. Second, it suggests that unanimity on the issue is such that even those courts that have not had a chance to address it feel comfortable deferring to the overwhelming majority rule.[10] Both points convey to parties drafting their arbitration clauses that they can securely delegate arbitrability determinations to the arbitrator simply by incorporating suitable institutional rules.

In fact, at least one of the federal circuits explicitly has recognized the impact that uniformity on this issue has had on parties' expectations:

> The real issue [is] . . . how the parties would have understood [the AAA's jurisdictional rule] in 2018 (when [Plaintiff] signed his agreement). At that time, almost every circuit court in the country—including [Plaintiff's] local regional circuit—had held that this rule or similar ones gave arbitrators the exclusive

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addition to the expansive language, an arbitration clause incorporates a specific set of rules that authorize arbitrators to determine arbitrability.").

[10] *See, e.g., James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("As a matter of policy, we adopt the majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator. We do so in the belief that Delaware benefits from adopting a widely held interpretation of the applicable rule, as long as that interpretation is not unreasonable.").

> authority to arbitrate "arbitrability." Washington law pointed to the same conclusion. As did the plain text of the rule itself. ***It's often said that parties bargain in the shadow of the law. To adopt a different understanding of the rule now would deprive countless parties of the benefit of their bargain.***[11]

As a result, to diverge from the clear consensus view would not merely make Florida an outlier, but would also disrupt the clear expectations of parties based on this consensus.

#### b. Practical Resources Advise That Incorporation by Reference Meets *First Options*.

In light of the foregoing, it is unsurprising that practical resources now consistently advise that incorporation by reference of applicable institutional rules likely suffices to delegate the arbitrability determination to arbitrators. For instance, Lexis' Practical Guidance article on *Arbitrability in U.S. Arbitration* explains that "[a]rbitrators most commonly decide th[e] issue [of whether a court or arbitration panel should determine the arbitrability of a particular dispute] when: [t]he parties' agreement includes a delegation clause . . . [or] [t]he designated arbitration

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11 *Blanton*, 962 F.3d at 850 (emphasis added) (citations omitted).

rules say so."[12] The article expands on this point by noting that "[i]n the absence of a delegation clause demonstrating the parties' intent, arbitrators also may decide arbitrability if the designated arbitration rules so provide."[13] Similarly, Westlaw's Practical Law practice note explains that "[c]ourts generally hold that parties clearly and unmistakably intend to have the arbitrator decide arbitrability issues if the parties' arbitration agreement provides for the arbitral proceedings to be conducted under institutional arbitration rules that confer this power on the arbitrator."[14]

Notably, some law firms now offer comparable advice on their websites. Consider, for instance, the following guidance provided by one law firm to its clients:

> If the parties want an arbitrator to decide the arbitrability of a dispute: 1) write that into the arbitration clause (best choice), or 2) include in the arbitration clause that an arbitration organization's rules authorizing the arbitrator to decide the arbitrability of disputes are the governing rules of arbitration (second best choice).[15]

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12 Available at: https://plus.lexis.com/api/permalink/d932c33c-64b8-49cf-987b-eabc33cb024c/?context=1530671.

13 *Id.*

14 Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator, Practical Law Practice Note w-005-0556.

15 Robert K. Cox, *When Your Contract Includes an Arbitration Clause: Who Decides the Arbitrability of the Dispute?*, WILLIAMS MULLEN (July 27, 2018), https://www.williamsmullen.com/news/

Other law firm guidance similarly observes that "[g]enerally, incorporation of the [AAA] Rules . . . delegates authority to the arbitrator to make determinations on arbitrability."[16] Additional secondary sources, like law review articles, are to the same effect.[17]

### c. A Contrary View Will Affect Thousands of Contracts.

It is in this legal environment that parties commonly draft arbitration clauses that incorporate institutional rules by reference. By way of example, the website terms and conditions of use of

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when-your-contract-includes-arbitration-clause-who-decides-arbitrability-dispute.

[16] John D. Huh & Scott M. Vernick, *Supreme Court Will Tackle Issue of Who Determines Arbitrability When a Dispute Involves Arbitration Carveouts*, DLA PIPER (June 18, 2020), https://www.dlapiper.com/en/us/insights/publications/2020/06/supreme-court-will-tackle-issue-of-who-determines-arbitrability.

[17] *See, e.g.*, Cornelis J.W. Baaij, *Liberal Justice and the Creeping Privatization of State Power*, 67 DRAKE L. REV. 561, 594-595 (2019) ("Parties can agree to send the arbitrability question to arbitration only if they do so 'clearly and unmistakably,' . . . . This standard of proof is relatively low. A common arbitration clause incorporating or referencing, for example, the American Arbitration Association (AAA) Arbitration Rules suffices."); Bruce E. Meyerson, *Arizona Adopts the Revised Uniform Arbitration Act*, 43 ARIZ. ST. L.J. 481, 492 (2011) ("[B]y adopting the AZ-RUAA and incorporating the AAA Commer[ci]al Rules in an arbitration agreement, parties have agreed that arbitrability issues will be decided by the arbitrator.").

major companies like Walmart,[18] CVS Health,[19] and Home Depot[20] all do so. Given the uniformity of the authorities on point, to hold that incorporation by reference of institutional rules does not constitute "clear and unmistakable" evidence of parties' intent to delegate questions of arbitrability to an arbitrator will undermine thousands of settled agreements.

## III. Courts Should Respect the Expectations of the Parties to an Arbitration Agreement.

It is fundamental to the common law of contracts throughout the United States that protecting the expectations of the parties to a contract at the time of contracting is paramount. The federal Third Circuit has explained:

> Protection of the justified expectations of the parties is the basic policy underlying the field of contracts. When the validity of a contractual provision is at stake, the parties' expectations should be measured from their vantage point at the time of contracting, because parties entering a contract will expect at the very least, subject perhaps to rare exceptions,

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[18] *Walmart.com Terms of Use*, WALMART, https://www.walmart.com/help/article/walmart-com-termsofuse/f25b207926d84d79b57e6a e2327bbf12 (last visited May 19, 2021).

[19] *CVSHealth.com: Notice of Terms of Use*, CVS HEALTH, https://cvshealth.com/ terms-of-use (last visited May 19, 2021).

[20] *Customer Support: Terms of Use*, HOME DEPOT, https://www.homedepot.com/c/Terms_of_Use (last visited May 19, 2021).

> that the provisions of the contract will be binding upon them. Their expectations should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied.[21]

In particular, when parties enter an arbitration agreement, they have the justified expectations at the time of contracting of efficient, timely, and cost-effective resolution of any disputes that may arise. The California Supreme Court summarized the increased time and cost that subverting this expectation could impose on parties:

> . . . to resolve the "who decides" question in favor of a court would contravene that expectation and impose substantial additional cost and delay, requiring the parties to stay matters before the arbitrator, proceed to a courthouse for a construction of their arbitration agreement, perhaps continue through appellate review of that construction, and only then return back to arbitration for further dispute resolution . . . . [R]eferring preliminary issues to the courts can cause serious delay and confusion, thus robbing the

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[21] *Pac. Employers Ins. Co. v. Global Reinsurance Corp. of Am.*, 693 F.3d 417, 438 (3d Cir. 2012) (internal citations and quotations omitted); *see also Powell v. Mactown, Inc.*, 707 So. 2d 825, 827 (Fla. 3d DCA 1998) ("Now well established in Florida law is the principle that contract law protects expectations.").

> arbitration procedure of much of its value to the parties.[22]

The highest courts of several states have taken the strict position of honoring the expectations of parties to an arbitration agreement.[23]

Since the U.S. Supreme Court opinions in *Stolt-Nielsen* in 2010 and *Concepcion* in 2011, the federal standard has been to respect the expectations of parties to an arbitration agreement:

> Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. ... In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution.[24]

After all, the backbone principle of both *Stolt–Nielsen* and *Concepcion* is that courts and arbitrators must "give effect to the

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[22] *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233, 246–47 (Cal. 2016) (internal citations and quotation marks omitted).

[23] *See, e.g.*, *Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161, 1169 (Ala. 2010) ("[C]ourts must rigorously enforce contracts, including arbitration agreements, according to their terms in order to give effect to the contractual rights and expectations of the parties."); *Cty. of Hawaii v. UNIDEV, LLC*, 129 P.3d 378, 394–95 (Haw. 2013) ("What issues, if any, are beyond the scope of a contractual agreement to arbitrate depends on the wording of the contractual agreement to arbitrate.").

[24] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682–83 (2010) (internal quotations omitted).

contractual rights and expectations of the parties."[25] Accordingly, courts routinely respect the expectations of the parties to an arbitration agreement. In one Eleventh Circuit case in 2014, the court ordered the transfer of venue to a Native American tribe where the forum-selection clause clearly manifested the parties' intent:

> The parties to the agreement . . . have exercised their right to structure their arbitration agreements as they see fit, by way of choosing who will resolve specific disputes between them. It falls on courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.[26]

Similarly, the District Court for the District of Columbia compelled arbitration due to the parties' showing their expectation of arbitration of *all* disputes (including arbitrability) by virtue of their

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[25] *Yahoo! Inc. v. Iverson*, 836 F. Supp. 2d 1007, 1013 (N.D. Cal. 2011) (quoting *Stolt–Nielsen,* 130 S. Ct. at 1773–74). Of course, even before *Stolt-Nielsen*, federal courts regularly honored parties' expectations in the context of an arbitration clause. *See, e.g., XL Capital, Ltd. v. Kronenberg*, 145 F. App'x 384, 385 (2d Cir. 2005) (affirming denial of a motion to stay arbitration before the AAA and to compel referral of the dispute to an accounting firm, on the grounds of the agreement to arbitrate).

[26] *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1352 (11th Cir. 2014) (citing *Stolt–Nielsen,* 559 U.S. at 683; *Doe v. Princess Cruise Lines, Ltd.,* 657 F.3d 1204, 1214 (11th Cir. 2011)).

executing the arbitration agreement.[27] Many Florida courts have agreed, delegating the arbitrability issue to the arbitrator according to the parties' agreement.[28]

The Second District's decision departs from the consensus of federal courts and other state courts in honoring the expectations built up over time as to the effectiveness of arbitration agreements. The decision goes against the accepted common law of contracts in thwarting the expectations of parties who entered arbitration agreements expecting the efficiency and affordability of arbitration, without unnecessary delays and expenses from entanglements in the courts.

## IV. Florida Has an Interest in Arbitration and Particularly International Arbitration.

A wide swath of business interests throughout Florida benefit from and rely on our state's favorable policy toward arbitration. This Court, in accord with the United States Supreme Court, has long followed the view that "[a]rbitration is a valuable right that is inserted into contracts for the purpose of enhancing the effective

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[27] *Haire v. Smith, Currie & Hancock LLP*, 925 F. Supp. 2d 126, 133 (D.D.C. 2013).

[28] *See Reunion W. Dev. Partners*, 221 So. 3d at 1278; *Rintin Corp., S.A. v. Domar, Ltd.*, 766 So. 2d 407 (Fla. 3d DCA 2000).

and efficient resolution of disputes . . . [and] [a]rbitration provisions are generally favored by the courts."[29]

Florida has traditionally offered to arbitration users all the hallmarks of an ideal seat of arbitration: (i) a hub of capable lawyers and arbitrators, (ii) geographic accessibility, (iii) a well-developed body of substantive and procedural law in commercial matters, and crucially, (iv) an independent judiciary that respects party autonomy and procedural efficiency. As a result, arbitration users have flocked to Florida as a preferred seat of arbitration for cross-border disputes. After New York, Miami is the second most often selected city in the United States for arbitrations administered by the International Chamber of Commerce. Likewise, the International Centre of Dispute Resolution (i.e., the international arm of the American Arbitration Association) maintains a permanent office in Miami, has administered between 100 and 200

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[29] *Raymond James Financial v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (citing *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla.1999)); *see also AT&T Technologies, Inc. v. Communications Workers*, 475 US 643, 653 (1986) (confirming that "congressional policy" has made "arbitration the favored method of dispute resolution").

hearings in Miami, and describes the city as the "preferred venue for Latin American international arbitrations."[30]

Local business and the Florida legal community have capitalized on these advantages. In December 2013, the Eleventh Judicial Circuit announced the creation of an International Commercial Arbitration Court with specialist judges and dedicated exclusively to hearing international commercial arbitration matters. As explained in the circuit's press release, the court was established because of "Miami's important role in the business community as gateway to the Americas and the need for such a court to handle disputes arising from international business matters."[31]

The Second District Court of Appeal's decision threatens Florida's standing as an international arbitration center. It would throw thousands of executed arbitral agreements under Florida law that relied on express references to arbitration rules into flux. Parties will flood court dockets with parallel proceedings to resolve arbitrability issues, which an arbitrator would ordinarily decide

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[30] *See* Daniel E. Vielleville, *Key Aspects of Miami as a place for international arbitrations*, Financier Worldwide (Oct. 2016).

[31] Media Advisory, *Eleventh Judicial Circuit Establishes International Commercial Arbitration Court*, Eleventh Jud. Cir. of Fla. (Dec. 17, 2013).

under the majority rule. If left undisturbed, it would make Florida's approach to this critical threshold question anomalous. As a result, arbitration users will view Florida unfavorably when selecting a place of arbitration in their agreements. This loss of standing would damage various interests in our state as arbitration users flee to more arbitration-friendly jurisdictions to resolve their disputes.

## CONCLUSION

For these reasons, the Miami International Arbitration Society respectfully request the Court reverse the Second District Court of Appeal and hold – in line with virtually every court that has addressed this issue – that adopting arbitration rules that empower the arbitrator to decide his or her own jurisdiction constitutes "clear and unmistakable" evidence that the parties agreed to arbitrate arbitrability.

Respectfully submitted this 27th day of May, 2021.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a), undersigned counsel hereby certifies that the foregoing Motion is submitted in Bookman Old Style 14-point font and contains 4,352 words.

s/ Harout J. Samra
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by electronic mail to all counsel of record on this 27th day of May 2021.

s/ Harout J. Samra
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