No. 20-55432

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMAZON.COM, INC. and A2Z DEVELOPMENT CENTER, INC.,

Appellants,

v.

HAYLEY TICE,

Appellee.

Appeal from an Order of the United States District Court
for the Central District of California
Case No. 5:19-cv-01311, Hon. Stephen V. Wilson

OPENING BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellant Amazon.com, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. Defendant-Appellant a2z Development Center, Inc. no longer exists as a separate entity, and has been succeeded by Amazon.com Services LLC, a subsidiary that is ultimately wholly owned by Amazon.com, Inc.

Date: July 16, 2020

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

STATUTES

RULES

INTRODUCTION

Plaintiff filed this action to challenge the lawfulness of the recording functions of Amazon's voice-activated Alexa service. As the district court recognized, Plaintiff is bound by a "facially valid arbitration clause," and "clearly and unmistakably" delegated to the arbitrator all questions regarding arbitrability and the scope of the arbitration clause. Amazon therefore moved to compel arbitration, and the district court correctly granted that motion with respect to the bulk of Plaintiff's claims. But the court refused to compel arbitration with respect to one aspect of Plaintiff's indivisible claims challenging the Alexa service. That was legal error. The Federal Arbitration Act ("FAA"), and consistent Supreme Court interpretations of the FAA, required the district court to enforce the parties' agreement as to the entirety of Plaintiff's claim. On *de novo* review, this Court should reverse that part of the district court's decision that denied arbitration.

The Alexa service is Amazon's voice-activated service that enables myriad informative, entertaining, and convenient features. At a user's request, among many other features, the Alexa service can play music, control household devices, provide useful information from many sources, and make online shopping easier. To use the Alexa service, a user speaks a "wake word," typically "Alexa," to activate an Alexa-enabled device, and then gives a voice command, like "Alexa, play Taylor Swift." Amazon discloses to the public that the Alexa service securely streams the user's

voice to the Amazon cloud after the device detects the wake word—clearly explaining that recording is necessary for a computer to translate and process the command—and that it retains those recordings until the user chooses to delete them. The device visually or audibly signals to the user that a recording is in progress. And users may review, listen to, and delete their recordings at will. In December 2016, Plaintiff's husband purchased an Alexa-enabled Amazon Echo Dot device, registered and activated the device, downloaded the Alexa app, and placed the Echo Dot in Plaintiff's home to be used and enjoyed by the family. Plaintiff concedes that she voluntarily and regularly used the family's Echo Dot device to obtain the benefits of the Alexa service.

To obtain the benefits of the Alexa service, users must agree to service-specific Alexa Terms of Use. These incorporate Amazon's general Conditions of Use, to which users of all Amazon services (e.g., online shopping) must agree. The Conditions of Use provide for arbitration of "any" dispute concerning "any" Amazon product or service, not excluding Alexa, and that the rules of the American Arbitration Association ("AAA") will govern. The AAA rules delegate arbitrability questions, including whether a given dispute is subject to arbitration, to an arbitrator. Plaintiff concedes that her husband agreed to the Alexa Terms of Use, and also concedes that she has repeatedly assented to the Amazon Conditions of Use when accessing and enjoying Amazon services.

And yet, despite enjoying her family's Echo Dot for years, and notwithstanding Amazon's disclosures about how the Echo functions and the devices own cues when it starts recording, Plaintiff now claims that the Alexa service's recording functionality is unlawful because, she claims, she was unaware of it. Her allegations primarily focus on recordings made after she or someone in her home intentionally activated the Alexa service with the wake word and gave the Alexa service a specific voice command that they expected the service to process and follow. The district court properly found that those claims must be arbitrated, emphasizing the parties' agreement to delegate to the arbitrator any questions about arbitrability or the scope of the arbitration clause. In just one paragraph of her Complaint, Plaintiff alleges that the Alexa service might "sometimes" record voices when no one has spoken the wake word, although she does not allege that any such recordings were ever made of her own voice. This is not a secret or mysterious phenomenon: Amazon calls it "accidental wake-up" or a "false wake," and describes it in detail on Amazon's website. It occurs when the Alexa service believes it has detected the wake word but subsequently determines that detection was, or might have been, in error, and stops recording. The district court dubbed those accidental wakes "surreptitious recordings," apparently based on the misapprehension that recordings absent a wake word might ever occur *other* than by mistake, and that a user would be unaware of them. In fact, with an accidental wake of an Alexa-

enabled device, the user receives the same cues that the device is recording as she would with a deliberate activation of the device, and the user can also see that the accidental wake occurred and delete the recording.

Despite having correctly found that the parties agreed to delegate questions of arbitrability—indeed, having already enforced that agreement by delegating Plaintiff's background recording claims—the district court refused to compel arbitration of Plaintiff's "surreptitious recording" claim. Exercising discretion that the FAA intentionally withholds from courts, the court ignored the parties' agreement to delegate with respect to the "surreptitious recording" claim. That was error. Under the FAA and consistent Supreme Court precedent, a trial court must compel arbitration when a valid agreement to arbitrate exists. And when the parties have delegated questions of arbitrability to an arbitrator, the court has no discretion to refuse to enforce the arbitration agreement: it must compel arbitration even if the court finds the argument for arbitrability "wholly groundless."

Even if the parties had *not* agreed to delegate all issues of arbitrability to the arbitrator, the court still should have compelled arbitration of the "surreptitious recording" claim because it is plainly within the scope of the arbitration agreement. The court's refusal to do so was also error, for at least three reasons. First, this claim about how and when the Alexa service records voices is not "outside" the scope of the parties' agreement to arbitrate. Because that agreement covers "any dispute"

related to the Alexa service, and the Alexa service depends technologically and by its terms on voice-activation and recording, Plaintiff's claim makes sense only in the context of the parties' agreement. Second, Plaintiff's claim is arbitrable notwithstanding that it is potentially "criminal in nature," as the court described it. Unless an express provision exempts a specific claim, or the challenger presents "the most forceful evidence" of the parties' intent to exclude it from the scope of an arbitration agreement, the FAA requires arbitration of all claims, even if they involve possibly criminal conduct.

Third, the FAA forbids a court from declaring an agreement unconscionable, and therefore unenforceable, merely because it permits arbitration of causes of action that the court would prefer to see litigated. The district court obviously did not find the arbitration clause unconscionable, having enforced it as to Plaintiff's other claims, but suggested that the agreement "would be" unconscionable if applied to the "surreptitious recording" claim. That was further error: it disfavored arbitration, and privileged litigation, in violation of the FAA.

This Court should reverse.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this action under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), and under 9 U.S.C. § 4, because (1) the combined claims of the putative class exceed $5,000,000, (2) Amazon and at

least one class member are domiciled in different states, and (3) there are at least 100 proposed class members. ER329 at ¶ 6; ER337 at ¶ 36.

In an order dated March 25, 2020, the district court granted in part, and denied in part, Amazon's motion to compel arbitration. ER001–07. Amazon timely noticed its appeal on April 17, 2020. ER100–11; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B), which provides for immediate interlocutory appeal of a district court's denial of a motion to compel arbitration. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1117 (9th Cir. 2008).

ISSUES PRESENTED

(1) Whether, in a case governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, where the district court found that Plaintiff was bound to a facially valid arbitration clause that delegated all questions of arbitrability to the arbitrator, the court erred by ruling on the arbitrability of one part of Plaintiff's claim, rather than enforcing the parties' agreement to delegate that issue to the arbitrator.

(2) Whether, even in the absence of an agreement to delegate questions of arbitrability, the district court erred by failing to compel arbitration of a claim unavoidably related to the Alexa service and Alexa-enabled devices, where the arbitration clause covers "any dispute" relating to the Alexa service, and where the FAA requires arbitration even of claims involving criminal or other allegedly egregious conduct.

ADDENDUM TO BRIEF

Pertinent rules are in the addendum attached to this brief. *See* Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. Amazon And Its Alexa Service.

Amazon operates an online store at www.amazon.com, through which customers may purchase countless different Amazon and third-party products and services. ER193 at ¶ 3; ER173 at ¶ 2. Amazon also operates the Alexa Voice Service ("Alexa" or the "Alexa service"), which gives users voice-command access to various Amazon services and "Alexa Skills." ER173–74 at ¶¶ 2–3. Alexa Skills are applications that enable voice command of household functions (e.g., lights, thermostats), provide weather or other information, play games, deliver news, set calendar reminders, and the like. ER173–74 at ¶ 3.

Amazon offers the Alexa service through many means, including Amazon Echo and Echo Dot smart speakers and Fire TV devices. ER173 at ¶ 2; ER370 at ¶¶ 2–3. To activate the Alexa service, users speak a "wake word," typically "Alexa," and then dictate their commands to the device—e.g., "Alexa, play The Rolling Stones." ER173 at ¶ 2. When the device detects the wake word, it transmits the commands to the Alexa service in the cloud for translation and processing, and to generate a response. *Id.*; *see also* ER331 at ¶ 13.

B. Amazon Users Must Agree To Conditions Of Use, Which Include Agreements To Arbitrate All Service-Related Disputes.

Assent to Amazon's Conditions of Use ("COU") is a mandatory feature of a customer's relationship with Amazon. Prospective customers must agree to the COU before their first use of an Amazon service. ER193–94 at ¶ 4. Customers also re-assent to the COU each time they register an Amazon device, ER194 at ¶ 4, and, as a condition of completing the transaction, each time they make a purchase, ER198–99 at ¶¶ 24–26; ER320–26.

The COU define Amazon Services broadly:

> website features and other products and services [that Amazon provides] to you when you visit or shop at Amazon.com, use Amazon products or services, use Amazon applications for mobile, or use software provided by Amazon in connection with any of the foregoing . . . .

ER202. They inform users that Amazon "offer[s] a wide range of Amazon Services, and that sometimes additional terms may apply." *Id.*

The COU include an agreement to arbitrate all disputes regarding Amazon services or products (the "Arbitration Clause"). ER196 at ¶ 10. The Arbitration Clause reads as follows, all emphases in original:

> **DISPUTES**
>
> **Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court**, except that you may assert claims

> in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.
>
> **There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of these Conditions of Use as a court would.**
>
> To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to our registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, WA 98501. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes. The AAA's rules are available at www.adr.org or by calling 1-800-778-7879. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous. You may choose to have the arbitration conducted by telephone, based on written submissions, or in person in the county where you live or at another mutually agreed location.
>
> **We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated, or representative action. . . .**

Id.; *see also* ER245.

The Arbitration Clause references the AAA four times, and it provides two

different means, including the AAA's URL, for accessing the AAA rules that are incorporated into the clause by reference. *Id*. The incorporated AAA rules direct that an arbitrator, not a court, will decide all threshold arbitrability issues, such as whether a given dispute is subject to arbitration, and the agreement's enforceability:

> 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 to the arbitrability of any claim or counterclaim.

AAA Consumer Arb. Rule R-14(a) (2014).

C. Alexa Users Also Assent To The Arbitration Procedures In The Amazon COU.

To activate the Alexa service, a user must have an Amazon account, and so have already agreed to the Amazon COU, including the Arbitration Clause. ER174 at ¶ 4; *see also* ER332 at ¶ 16. The user must then link an Alexa-enabled device to that Amazon account as part of the registration process. ER174 at ¶ 4; *see also* ER332 at ¶ 16. In doing so, the user must also agree to separate, Alexa-specific Terms of Use ("TOU"). ER1; *see also* ER174–77 at ¶¶ 5–9. The TOU reaffirm the parties' commitment to arbitration as described in the COU, expressly and by hyperlinked reference to the COU (all emphases in the original):

> **Disputes/Binding Arbitration. Any dispute or claim arising from or relating to this Agreement or Alexa is subject to the binding arbitration, governing law, disclaimer of warranties, limitation of liability, and all other terms in the Amazon.com Conditions of Use. By using Alexa, you agree to be bound by those terms.**

ER197 at ¶ 11, ER255 at § 3.6.

D. Plaintiff Is An Avid Amazon Customer.

Plaintiff registered as an Amazon accountholder in 2005, ER368, and she has made hundreds of separate purchases through her account since then. ER365–66 at ¶ 3; ER368. She has also registered for Amazon services, and used Amazon apps, on at least five different Amazon devices, including multiple Alexa-enabled Amazon Fire TVs and Fire TV Sticks. ER371–72 at ¶¶ 7–9. Amazon's Fire TV devices allow users to access Amazon services, including Alexa, on their televisions. ER370 at ¶ 3. Plaintiff "does not deny that she is an Amazon user, and has therefore agreed to Amazon's general COU . . . ." ER001. With each new device registration and every purchase, Plaintiff reaffirmed her understanding of and agreement to the COU. *See* ER193–94 at ¶ 4; ER198–99 at ¶¶ 24–26; ER319–26.

Plaintiff's husband also willingly enjoys the benefits of Amazon devices and services. On December 25, 2016, ER373, he registered an Alexa-enabled Echo Dot in Plaintiff's household, assenting, as required, to the TOU and COU. ER174–75 at ¶¶ 46; ER176–77 at ¶¶ 8–9; ER178–91. The district court found that he "undisputedly agreed to the Arbitration Clause in the Alexa TOU." ER001. Continuing her long-standing relationship with Amazon and its services, Plaintiff admits that she intentionally "used the Echo device [in her home] to communicate

with Alexa" by affirmatively speaking the "wake word" to activate it. ER335–36 at ¶¶ 27–29.

E. Amazon Clearly Conveys To Users That Voice Recordings Are Necessary For The Alexa Service To Function Properly.

Plaintiff acknowledges that she initiates a voice recording as part of Alexa's normal, intended operation: "Echo devices are voice-activated and are constantly listening in the owner's home for a 'wake word' which is set by default to 'Alexa.' If someone says the wake word, the device starts recording the user's voice and uploads the recording to Amazon's Alexa Cloud." ER331 at ¶ 13. "The cloud transcribes Alexa's voice recordings into text and translates the text into an 'intent' which is a standardized machine-compatible translation of the text." ER332 at ¶ 15. Plaintiff also acknowledges that users can easily manage and delete the recordings of the commands they give: "Amazon registered account holders can review, listen to, and delete voice recordings associated with their account using the Voice History feature available in the Alexa app and the Alexa Privacy Hub at www.amazon.com/alexaprivacy." ER334–35 at ¶ 23.

Amazon discloses the Alexa service voice recording functions to prospective and registered users even more thoroughly than these excerpts in Plaintiff's Complaint convey. The first time that a user signs into an Alexa mobile app or website, for example, the "Welcome to Alexa!" page informs her, in its first sentence, that "Amazon processes and retains audio, interactions, other data in the

cloud to provide and improve our services. . . . By clicking 'Continue', you agree to Amazon's Conditions of Use and all the terms found here." ER176–77 at ¶ 8 (blue hyperlink in original; underline added)]. The terms at the hyperlink reinforce that the Alexa service keeps voice recordings of the user, but also that a user can delete them:

> **1.3 Alexa Interactions.** You control Alexa with your voice. Alexa streams audio to the cloud when you interact with Alexa. Amazon processes and retains your Alexa Interactions, such as your voice inputs, music playlists, and your Alexa to-do and shopping lists, in the cloud to provide, personalize, and improve our services. Learn more about these voice services including how to delete voice recordings associated with your account.

ER262, 267, 273, 279, 285, 291, 297, 303, 309, 315 (emphasis added).

At the "Privacy Hub," the same website that Plaintiff cites in her Complaint, and which Amazon dedicates to Alexa-related privacy issues, Amazon explains that "you'll always know when Alexa is recording and sending your request to Amazon's secure cloud because a blue light indicator will appear or an audio tone will sound on your Echo device." ER065. In response to the large-type question, "How do I know when audio is being sent to the cloud?", the same site informs the user that, in addition to the blue light indicator, "[y]ou can also configure certain Echo devices to play a short audible tone any time audio is sent to the cloud." ER067. The page also explains *why* Amazon retains the voice recordings that users do not choose to delete (to improve the service), linking to more information about that topic should

the user require it. Under the large-type heading "Can I review and delete my voice recordings?", it details the many ways—through a website, by voice command, by date, and so on—in which a user can delete any (and all) recordings of her voice. ER067–68. These disclosures contradict Plaintiff's allegation that "one would naturally expect Alexa" to "delete a recording after Alexa acts on it." ER332–33 at ¶ 17.

Plaintiff conceded that "her husband consented to his voice being recorded by agreeing to the Alexa TOU," ER001 (emphasis added), and, again, that she herself has voluntarily activated the Alexa device in her home for purposes of using Amazon services, ER335–36 at ¶¶ 28–29.

F. There Is No Such Thing As A "Surreptitious" Alexa Service Voice Recording.

Plaintiff did not allege that Alexa makes "surreptitious recordings." That term does not appear in her Complaint, which treats all voice recordings together in each cause of action. *See* ER327–48; ER341–47 at ¶¶ 42–62. In her Opposition to Amazon's Motion To Compel Arbitration, ER145, 164, for the first time, Plaintiff tried to distinguish among different types of voice recordings, i.e., those associated with her own intentional use of Alexa, those associated with someone else's intentional use in her household, and those made in the absence of a valid wake word, ER149. Even then, Plaintiff did not use the term "surreptitious recordings" to refer to the third category—she claimed that all of Alexa's recording was

"surreptitious." ER145. The district court erroneously treated Plaintiff's Complaint as having pled three separate claims, which contributed to the court's unwarranted disaggregation of the dispute and, ultimately, to its refusal to submit what it called "surreptitious recording"—i.e., mistaken wake—claims to the arbitrator.[1]

With respect to recordings that occur in the absence of a valid wake word, Plaintiff's Complaint alleges only this:

> While Amazon represents that Alexa only records voices and communications once it is activated by its wake word, that is not true. Alexa is constantly listening to voices and conversations and sometimes records these conversations even without prompting by a wake word and the persons in the household have no way of knowing that Alexa is recording them.

ER331 at ¶ 14.

The first sentence of that scant paragraph acknowledges, again, that Amazon does disclose the practice of voice recording. But it misleadingly omits Amazon's disclosures about recordings that might occur "even without prompting by a wake word," suggesting that Amazon somehow keeps the possibility of such recordings a secret. To the contrary, Amazon discloses the accidental wake phenomenon, and how it can occur, in the Privacy Hub, which, again, Plaintiff incorporates into her Complaint, ER334–35 at ¶ 23:

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[1] In her Opposition brief, Plaintiff described *all* Alexa voice recordings as "surreptitious"—contradicting her admissions about Amazon's disclosures, ER145—but not to distinguish a particular type of recording. *Id.*

> **What's an accidental wake-up?** On some occasions, Alexa may wake up when no one has said the wake word. It's similar to when a person walking down the street turns their head when they hear what sounds like their name. Alexa may react the same way, misinterpreting audio that sounds like the wake word, but isn't. For example, you're talking to a friend and you say, "My neighbor just bought a Lexus convertible." There is a small chance that Alexa might incorrectly identify that as the wake word. (That's getting better, by the way. We are constantly improving our wake word detection technology.) To understand why there was an accidental wake-up, you can simply say, *"Alexa, why did you do that?"* and Alexa will explain why that happened. No surprises.

ER070. When the Alexa service "wakes up" accidentally in this way, a voice recording begins just as it would in ordinary operation. ER070–71. And, just as it does for an intentional-use recording, the Alexa device will always flash a blue light and, at the user's option, also provide a tone, to alert the user when a recording, accidental or intentional, begins. ER061 at ¶ 5; ER067, 070. Thus, it is not the case, as Plaintiff conclusorily alleges, that "persons in the household have no way of knowing that Alexa is recording them." ER331 at ¶ 14. And, as Plaintiff admits, users can "review, listen to, and delete" all voice recordings. ER334–35 at ¶ 23.

In short, accidental wakes are not "surreptitious." Amazon prominently tells users about voice recordings and accidental wakes, provides signals that recordings are in progress, and makes recordings available immediately for review and permanent deletion. Moreover, although Plaintiff alleges that the Alexa service has in fact recorded her voice when she or someone else in her home has intentionally

activated it, she does not allege a single recording of her voice following an accidental wake. ER335–36 at ¶¶ 28, 30. Given that Plaintiff can readily review and delete all recordings, this omission to plead any accidental wake recordings suggests that there are no such recordings.

G. Procedural History And The District Court's Rulings.

Plaintiff filed this putative class action on July 17, 2019, asserting four causes of action against Amazon and an affiliate, a2z Development Center, based on what she alleges to be unlawful voice recordings associated with Amazon's Alexa service. Plaintiff alleges that the voice recordings violate California Invasion of Privacy Act ("CIPA"), California Unfair Competition Law, common law invasion of privacy and unjust enrichment. ER001; ER341–45. Plaintiff seeks to represent a class comprising all adults in California whose voices were recorded by Alexa devices and who were not registered Alexa users. *Id.*

1. The District Court Grants Amazon's Motion To Compel Arbitration As To Intentional Use And Background Recordings, But Not As To "Surreptitious Recordings."

Amazon filed a Motion to Compel Arbitration on October 10, 2019. ER357. The court did not hold a hearing, ER112, and it issued its Order on March 25, 2020, ER360.

The district court disaggregated Plaintiff's allegations into three claims based on different types of recording: (1) those that result from Plaintiff's "intentional use"

of an Alexa-enabled device; (2) the "background recordings" of her voice that could occur when another person in Plaintiff's household intentionally used an Alexa enabled device; and (3) so-called "surreptitious recordings" that might occur if the Alexa service is activated accidentally (i.e., erroneously detects a wake word). ER002. As noted above (*supra*, section F), Plaintiff made no such distinctions in her Complaint, but in the court's view, "each of these three factual circumstances presents distinct legal issues." ER002.

The district court made three correct and crucial predicate rulings: (i) that Plaintiff, as a voluntary user of her household's Alexa device, was equitably estopped from challenging the terms of the COU and TOU; (ii) that the COU and TOU "contain facially valid arbitration clauses;" and (iii) that, by incorporating the AAA rules into the COU, the parties clearly and unmistakably delegated questions of arbitrability to an arbitrator. ER003, 005–06. From there, the court's analysis branched according to its grouping of Plaintiff's claims.

The court rightly compelled arbitration of Plaintiff's "intentional use" claims. ER003–06. In this part of its analysis, the court held that the TOU covers Plaintiff's "intentional use" claims because, as the spouse of the contracting party, who voluntarily availed herself of the Alexa service, Plaintiff was equitably estopped from contesting the application of the TOU: "Just as her husband would be bound to arbitrate claims related to his voluntary use of Alexa, Plaintiff must adhere to the

Alexa TOU for claims directly related to her voluntary usage." ER005.

Relying again on equitable estoppel, the court also compelled arbitration of Plaintiff's "background recording" claims. The court noted that she had argued that these claims "fall outside the scope of the Arbitration Clause, and the arbitrator should not be allowed to determine scope of the provision." *Id.* The court correctly rejected that argument, ruling that the parties' incorporation into the COU of the rules of the AAA was clear and unmistakable evidence of the delegation of arbitrability, that is, that the parties intended an "arbitrator to determine whether Plaintiff's second claim, the background recording of Plaintiff's conversation when a third-party activates Alexa in her house, is encompassed by the Arbitration Clause." ER006.

Notwithstanding its estoppel and delegation rulings, the district court refused to compel arbitration of Plaintiff's "surreptitious recording" claim, finding it "criminal in nature—far outside the bounds of both the Alexa TOU and Amazon COU." *Id.* Adopting Plaintiff's undifferentiated allegation as to all recording by the Alexa service, *see* ER335–36 at ¶¶ 26–31, the court described Amazon as "mak[ing] these recordings intentionally to collect data on its customers," ER002 (citing Complaint ER331).[2] It hypothesized that "[a] contract that allowed Amazon to

[2] Plaintiff's Complaint, by contrast never alleged that any recording absent a wake word occurred intentionally, rather than by mistake. ER331 at ¶ 14.

compel every possible claim, even criminal acts or those completely unrelated to the contract, into arbitration would be unconscionable as a matter of law." ER006.

Plaintiff has never argued that the Arbitration Clause, or the parties' delegation of arbitrability through the AAA rules, are unconscionable or otherwise unenforceable. In her Opposition to Amazon's Motion to Compel Arbitration, Plaintiff stated summarily that incorporation of the AAA rules by reference is ineffective against "unsophisticated" parties, but not that such incorporation is unconscionable. ER162–63. In a sentence and footnote at the very end of her Opposition brief, Plaintiff named types of unconscionability that one *might* argue to challenge an arbitration clause. ER164–65. But she did not attempt to apply those principles to the clauses at issue, and, in fact, she instructed the district court that it did not need to reach those issues. *Id*. The court acknowledged that Plaintiff had not briefed the unconscionability issue. And, by enforcing the parties' agreements with respect to intentional and background recordings, ER006, the court obviously did not find them unconscionable as a whole.

2. The District Court Grants Amazon's Motion To Stay The Case Pending Appeal.

On April 17, 2020, Amazon timely filed a Notice of Appeal with respect to that portion of the Order denying the Motion to Compel Arbitration of Plaintiff's alleged "surreptitious recording" claim. ER101. The same day, Amazon filed its Motion to Stay Case Pending Appeal. ER361. On May 14, 2020, the district court

stayed all proceedings, finding that Amazon had "raise[d] serious legal questions that are best addressed on appeal before the litigation proceeds." ER008. Plaintiff did not argue unconscionability in her Opposition to Amazon's Motion to Stay, ER009–42, passing for a third time on an opportunity to raise the issue.

SUMMARY OF THE ARGUMENT

By Congressional design, the FAA evinces a strong, even presumptive, policy in favor of arbitration for resolving disputes. It provides that the terms of arbitration agreements "shall be valid, irrevocable, and enforceable" with limited exception. 9 U.S.C. § 2. Agreements to arbitrate are matters of contract, and courts must "enforce them according to their terms." *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2010). The text of the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (internal citations and quotations omitted). The Supreme Court has interpreted the FAA's pro-arbitration policy very broadly: as shown below, where there is a valid arbitration clause, and the dispute at issue falls within its scope, or the parties have agreed to delegate arbitrability, courts have no discretion to refuse to compel arbitration. The district court erred in two primary respects:

First, under the FAA, parties may agree to delegate to an arbitrator "gateway" questions of arbitrability, including whether a given dispute falls within the agreement to arbitrate. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010).

When the parties have clearly agreed to delegate arbitrability, a court may not decide those issues, and it must compel arbitration, even if it thinks that the claim to arbitration is "wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). A court may refuse to enforce a delegation or arbitration clause only if the party seeking to avoid arbitration proves that the clause itself is unconscionable, but the FAA limits judicial discretion even as to that issue. *See Rent-A-Ctr., W., Inc.*, 561 U.S. at 70.

The district court correctly ruled that Plaintiff, though not herself a signatory to the Alexa TOU, is equitably estopped from challenging its terms, including its requirement to arbitrate disputes. ER005. The court also ruled that the parties had entered into a "facially valid" arbitration agreement and had clearly delegated arbitrability by incorporating the AAA rules by reference. On these bases, the court ordered arbitration of Plaintiff's "intentional use" and "background recording" claims. Given those predicate rulings, that Plaintiff did not challenge the delegation clause as unconscionable, the court had no authority to refuse to compel arbitration of Plaintiff's "surreptitious recording" claim. *Henry Schein, Inc.*, 139 S. Ct. at 529. That ruling was error and should be reversed.

Second, even if there were no delegation clause, the court still should have compelled arbitration of the "surreptitious recording" claim. Contrary to the court's suggestions, that claim is not beyond the scope of the Arbitration Clause, and civil

claims with criminal elements are indisputably arbitrable. Plaintiff's "surreptitious recording" claim is fundamentally the same as her other claims. She does not distinguish among different types of recording in her causes of action, the essence of her Complaint being the alleged unlawfulness of the Alexa service's voice recording functionality generally. Those voice recordings relate, obviously and almost tautologically, to the voice-activated and voice-dependent Alexa service and devices—they do not relate to anything else. The Arbitration Clause is broad, covering "any dispute" related to those services and devices. Plaintiff's "surreptitious recording" claim therefore fits easily within its scope, and if there were any doubt, it must be resolved "in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 589 (1960).

Civil claims with criminal elements or counterparts are no less subject to arbitration under the FAA than any other claims. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 239–40 (1987). The district court thus erred in relying on the potentially "criminal . . . nature" of Plaintiff's CIPA claim in excluding it from the scope of the Arbitration Clause. The court also erred in suggesting that the Arbitration Clause "would be unconscionable as a matter of law" if it encompassed the "surreptitious recording" claim. Neither state legislatures nor courts can declare the arbitration of certain types of claims inherently unconscionable, or otherwise limit the availability of arbitration to contracting parties, in a manner that disfavors

arbitration as a procedure. *Concepcion*, 563 U.S. at 341 (citation omitted). The FAA preempts any such limitations, *id.*, and by suggesting that the Arbitration Clause was unconscionable as applied to one part of Plaintiff's cause of action, the court impermissibly disfavored arbitration for a category of disputes.

STANDARD OF REVIEW

This Court reviews a denial of a motion to compel arbitration *de novo*. *Nguyen v. Barnes & Noble*, 763 F.3d 1171, 1175 (9th Cir. 2014). The Court reviews underlying factual findings for clear error. *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 917 (9th Cir. 2011).

ARGUMENT

I. THE COURT SHOULD REVERSE AND COMPEL ARBITRATION OF THE SO-CALLED "SURREPTITIOUS RECORDING" CLAIMS BECAUSE PLAINTIFF IS BOUND TO A VALID AGREEMENT TO ARBITRATE THAT DELEGATES QUESTIONS OF ARBITRABILITY TO AN ARBITRATOR.

In deciding Amazon's Motion to Compel Arbitration, the district court ruled that the COU contained a "facially valid arbitration clause"; that Plaintiff's marriage to a signatory to the Alexa service, and her own voluntary use of the Alexa service in their home, estopped her from challenging the arbitration clause; and that the parties clearly and unmistakably delegated arbitrability questions to an arbitrator. ER003–05. On the strength of these rulings, the district court correctly compelled arbitration of Plaintiff's claims as they related to her own intentional use of the Alexa

service, and that of others in her household. ER005–06. But the court *declined* to compel arbitration of claims related to recordings that the Alexa service might make when it misinterprets a sound as a wake word. ER006–07. That part of the court's decision was reversible legal error. Under the FAA and consistent Supreme Court interpretations of it, if parties agree to delegate arbitrability to an arbitrator, as they did here, a court must enforce that delegation agreement as to all claims, even if it considers a given argument for arbitrability "wholly groundless."

A. Plaintiff Is Bound To The Valid Arbitration Clause.

Although not a signatory to the TOU for the Alexa service, Plaintiff is bound to those terms, and to the arbitration clause they contain via reference to the COU, in at least two ways: through equitable estoppel, and, independently, through her own oft-reaffirmed agreement with Amazon to arbitrate all disputes. The district court ruled only on estoppel, but this Court may affirm for either reason.

1. Plaintiff Is Equitably Estopped From Challenging The Arbitration Clause Because She Is Married To A Contract Signatory, And Because She Directly Benefitted From Her Household's Alexa Service Contract.

Equitable estoppel binds Plaintiff to arbitrate her Alexa service disputes because she availed herself of the benefits of her husband's Alexa service account, which benefits are expressly conditioned upon acceptance of the COU and TOU. Independently, but relatedly, certain close relationships, including marriage, can themselves give rise to estoppel.

Equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045–46 (9th Cir. 2009). This Court acknowledges the validity of "direct benefits" estoppel, by which "a non-signatory to an arbitration agreement may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of the agreement and receives benefits flowing directly from the agreement." *Nguyen*, 763 F.3d at 1179 (finding no direct benefit on the facts) (internal citations omitted). "Equitable estoppel typically applies to third parties who benefit from an agreement made between two primary parties," including spouses of contracting parties. *Id*. (internal citation omitted). It is not a rigid doctrine, but, rather, "[t]he linchpin for equitable estoppel is equity—fairness" and "each case, of course, turns on its facts." *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 527–28 (5th Cir. 2000) (compelling arbitration)).

Direct-benefit estoppel applies with full force to arbitration clauses. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). The district court adhered to a long line of authorities recognizing direct-benefit estoppel as a basis to equitably compel a non-signatory to arbitrate her claims. *Townsend v. Quadrant Corp.*, 268 P.3d 917, 922 (Wash. 2012) (relying on Ninth Circuit law, compelling children to arbitrate claims against homebuilder, where children "received the benefit of the bargain in the transaction with [the builder] to the same extent as their parents");

Hawkins v. Superior Court, 152 Cal. Rptr. 491, 493–95 (Cal. Ct. App. 1979) (spouse must arbitrate a wrongful death claim when his or her decedent spouse applied for health insurance for both of them and the application contained an arbitration clause); *Herbert v. Superior Court*, 215 Cal. Rptr. 477, 478–82 (Cal. Ct. App. 1985) (wrongful death claims of nonsignatory adult heirs of a group health plan member must be arbitrated); *Michaelis v. Schori*, 24 Cal. Rptr. 2d 380, 383 (Cal. Ct. App. 1993) (father must arbitrate medical malpractice claim related to child's birth when mother had signed arbitration agreement with the physician); *Hofer v. Emley*, No. 19-cv-02204-JSC, 2019 WL 4575389, at *6 (N.D. Cal. Sep. 20, 2019) (non-signatory brother must arbitrate negligence claims because he benefited from brother's car rental agreement through sharing car for family visit) (following *Nguyen*).

The court in *Hofer* relied on *NORCAL Mut. Ins. Co. v. Newton*, 100 Cal. Rptr. 2d 683 (Cal. Ct. App. 2000), which states in plain terms the justification, indeed the need, for equitable estoppel, and demonstrates the breadth of its application. The wife in *NORCAL* was neither a signatory to nor a covered party under her psychiatrist-husband's professional liability policy, but she accepted the insurance company's legal defense when she and her husband were sued for malpractice. *Id* at 697–98. Her acceptance of this contract *benefit* estopped her, later, from trying to avoid the contract's *obligation* to arbitrate coverage disputes with the insurance

provider. *Id.* at 698. She claimed never to have consented to arbitration, but that did not move the Court, which explained:

> The fundamental point is that respondent was not entitled to make use of the policy as long as it worked to her advantage, then attempt to avoid its application in defining the forum in which her dispute with NORCAL should be resolved. Another maxim of jurisprudence is relevant here: "He who takes the benefit must bear the burden." (Civ.Code, § 3521.) "No person can be permitted to adopt that part of an entire transaction which is beneficial to him/her, and then reject its burdens."

Id. at 699 (citation omitted).

Thus, in cases concerning the Amazon COU, more than one Federal court has applied equitable estoppel to require a non-signatory to arbitrate claims against Amazon. *See Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 272–74 (E.D.N.Y. 2019) (Amazon's arbitration agreement bound a husband who used his wife's Amazon account and received "direct benefits" through use of the Amazon account governed by Amazon's COU); *Payne v. Amazon.com, Inc.*, No. 2:17-CV-2313-PMD, 2018 WL 4489275, at *7 (D.S.C. July 25, 2018) (non-signatory plaintiff was bound by arbitration agreement where she "knowingly exploited" her fiancé's contractual agreement with Amazon by using the goods he purchased).

Likewise, the California Superior Court for Alameda County, in a statewide Judicial Council Coordinated Proceeding (JCCP) involving Alexa recording cases, recently applied equitable estoppel to hold that non-signatory family members are

bound by the arbitration provisions governing the Alexa service. *See* Appellants' Motion to Take Judicial Notice, Exh. A. The JCCP cases, like this one, all involved claims under CIPA based on use of Alexa-enabled devices in plaintiffs' homes. Plaintiffs included a wife, a child, and a partner of the registrants of Alexa devices. The JCCP decision, *id.* at 6, followed this Court's rule from *Nguyen* and *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (equitable estoppel applies when non-signatory sues under "or otherwise take[s] advantage of" the contract). As the owner of a device must register and agree to Alexa's terms before use, "it follows that [plaintiffs] took advantage of the underlying contract when they intentionally called out 'Alexa' to use the Alexa service." JCCP Decision, RJN Exh. A at 8. The plaintiffs were not entitled to "embrace[] the contract despite their non-signatory status but then, in litigation, attempt to repudiate the arbitration clause in the contract." *Id.* at 7.[3]

[3] The court in the JCCP proceedings, *id.* at 6, declined to follow and rejected the analysis of *B.F. v. Amazon.com, Inc.*, No. C19-910-RAJ-MLP, 2019 WL 4597492 (W.D. Wash. Sept. 23, 2019), which is now on appeal to this Court. *B.F.* is an outlier—the only decision that has declined to apply equitable estoppel to bind to arbitration a plaintiff who, as here, took the benefits of a service provided to her household through an agreement entered by a close family member. *See also Hofer*, 2019 WL 4575389, at *6 (passenger who shared ride in rental car bound by his brother's entry of arbitration agreement); *Bridge v. Credit One Fin.*, No. 2:14-CV-1512-LDG-NJK, 2016 WL 1298712, at *2–3 (D. Nev. Mar. 31, 2016) (son who used mother's cable account bound by her entry of arbitration agreement); *Nicosia*, 384 F. Supp. 3d at 272–74 (spouse); *Payne*, 2018 WL 4489275, at *7 (fiancé); JCCP Decision, RJN Exh. A (spouse, child, partner).

Likewise, here, where it is undisputed that Plaintiff's husband agreed to the Alexa TOU, ER001, and Plaintiff admits to having availed herself of the benefits of her husband's Alexa service, ER335–36 at ¶¶ 27–29, the district court ruled correctly that Plaintiff is estopped from contesting the Arbitration Clause as it relates to "claims directly related to her voluntary usage [of Alexa]." ER005. The court noted that "arbitration agreements are enforced with regularity against nonsignatories," on the strength of preexisting relationships between the nonsignatory and a contracting party, including marriage. *Id*. (internal quotations and citations omitted). Plaintiff cannot, therefore, contest arbitration with respect to recordings of her voice made by the intentional invocation and activation of the Alexa service, even during *someone else's* intentional use of Alexa: The court found that, "[a]pplying the principles of equitable estopped [sic] explained above, it seems clear that Plaintiff would be bound to the same terms as her husband." ER005. And because the district court properly concluded that disputes as to "background recordings" were "within the scope of the Arbitration Clause," it correctly compelled arbitration on that claim, too. ER006; *see section* I.B, *infra*.[4]

[4] Although equitable estoppel is a question of state law, *Arthur Andersen LLP*, 556 U.S. 624 at 630, courts applying California and Washington law both draw on federal equitable estoppel authorities. *See Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 111 Cal. Rptr. 876, 893 (Cal. Ct. App. 2010) (reversing denial of motion to compel arbitration, observing that "merely because a legal concept emanates from federal jurisprudence does not necessarily make it unreasonable, inapplicable, or unpersuasive"); *Townsend*, 268 P.3d at 922 (relying on *Mundi*, a

2. Plaintiff Is Bound To The Arbitration Clause Through Her Own Agreement To Amazon's COU.

Plaintiff's own repeated assent to the Amazon COU, including the Arbitration Clause, independently binds her to arbitrate all disputes related to her use of Amazon services. Plaintiff agreed to the Amazon COU when she activated her Amazon account, when she registered her many Alexa-enabled Fire TV devices, and each of the hundreds of times that she used her own Amazon account to make a purchase. The Arbitration Clause in the COU, which is linked from the Alexa TOU to which her husband assented, is clear and broad, providing for arbitration of "**[a]ny dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com.**" ER194–95 at ¶ 5; ER196–97 at ¶ 10 (bold in original, other emphases added).

Plaintiff admits to having used her husband's Alexa-enabled device routinely and voluntarily, speaking the wake word "Alexa" and communicating with the Alexa service, as intended. ER335–36 at ¶¶ 27–29. Especially given her own extensive

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decision under California law, holding that "cannot avoid the arbitration clause within it"); *see also G.G. v. Valve Corp.*, 799 F. Appx. 557, 558 (9th Cir. 2020) (reaffirming the doctrine but declining to apply it on the facts); *Allied Professionals Ins. Co. v. Anglesey*, No. CV 14-00554 CBM, 2018 WL 6219926, at *5 (C.D. Cal. Aug. 10, 2018) (citing *Mundi* and California and Washington state laws in supporting application of equitable estoppel against non-signatory assignees of an insurance policy containing an arbitration clause). The district court here applied California law, but as *Townsend*, *Nicosia*, and *Payne* illustrate, the result under Washington equitable estoppel law is the same.

use of Amazon over the last fifteen years, and her registration of Alexa-enabled devices, Plaintiff surely knew that she was using an "Amazon Service" when she did so. Through her repeated assent to the COU, Plaintiff agreed to arbitrate *any* disputes related to Amazon products or services, and her claims in this case plainly qualify.

B. The Parties Delegated Questions Of Arbitrability To An Arbitrator.

Under the FAA, parties may agree to have an arbitrator decide "gateway" questions of arbitrability through a "delegation provision." *Rent-A-Ctr., W,. Inc.*, 561 U.S. at 68–69. Questions of arbitrability include whether an arbitration agreement covers a given dispute, and whether unconscionability or other contract defenses affect its enforceability. *Id*. Where the parties' agreement to delegate threshold arbitrability questions to an arbitrator is "clear and unmistakable," then the court "may not decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 530. A delegation agreement is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr., W,. Inc.*, 561 U.S. at 70. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Henry Schein*, 139 S. Ct. at 529–30.

The Court in *Henry Schein* elaborated on the FAA's limits on a court's discretion when the parties have delegated arbitrability:

> We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

Id. at 529 (emphasis added).

1. The Incorporation Of AAA Rules Is Clear and Unmistakable Evidence of Delegation.

As the district court recognized, the parties clearly and unmistakably expressed their intent to delegate issues of arbitrability through the clear and express incorporation of the rules of the AAA in the Arbitration Agreement. ER005–06. The AAA rules delegate arbitrability to an arbitrator: "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 to the arbitrability of any claim or counterclaim." AAA Consumer Arb. Rule R-14(a) (2014). This language has consistently been held to reserve, or delegate, to the arbitrator issues of arbitrability. *See, e.g.*, *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (holding that language delegating to the arbitrator the authority to determine "the validity" of any provision of the arbitration clause constitutes "clear and

unmistakable" evidence of an intent to delegate arbitrability).

Incorporation by reference is a valid, enforceable, and effective means to declare the terms of a contract under both Washington law, which governs the contract,[5] and under California law, which the district court applied. *State v. Ferro*, 823 P.2d 526, 527 (Wash. Ct. App. 1992); *McLellan v. Fitbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484, at *3 (N.D. Cal. Oct. 11, 2017) (quoting *Wolschlager v. Fid. Nat'l Title Ins. Co.*, 4 Cal. Rptr. 3d 179, 184 (Cal. Ct. App. 2003)). In legal effect, terms incorporated into a contract by reference are no less a part of the contract than terms spelled out in full. Consistent with these principles, in this Circuit, incorporation of the AAA rules is "clear and unmistakable" expression of the parties' intent to delegate arbitrability. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015). Here, then, because the parties incorporated the AAA delegation provision into the COU, it became fully part of the agreement.

In finding that incorporation of the AAA rules conveyed a clear, mutual intent to delegate, and then delegating arbitrability of the background recording claim, the district court tacitly rejected Plaintiff's argument that incorporation by reference is

[5] The Amazon COU provide that "the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon." ER207, 217, 228, 237, 245 at "Applicable Law." Similarly, the Alexa Terms state that "**[a]ny dispute or claim arising from or relating to this Agreement or Alexa is subject to the . . . governing law. . . and all other terms in the Amazon.com Conditions of Use**." ER197 at § 3.6, ER255 (bold in original; linking Amazon COU).

ineffective against an "unsophisticated" party. ER163. Although *Brennan* concerned sophisticated parties and suggested that the incorporation rule "may" be different when one party lacks sophistication, neither that case nor any other establishes separate standards. And *Brennan* acknowledged that "the vast majority of the circuits" that endorse delegation by incorporation of the AAA rules have *not* limited their holding to "sophisticated parties or to commercial contracts." *Brennan*, 796 F.3d at 1130–31 (collecting cases).

Courts in Washington have repeatedly enforced incorporated delegation clauses against supposedly unsophisticated parties. *See Krause v. Expedia Grp., Inc.*, No. 2:19-cv-00123-BJR, 2019 WL 4447317, at *4 (W.D. Wash. Sept. 17, 2019) ("confirming that *Brennan*'s holding as to the incorporation of the AAA rules extends to both sophisticated and unsophisticated parties" and compelling employee to arbitrate gateway questions) (citing *McLellan*, 2017 WL 4551484, at *2)); *see also McLellan*, 2017 WL 4551484, at *3 (it is "utterly unrealistic to accept the proposition that a failure to know what was in the [incorporated document] was anyone's responsibility and fault but" contracting party's, where "most certainly the [incorporated document] was readily available") (citation omitted); *Chen v. Sierra Trading Post, Inc.*, No. 2:18-cv-1581-RAJ, 2019 WL 3564659, at *4 (W.D. Wash. Aug. 6, 2019) (enforcing delegation clause incorporated by reference as to

consumer).[6] California courts within this Circuit likewise treat incorporated terms as part of the contract without regard to a party's sophistication, just as the district court did.[7]

Nor would the FAA permit divergent delegation analyses that construed the same delegation terms as effective for some, but not for others. The result would be to disfavor arbitration for a particular class of litigant, which cannot be squared with the FAA. To hold that a sophisticated party is bound by incorporated terms, but that an unsophisticated party is not—out of concern that the latter not be subjected to arbitration of arbitrability—would be to treat arbitration as a less appropriate

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[6] Washington "[c]ourts presume that parties to an agreement have read all parts of the entire contract and intend what is stated in its objective terms." *W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 694 P.2d 1101, 1104 (Wash. Ct. App. 1985).

[7] *See Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 992 (N.D. Cal. 2017) (observing that "'nearly every . . . decision in the Northern District of California . . . has consistently found effective delegation of arbitrability regardless of the sophistication of the parties'") (omissions in original); *Gountoumas v. Giaran, Inc.*, No. CV 18-7720-JFW(PJWx), 2018 WL 6930761, at *6 (C.D. Cal. Nov. 21, 2018) (finding that "[t]he greater weight of authority has concluded that the holding of [Brennan] applies similarly to non-sophisticated parties" and adopting that "majority view") (alteration in original; citation omitted); *Bloom v. ACT, Inc.*, No. CV 18-6749-GW(SSx), 2018 WL 6163128, at *4 (C.D. Cal. Oct. 24, 2018) ("The Court would side with the overwhelming weight of authority and conclude that threshold questions of arbitrability can be delegated to the arbitrator through incorporation of the AAA rules regardless of the contracting parties' sophistication"); *Diaz v. Intuit Inc.*, No. 5:15-CV-01778-EJD, 2017 WL 4355075, at *3 (N.D. Cal. Sept. 29, 2017), *motion to certify appeal denied*, No. 5:15-CV-01778-EJD, 2018 WL 934875 (N.D. Cal. Feb. 16, 2018); *Zelkind v. Flywheel Networks, Inc.*, No. 15-CV-03375- WHO, 2015 WL 9994623, at *3 (N.D. Cal. Oct. 16, 2015); *see also Rodriguez v. Am. Techs., Inc.*, 39 Cal. Rptr. 437, 446 (Cal. Ct. App. 2006).

procedure, in violation of the FAA. Indeed, the FAA countermands judicial and legislative efforts that hinder the enforcement of otherwise permissible arbitration agreements in the name of protecting certain disputant classes. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), for example, the Court held that the FAA preempted the rule by which courts construe a contract against the drafter if the effect of that rule would be to displace an arbitration agreement based on one party's purported "degree of sophistication." *Id*. at 1418–19.

That decision is consistent with the Court's overall interpretation of the FAA as forbidding either contractual interpretations, or state policy limitations, that disfavor arbitration. Thus, in *Concepcion*, the Supreme Court held that the FAA pre-empted a state consumer protection rule that had disallowed waivers of collective action in arbitration agreements as unconscionable, because

> [t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concepcion, 563 U.S. at 343–44. And in *Kindred Nursing Ctrs., Ltd. v. Clark*, 137 S. Ct. 1421, 1427 (2017), the Supreme Court invalidated a state rule that required greater verification of authority to enter arbitration agreements under a power of attorney, thus failing to place arbitration agreements on "equal plane" with other contracts. The principle underlying these decisions likewise prohibits limiting the

enforcement of delegation terms incorporated by reference to "sophisticated" parties, as that would represent a non-neutral application of the law "in a fashion that disfavors arbitration" in violation of the FAA. *Concepcion*, 563 U.S. at 341. Such a limit would subject delegation clauses—themselves an additional, antecedent agreement to arbitrate, *Henry Schein*, 139 S. Ct. at 529—to discriminatory treatment "by virtue of their defining trait": i.e., that they require arbitration. *Kindred Nursing*, 137 S. Ct. at 1427.

2. Plaintiff Did Not Challenge The Delegation Clause As Unconscionable, Which Was The Only Issue On Which The District Court Could Have Ruled.

The FAA permits a court to assess the validity or unconscionability *of the delegation clause itself*; but the alleged unconscionability of the entire agreement is for the arbitrator alone to decide. "[U]nless [plaintiff] challenged [as unconscionable] the delegation provision specifically, [courts] must treat it as valid under [FAA] § 2, and must enforce it . . . leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *See Rent-A-Ctr., W., Inc.*, 561 U.S. at 72. Although she had three opportunities to do so—in her Complaint, and in her Oppositions to Amazon's Motions to Compel Arbitration and to Stay Pending Appeal—Plaintiff did not challenge the Arbitration Clause, let alone the delegation clause, as unconscionable or otherwise unenforceable.

Plaintiff identifies unconscionability in a last-page footnote in her Opposition

to Amazon's Motion to Compel, but in concept only, assuring the district court that it need not reach any such argument. ER164 at ¶¶ 22–25 n.15. There was no argument for the court to reach: the closest Plaintiff came to the issue was to describe the entire contract as one of adhesion. *Id.* (agreement is "*completely* one-sided"). But, under the FAA, it is well-established that a contract is not unconscionable for being adhesive, *Concepcion*, 563 U.S. at 346–47; *Nicosia*, 384 F. Supp. 3d at 264, and a party seeking to establish unconscionability in a court must attack the arbitration and delegation clauses themselves, not the contract as a whole, *Rent-A-Ctr., W., Inc.*, 561 U.S. at 72.

The district court acknowledged Plaintiff's decision not to argue unconscionability both expressly, ER006 at n.1, and implicitly, by enforcing the incorporated delegation clause to compel the background recording claim into arbitration, ER006. Indeed, the trial court accepted that the Alexa TOU and COU "contain facially valid arbitration clauses," ER003, and, in discussing background recordings, correctly noted that "Plaintiff may argue any unconscionability defense *to the arbitrator* on the claims which have been compelled to arbitration. . . ." ER006 at n.1 (emphasis added).

Plaintiff did not raise unconscionability of the delegation clause in her Opposition to Amazon's Motion to Stay, either. Indeed, even with the court's ruling before her, no variant of the word "unconscionable" appears in her Opposition.

ER009–42. There is nothing unconscionable about the delegation clause in any event. But it is now too late for Plaintiff to raise the issue. *See Rent-A-Center W.*, 561 U.S. at 75–76 (Supreme Court refused to consider unconscionability challenge to delegation clause raised for first time before it).

C. The District Court Erred By Not Enforcing the Delegation Clause With Respect To Plaintiff's "Surreptitious Recording" Claim.

Here, the FAA required the district court to honor the parties' incorporation of the AAA rules and delegate the determination of the arbitrability of Plaintiff's claims to the arbitrator. The court properly did so with respect to the background recording claims holding "the Alexa TOU require the arbitrator to determine whether Plaintiff's second claim, the background recording of Plaintiff's conversation when a third party activates Alexa in her house, is encompassed by the Arbitration Clause." ER006. But when it turned to so-called "surreptitious recordings," the district court ignored its own rulings and FAA imperatives, declining to allow the arbitrator to decide whether that claim, too, is arbitrable. ER006–07. Instead, the court reached its own judgment as to arbitrability, usurping the arbitrator's authority, and "accepting" as true allegations that were both incorrect and, in all events, for the arbitrator to decide. The court relied on its own assumption that, "neither Plaintiff nor her family ever agreed to unanticipated surreptitious recording of their private conversations," and, "[a]ccepted as true, this allegation raises a free-standing, potentially criminal, CIPA violation that has no basis in any

agreement with Amazon." ER006.[8]

It was a fundamental error for the district court to reach the issue of scope and unconscionability in the first place: where the parties have delegated arbitrability, only the arbitrator may make those decisions. *See Henry Schein*, 139 S. Ct. at 530 ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."); *see also Rent-A-Ctr.*, 561 U.S. at 68–69. On *de novo* review, this Court should reverse that clear error.

II. PLAINTIFF'S "SURREPTITIOUS RECORDING" CLAIM WOULD BE SUBJECT TO ARBITRATION EVEN IF THE PARTIES HAD NOT DELEGATED ARBITRABILITY TO AN ARBITRATOR.

In addition to, and independent of, its error in failing to honor the delegation clause as to the "surreptitious recording" claims, the district court erred in holding that Plaintiff's accidental wake claim is outside the scope of Amazon's Arbitration Clause, and that a contract requiring Plaintiff to arbitrate this claim "would be unconscionable as a matter of law." ER006.

Once a court recognizes a valid arbitration agreement, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983), *superseded*

[8] Plaintiff does not allege that "the Alexa device . . . picks up conversations without any connection to the intended and advertised use of Alexa," *id.*, but the court's delegation error does not depend on its mischaracterization. *See* section II, below.

by statute on other grounds; *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (citing and quoting *United Steelworkers of Am.*, 363 U.S. at 582–83). This "presumption of arbitrability" applies whenever a contract contains an arbitration clause. *Id.*[9]

Plaintiff's "surreptitious recording" claim easily falls within the scope of the arbitration clause—which, after all, covers any dispute related to the Alexa service—even without applying mechanisms of construction intended to resolve any doubts in favor of arbitration. And the FAA policy favoring arbitration applies with equal force to claims that raise allegedly criminal or other seemingly egregious conduct. The court's suggestion that an agreement compelling arbitration of such claims would be "unconscionable as a matter of law" was, in fact, no more than an expression of the court's impermissible preference for litigation over arbitration. Thus, even if the parties had not clearly agreed to delegate arbitrability (they did), the district court would have been required to compel arbitration of the "surreptitious recording" claim.

A. The "Surreptitious Recording" Claim Is Easily Within The Scope Of The Broad Arbitration Clause.

Under the FAA's presumption of arbitrability, the party resisting arbitration

[9] The presumption applies under Washington law, too. *See Council of Cty. & City Employees, AFSCME, AFL-CIO v. Spokane Cty.*, 647 P.2d 1058, 1060 (Wash Ct. App. 1982) ("all questions upon which the parties disagree are presumed to be within the arbitration provisions unless negated expressly or by clear implication").

bears the burden of showing that the agreement does not cover the claims at issue, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000), and the burden is heavy. Courts must order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am*, 363 U.S. at 582–83. "The clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect . . . ." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991); *accord Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1059 (S.D. Cal. 2015) (quoting *Republic of Nicaragua* and ordering arbitration based on similar provision in Amazon COU).

The presumption in favor of arbitrability "is particularly applicable" where, as here, the arbitration clause is broad. *AT&T Techs., Inc.*, 475 U.S. at 650 (clause "provid[ing] for arbitration of 'any differences'"); *see Moses H. Cone Mem'l Hosp.*, 460 U.S. at 5 (all claims "arising out of" and "relating to" an agreement); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (requiring arbitration of "any controversy or claim arising out of or relating to" the agreement was "easily broad enough" to send claim of fraud in the inducement of the contract to arbitrator). Where no express provision excludes the challenged grievance from arbitration, only "the most forceful evidence" of a purpose to exclude the claim from

arbitration can overcome a broadly drawn agreement to arbitrate. *United Steelworkers of Am.*, 363 U.S. at 584–85; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13 (1985) (statutory claims fall within the scope of broadly defined arbitration provisions if they merely "touch" the matters covered).

The Amazon Arbitration Clause is broad. It requires arbitration of "[a]ny dispute or claim relating in any way to . . . use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com . . . ." ER194–95 at ¶ 5 (emphasis added). The Alexa TOU likewise provides that "[a]ny dispute or claim arising from or relating to this Agreement or Alexa is subject to the binding arbitration" terms "in the Amazon.com Conditions of Use." ER197 at ¶ 11 (emphasis added). The "broad and far reaching" language of these arbitration clauses "leaves little doubt that the dispute [here] is subject to arbitration." *Chiron v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1131 (2000). In *Chiron*, this Court affirmed an order compelling arbitration, including as to arbitrability, where the agreement provided for arbitration of "any dispute," ruling that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* (internal quotations and citations omitted).

Plaintiff's "surreptitious recording" claim falls squarely within the scope of the Arbitration Clause. It is "related" directly, and certainly "in any way," to the Echo Dot and Fire TV devices, which are indisputably "products . . . sold or distributed by Amazon," and the Alexa service is indisputably a "service sold or distributed by Amazon." A dispute about Alexa service's voice recording, including in the absence of a wake word, is a claim "arising from or relating to Alexa"—it cannot seriously be said to arise from or relate to anything else. And resolution of Plaintiff's dispute, in any forum, will require an analysis of the COU, TOU, the Alexa service generally, and whether the Alexa service—including the phenomenon of accidental wakes—comport with the terms that govern them. Plaintiff's lawsuit boils down to an allegation that an Amazon service, governed by terms and conditions to which she and her husband (both Amazon customers) are bound, and that works through Amazon devices, that she and her husband independently registered with Amazon, did something (misperceived wake words) to which she objected. Even without the benefit of the doubt in favor of arbitration that the law provides, is hard to imagine a claim more surely within the coverage of an Arbitration Clause that covers any dispute related to the Alexa service; with that benefit, and in the absence of any express exclusion, it is impossible to place Plaintiff's claim beyond the reach of the Arbitration Clause.

The district court nonetheless ruled that "surreptitious recordings" were

"completely unrelated to the contract," "unanticipated," and therefore "far outside the bounds of both the Alexa TOU and Amazon COU," and that the CIPA violation "has no basis in any agreement with Amazon." ER006. As an initial matter, that simply is not true. Amazon publicly, expressly, and clearly describes that accidental wakes might occur and why. ER067–68. Setting aside the loaded label "surreptitious recordings," the specific act that Plaintiff challenges here—the Alexa service recording a voice when no valid wake word was spoken—is not hidden or unanticipated. But even if it were, the TOU and COU require arbitration of "any" dispute, not necessarily just the arguably obvious ones. A dispute about the Alexa service that takes the form of an alleged CIPA violation is still a dispute about the Alexa service. The court also scrambled the burdens and analysis. Amazon need not prove that the parties anticipated a particular dispute when they agreed to arbitrate "any dispute." Rather, to avoid arbitration of, e.g., a CIPA-related cause of action, Plaintiff must point to an express provision carving it out of the Arbitration Clause, or, failing that, offer "the most forceful evidence" of an intent to exclude it. *United Steelworkers of Am.*, 363 U.S. at 584–85. No express (or, indeed, implied) clause excludes <u>any</u> dispute from the scope of the COU or TOU, and there is no other evidence, let alone forceful evidence, of an intent to exclude "surreptitious recording," CIPA-based, or any other claims. [10]

[10] Even if it mattered to enforcement of the arbitration agreement whether false

B. Courts Must Compel Arbitration Of All Claims, Including Those "Criminal In Nature," That Fall Within The Scope Of An Agreement To Arbitrate.

The district court held that the false wake claim is beyond the scope of arbitration because it may be "criminal in nature," again citing Plaintiff's CIPA violation allegations. ER006. That was error: absent clear Congressional intent to exclude it from arbitration, a civil claim that overlaps with elements of a criminal violation is no less subject to arbitration than any other. *Shearson*, 482 U.S. at 239–40.

In *Shearson*, the Supreme Court held that the "overlap" of certain civil and criminal provisions of RICO does not preclude arbitration of civil RICO actions, because "nothing in the text of the RICO statute . . . even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act." *Id.* at 238. "The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims" that may only "be overridden by a contrary congressional command." *Id.* at 226. Courts thus regularly compel arbitration of causes of action arising under statutes that impose both civil and criminal liability. *See, e.g.*, *Mitsubishi*, 473 U.S. at 637 (arbitration is

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wakes, or claims about them, were "unanticipated," that would be a question of arbitrability for the arbitrator to consider. It would be for the arbitrator to evaluate the evidence, including the disclosures about false wakes on Alexa's Privacy Hub, and the fact that, even for accidental wakes, the Alexa device flashes a blue light or emits a sound to confirm that the device has been activated.

appropriate for treble-damages antitrust claims even though conduct underlying the claim might give rise to criminal liability); *see also Bridgetown Trucking, Inc. v. Acatech Sols., Inc.*, 197 F. Supp. 3d 1248, 1258–60 (D. Or. 2016) (compelling federal Computer Fraud and Abuse Act claims to arbitration). If a *federal racketeering* claim is arbitrable, Plaintiff's claim that the Alexa service sometimes records without her knowledge surely is too.

Courts must likewise compel arbitration of civil claims alleging potential criminality under state law. *See, e.g.*, *Hunter v. First Nat'l Bank of Omaha, NA*, No. 15-CV-808-H-NLS, 2015 WL 12672151, at *5 (S.D. Cal. July 31, 2015) (granting motion to compel arbitration of CIPA claims); *Ortiz v. Volt Mgmt. Corp*, No. 16-cv-07096-YGR, 2017 WL 1957072, at *4 n.5 (N.D. Cal. May 11, 2017) (compelling arbitration of claim regarding assertedly criminal violations of California's wage and labor laws); *Dagnan v. St. John's Military Sch.*, No. 16-2246-CM, 2016 WL 7386280, at *8 (D. Kan. Dec. 21, 2016) (compelling child sexual assault case to arbitration).

Neither plaintiff nor the district court cited Congressional intent to exclude civil CIPA claims from arbitration, and there are none to cite. The court erred by refusing to compel arbitration of the "surreptitious recording" on grounds that the claim was "criminal in nature." ER006.

C. A Court May Not Hold An Agreement To Arbitrate Unconscionable On Grounds That The Agreement Requires Arbitration, Rather Than Litigation, Of Certain Types Of Claim.

The district court's holding—or suggestion—that the Arbitration Clause "would be unconscionable as a matter of law" if it extended to Plaintiff's "surreptitious recording" claim, ER 006, was also error, as it was no more than an expression of the court's view that arbitration would be an inferior mechanism to resolve this part of Plaintiff's claim.

Under the FAA "[a] court may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd.*, 137 S. Ct. at 1426 (internal quotation marks omitted) (citing *Concepcion*, 563 U.S. at 339). The FAA also sets limits on state-law unconscionability doctrines, preempting them if they are "applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341 (invalidating "neutral" prohibition on class action waivers as imposing an obstacle to arbitration). Thus, in *Marmet Health Care Ctr.*, 565 U.S. 530, the Supreme Court first struck down West Virginia's statute categorically banning arbitration of wrongful death claims against nursing homes. The Court went on to hold that, under the FAA, a state's policy against arbitration of certain claims cannot be the basis for, or even "influence," a finding of unconscionability. *Id*. at 532–33

("The [FAA's] text includes no exception for personal-injury or wrongful-death claims. It 'requires courts to enforce the bargain of the parties to arbitrate.' It 'reflects an emphatic federal policy in favor of arbitral dispute resolution.'") (citations omitted). "An argument that a contract is unenforceable *just because it requires bilateral arbitration* . . . impermissibly disfavors arbitration whether it sounds in illegality or unconscionability." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (emphasis added).

Just as a legislature may not categorically define arbitration as unconscionable in certain circumstances, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Concepcion*, 563 U.S. at 341 (citation omitted). The Ninth Circuit "take[s] *Concepcion* to mean what its plain language says: Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) (interpreting *Concepcion* to be "broader than a restriction on the use of unconscionability to end-run FAA preemption").

Courts may still hold arbitration clauses substantively unconscionable post-*Concepcion*, for example where the clauses call for unilateral, overly expensive, or unfair mechanisms in arbitration. *See, e.g.*, *Newton v. Am. Debt Servs., Inc.*, 549 F.

App'x 692, 694 (9th Cir. 2013). But Plaintiff made no such arguments here, and the district court made no such findings. The court's view that the claim would be "better determined on summary judgment" privileges litigation over arbitration in violation of the FAA: it is not the *agreement* that the court found unconscionable, but *arbitration* as a mechanism for resolving a claim the court apparently found more troubling than the others alleged. ER006–07 (reciting "the Alexa device allegedly picks up conversations without any connection to the intended and advertised use of Alexa, but to be used by Amazon for commercial gain").

This part of the court's ruling clashes with the rest in a way that emphasizes the error: Plaintiff herself did not distinguish among different types of recording in her causes of action, and her CIPA-based cause of action covers not only "surreptitious" recordings, as the court used that term, but the intentional recordings and background recordings that the court *did* send to arbitration. The court in effect imposed a categorical ban on arbitrating a certain type of claim—possibly on grounds of its potentially criminal implications—in precisely the manner that the FAA forbids and preempts.

This Court should reverse.

CONCLUSION

The portion of the district court's Order denying the Motion to Compel Arbitration of Plaintiff's alleged "surreptitious recording" claim should be reversed and the case remanded with instructions to compel arbitration of Plaintiff's "surreptitious recording" claim.

Date: July 16, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

An appeal from a case filed in the Western District of Washington involving a different proposed class of persons, but involving the same Alexa terms and conditions of usage, is currently pending before this Court. *See B.F., et al. v. Amazon.com, Inc., et al.*, No. 20-35359 (9th Cir.). Appellate briefing in that action is scheduled to conclude on September 24, 2020.

Date: July 16, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,837 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: July 16, 2020

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ADDENDUM

TABLE OF CONTENTS

AAA, Consumer Arbitration Rule 14
Jurisdiction

R-14. (a) 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 to the arbitrability of any claim or counterclaim.