ROSENBAUM, Circuit Judge, dissenting:

You can't make up the rules as you go along. It's a basic concept of fairness, and it's one that applies to arbitration as well. No wonder. If a party to the arbitration can create the rules governing the arbitration as the arbitration progresses, it enjoys an insurmountable advantage that effectively guarantees its victory. That's not an arbitration; it's just plain arbitrary. And a federal court should not be a rubber stamp for the kind of inherently unfair, anything-the-arbitration-contract-drafting-party-wants-goes "arbitration" that necessarily occurs when the agreement-drafting party can subject the other party to whatever rules it desires—even changing the rules—as the arbitration unfolds.

I would vacate the district court's order compelling arbitration here because the arbitration agreement is not a valid agreement to arbitrate. Rather, in requiring the Garcias to agree to be governed at arbitration by rules that did not exist and would be devised by the Church and evolve while the arbitration proceeded, the arbitration agreement was as one-sided and unconscionable as an arbitration agreement can be. Because that kind of spectacle is not an arbitration and we should not stamp it with the imprimatur of the federal courts, I respectfully dissent.

I divide my discussion into two parts. In Section I, I review the district court's factual findings about the arbitration "process" involved here. And Section II applies the caselaw to the facts and shows why the arbitration agreement here was not valid.

I.

I reprint the entirety of the relevant language of the arbitration agreement, since that is what governed the "arbitration" here. It provided,

> d. In accordance with the discipline, faith, internal organization, and ecclesiastical rule, custom, and law of the Scientology religion, and in accordance with the constitutional prohibitions which forbit governmental interference with religious services or dispute resolution procedures, should any dispute, claim or controversy arise between me and the Church, any other Scientology church, any other organization which espouses, presents, propagates or practices the Scientology religion, or any person employed by any such entity, which cannot be resolved informally by direct communication, I will pursue resolution of that dispute, claim or controversy solely and exclusively through Scientology's Internal Ethics, Justice and ***binding religious arbitration procedures***, which include application to senior ecclesiastical bodies, including, as necessary, final submission of the dispute to the International Justice Chief of the Mother Church of the Scientology religion, Church of Scientology International ("IJC") or his or her designee.
>
> e. Any dispute, claim or controversy which still remains unresolved after review by the IJC shall be

submitted to ***binding religious arbitration in accordance with the arbitration procedures of Church of Scientology International***, which provide that:

> i. I will submit a request for arbitration to the IJC and to the person or entity with whom I have the dispute, claim or controversy;
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> ii. In my request for arbitration, I will designate one arbitrator to hear and resolve the matter;
>
> iii. within fifteen (15) days after receiving my request for arbitration, the person or entity with whom I have the dispute, claim or controversy will designate an arbitrator to hear and resolve the matter. If the person or entity with whom I have the dispute, claim or controversy does not designate an arbitrator within that fifteen (15) day period, then the IJC will designate the second arbitrator;
>
> iv. the two arbitrators so designated will select a third arbitrator within fifteen (15) days after the designation of the second arbitrator. If the arbitrators are unable to designate a third arbitrator within the fifteen (15) day period, then the IJC will choose the third arbitrator;
>
> v. consistent with my intention that the arbitration be conducted in accordance with Scientology principles, and consistent with the ecclesiastical nature of

> the procedures and the dispute, claim or controversy to which those procedures relate, it is my specific intention that all such arbitrators be Scientologists in good standing with the Mother Church.

(emphasis added).

This language, of course, conveys that, at the time the arbitration agreements were entered, the Church of Scientology had "binding religious arbitration procedures."

But following an evidentiary hearing, the district concluded that, in fact, it did not. In response to the Church's[1] assertion that its Committee on Evidence provides the rules and procedures governing arbitration, the district court determined that the Church "failed to present any convincing evidence supporting [this] constrained contention." Among other reasons why the court found that to be the case, the court noted that (1) "the arbitration agreements make no reference to the Committee on Evidence"; (2) "the word 'arbitration' cannot be found in the Committee on Evidence or in L[.] Ron Hubbard's book"; and (3) "even a superficial comparison of the arbitration agreements with the provisions in the Committee on Evidence supports Plaintiffs' contention that the Committee on Evidence could not, absent an *ad hoc* determination, provide the rules and procedures of arbitration." As the court explained, "[E]ven [the IJC] acknowledged[] numerous

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[1] For ease of reference, I refer to the Defendants collectively as the "Church of Scientology" or the "Church."

irreconcilable inconsistencies exist between [the arbitration agreements and the provisions in the Committee on Evidence]."

And with respect to the IJC's testimony allegedly "identif[ying] various sources of Scientology justice procedures," Maj. Op. at 6, the district court rejected it. The court "g[ave] no weight" to correspondence the IJC created, noting that the IJC "could recall little about circumstances giving rise to [a letter to the IJC] and [the IJC's] response, even though his response[] was written only a few months before the evidentiary hearing." Indeed, the court concluded that "the timing of the [letter to the IJC] raise[d] a compelling inference that it was conveniently written only after [the Church] had represented to the Court that [the IJC] had 'ruled' that the Committee on Evidence applied to Scientology arbitration and the Court directed [the Church] to submit proof of that representation." As the district court observed, "[a] mere six days passed between that Order . . . and [the letter to the IJC]." And as for the IJC's testimony that he "made a prior determination that the Committee on Evidence applies to Scientology arbitration . . . five to ten years before," the district court found the IJC's "testimony was not credible."

Even the Church's counsel implicitly conceded that the Church lacked existing rules of procedure. In fact, he advised the Garcias' attorney in writing before the arbitration that "[t]he

conduct of the religious arbitration *will be decided by the IJC at the appropriate time during the arbitration.*"[2] (emphasis added).

Not only did the Church not have existing arbitration rules and procedures as late as the time of the Garcias' "arbitration" here, but until the Garcias' "arbitration," the district court found, "there ha[d] never even been an arbitration in the Church." The district court cited this fact as further support for the Garcias' position that "no rules and procedures for conducting arbitration exist[ed]" at the time of the Garcias' "arbitration."

In short, the district court found, as a matter of fact, that the Church had no rules and procedures for conducting the actual "arbitration" not only at the time the Garcias signed the agreements but as late as when their "arbitration" occurred. Instead—and as

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[2] At the "arbitration," the IJC did, in fact, make up the rules—and change them—as the proceedings went on. For example, before arbitration, the IJC testified in his deposition that the attorney for the Garcias could be present at the arbitration, but could not "represent" them. Once it was time to actually arbitrate, though, the Garcias were told that the procedures "[did] not contemplate participation by an attorney" and that civil lawyers "[had] no role to play at the arbitration." The IJC also testified that the Garcias would be permitted to testify at the arbitration, but the arbitrators consistently cut Mr. Garcia off when he tried to present his case and told him he could not submit any "entheta," a Scientology term for material that is critical of Scientology. Similarly, pre-arbitration, the IJC testified that the Garcias would be able to "present [their] side of the story" and "originate whatever [they] wanted to." But then at the arbitration, the IJC prohibited the Garcias from bringing witnesses because "their testimony could not possibly be confirmed," and he heavily redacted the Garcias' evidence for entheta before giving it to the arbitrators.

counsel for the Church conceded in his letter referenced above, the IJC simply made things up as the "arbitration" proceeded.

We review the district court's factual findings for clear error. *Smith v. Owens*, 13 F.4th 1319, 1325 (11th Cir. 2021). As we have explained, "[a] factual finding is clearly erroneous if the record lacks substantial evidence to support it or we are otherwise left with the impression it is not the truth and right of the case—a definite and firm conviction that a mistake has been committed." *Knight v. Thompson*, 797 F.3d 934, 942 (11th Cir. 2015) (cleaned up). On this record, I see no basis for concluding that the district court's factual findings in these regards were clearly erroneous. Nor has the Church even suggested they are. So our legal analysis must account for these facts.

II.

As the Majority Opinion notes, under the Federal Arbitration Act, a federal court must stay or dismiss a lawsuit and compel arbitration when "the plaintiff entered into a written arbitration agreement that is enforceable under ordinary state-law contract principles," and "the claims before the court fall within the scope of that agreement." *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008) (internal quotation marks omitted) (citing 9 U.S.C. §§ 2-4). Here, the "ordinary state-law contract principles" we must apply are those of Florida.[3]

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[3] Although the arbitration agreements do not include a choice-of-law clause, the district court concluded that Florida law governed because, under Florida

Under Florida law, a valid arbitration agreement must "establish the basic terms of an arbitration proceeding such as the form and procedure for arbitration, the number of arbitrators, how the arbitrators [a]re to be selected, . . . [and] the issues to be decided by arbitration." *Malone & Hyde, Inc. v. RTC Transp., Inc.*, 515 So. 2d 365, 366 (Fla. 4th DCA 1987). By separately identifying "the form and procedure for arbitration," "the number of arbitrators," and "how the arbitrators [a]re to be selected," *Malone & Hyde* necessarily indicates that "the form and procedure for arbitration" are different things than "the number of arbitrators" and "how the arbitrators were to be selected."

I agree with the Majority Opinion that the arbitration agreements here sufficiently identified the issues to be arbitrated, the number of arbitrators, and the manner by which they were to be selected. But I part company with the Majority Opinion when it comes to "the form and procedure for arbitration."

To conclude that the arbitration agreements sufficiently stated "the form and procedure for arbitration," the Majority Opinion relies primarily on the procedure set forth in the enrollment

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choice-of-law principles, the rule of *lex loci contractus* applies. Doc. 189 at 5 (citing *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006)). That rule provides that the law of the place where the contract was executed—meaning "where the last act necessary to complete the contract was done"—controls. *Prime Ins. Syndicate, Inc. v. B.J. Handley Trucking, Inc.*, 363 F.3d 1089, 1093 (11th Cir. 2004) (citation and internal quotation marks omitted). Here, the district court found that was Florida. The parties do not challenge this finding on appeal.

agreement for *selecting arbitrators*. But as I have noted, "the form and procedure for arbitration" is different and separate from the "number of arbitrators" and "how the arbitrators [a]re to be selected." So the procedure for selecting arbitrators can't also stand in as "the form and procedure for arbitration."

Plus, when it came to "the form and procedure for arbitration," the arbitration agreements themselves specified that "binding religious arbitration procedures" and "binding religious arbitration in accordance with the arbitration procedures of Church of Scientology International" would govern. Just two problems with that: as the district court concluded, there were no such things, and the Church had never once conducted an arbitration. Given that the rules identified in the agreement didn't exist and the Garcias could not have looked to any precedent for the rules and procedures because the Church had never conducted an arbitration previously, it's hard to conceive of how the Garcias could have had even "some idea" of the arbitration form and procedures that would apply at the time they signed the agreements (or even at the time the arbitration began, for that matter). *See* Maj. Op. at 18 (quoting *Greenbrook NH, LLC v. Est. of Sayre ex rel. Raymond*, 150 So. 3d 878, 881 (Fla. 2d DCA 2014)).

Nor, contrary to the Majority Opinion's conclusion, is the agreements' provision that arbitration would be "conducted in accordance with Scientology principles" enough. First, this aspect of the Majority Opinion ignores the fact that the arbitration agreements promised that dispute resolution would occur through

"binding religious ***arbitration procedures***" and "binding religious arbitration in accordance with ***the arbitration procedures*** of Church of Scientology International." It offers no answer as to what these things were at the time the Garcias entered the agreements other than to refer to the method for selecting arbitrators—which, as I have noted, is separately accounted for and not a part of "the form and procedure for arbitration"—and to refer generally to "Scientology principles."

But as noble as religious principles may be, no matter the religion—Scientology, Christianity, Judaism, Islam, or any other—religious principles are not arbitration procedures and do not and are not meant to establish a form for conducting arbitration. And saying an arbitration will be "conducted in accordance with Scientology principles" is a lot like saying a football game will be played in accordance with Scientology principles or principles of any other religion (secular Alabama Football Religion aside—I'm talking to you, Chief), such as Christianity, for example. What does that mean? Will it be tackle, touch, flag, or something else? Will there be eleven people on a team? Will there be four downs? Will the teams have to pick up ten yards within those four downs to receive another four downs? Will the field be 100 yards long? Will holding qualify for a penalty? How about clipping? False starts? And if so, what will those penalties be? Will there be touchdowns, field goals, extra points, safeties, and two-point conversions? If so, how much will each count? And so on.

Religious principles are no more meaningful in identifying the form and procedure of arbitration than they are in establishing the form and procedure of a football game. Will the parties be permitted attorneys? Will they be allowed to put on evidence? Cross-examine witnesses? Make statements themselves? Present argument? For those matters, will the parties even be allowed to be present for the arbitration, or will it be determined on submissions?

The fact is, a vague statement that arbitration will be "conducted in accordance with Scientology principles" answers none of these or any other procedural or format questions. And that is especially the case here, where the Church had never conducted a single arbitration before the Garcias'. So perhaps it is not surprising that the district court found the Church had no rules and procedures for conducting the arbitration.

Yet the Majority Opinion insists that the district court made a factual finding "that the Garcias had 'some idea' about the arbitration procedures," based on "Luis's testimony that he was a 'committed Scientologist and that he had 'successfully completed the "Ethics Specialist Course," during which he studied . . . the Committee on Evidence and its procedures, as well as the Scientology Justice System.'" Maj. Op. at 19. But the district court did not describe this conclusion as a factual finding. Rather, at best, the district court characterized its conclusion that the Garcias had "some idea" about the arbitration procedures as a mixed question of law and fact (*see* Dist. Ct. Ord. at 15 (stating that it arrived at this conclusion after "[a]pplying these principles [of law]"). And a review

of the district court's analysis shows that to be the case. *See United States v. Steed*, 548 F.3d 961, 966 (11th Cir. 2008) (holding that application of the law to facts determined by the district court presents a mixed question of law and fact). So the district court's conclusion is subject to de novo review. *See id.*

For the reasons I have discussed, though, the district court's conclusion that the Garcias had "some idea" of the form and procedures of the arbitration was not correct, based on the district court's own factual findings, which were not clearly erroneous. The problem with concluding that Luis Garcia must have had "some idea" of the form and procedure for the arbitration based on his testimony that he completed the "Ethics Specialist Course," where he studied the Committee on Evidence and its procedures and the Scientology Justice System is that that district court expressly found that the Committee on Evidence did not provide any procedures for arbitration. And as I have noted, the district court likewise determined that the Church could point to nothing—including the Scientology Justice System—to identify any procedures for arbitration. So again, it is not clear to me how Garcia's study of the Committee on Evidence and the Scientology Justice System—neither of which refers to any procedures of arbitration because, again, none existed at the time Garcia studied the Committee on Evidence and the Scientology Justice System—could have given the Garcias any idea of the procedures of arbitration.

Indeed, the Church could point to nothing that the court found would advise the Garcias of the arbitration rules and

procedures (because there weren't any) or would rein in the Church's conduct of the arbitration (because no rules and procedures bound the Church). The Church's failure to identify even the most fundamental aspects of the form and procedures governing the arbitration allowed the Church to supply answers that best suited it in the moment. And that circumstance rendered the arbitration agreements invalid under Florida law.

I can perceive no meaningful difference between the arbitration agreements here and the one ruled invalid in *Spicer v. Tenet Fla. Physician Servs., LLC*, 149 So. 3d 163 (Fla. 4th DCA 2014).

In *Spicer*, the arbitration agreement stated, "[Y]ou agree that any and all disputes regarding your employment . . . are subject to the Tenet Fair Treatment Process ["FTP"], which includes final and binding arbitration. You also agree to submit any such disputes for resolution under that process . . . ." 149 So. 3d at 164 (alteration in original). But the FTP was not attached to the agreement, and the agreement did not explain how the employee could access the FTP. *Id.*

So the court concluded the agreement did not bind the employee to arbitration. *Id.* at 166. As the court explained, the agreement itself did "not set forth any procedures for arbitration as required by *Malone*." *Id.* (emphasis omitted). Nor did the agreement incorporate the FTP by reference. *Id.* at 166-67. *Spicer* stated that incorporation by reference required "the incorporating document . . . (1) [to] specifically provide that it is subject to the incorporated collateral document[,] and (2) the collateral document to be

incorporated must be sufficiently described or referred to in the incorporating agreement *so that the intent of both parties may be ascertained*." *Id.* at 166. In *Spicer*, the court determined that the second condition was not met. *Id.* at 167-68.

The Garcias' case is even more compelling than *Spicer*. At least in *Spicer*, the FTP existed somewhere at the time the parties signed the agreement referencing it. In contrast, the "binding religious arbitration procedures" that the Garcias' arbitration agreements referred to did not.

Not only that, but in *Spicer*, the employee actually received an electronic copy of the FTP seventeen days after she signed the agreement and well before she had a dispute with the company. *See id.* at 165. Here, as we know, the Garcias never received a copy of the "binding religious arbitration procedures" because they did not exist until the IJC made them up on the spot.

The Majority Opinion does not meaningfully explain why *Spicer* does not require the conclusion that the arbitration agreements here were invalid. *See* Maj. Op. at 19. Instead, it says that "[t]he Garcias' agreements provided that the arbitration would be '[i]n accordance with the discipline, faith, internal organization, and ecclesiastical rule, custom, and law of the Scientology religion.'" *Id.* But again, since the district court found as a matter of fact that "the discipline, faith, internal organization, and ecclesiastical rule, custom, and law of the Scientology religion" did not include any arbitration procedures and the Church had never previously conducted an arbitration and concededly made up the

arbitration rules as the arbitration progressed, the reference in the Garcias' agreement on which the Majority Opinion relies provides no answer to the form and procedures for the arbitration.

The Majority Opinion also rests on *Intracoastal Ventures Corp. v. Safeco Ins. Co. of Am.*, 540 So. 2d 162 (Fla. 4th DCA 1989), *abrogated on other grounds as recognized in Nationwide Mut. Fire Ins. Co. v. Schweitzer*, 872 So. 2d 278, 279 (Fla. 4th DCA 2004), and *Greenbrook NH, LLC v. Est. of Sayre ex rel. Raymond*, 150 So. 3d 878 (Fla. 2d DCA 2014). But both are materially distinguishable.

The arbitration requirement in *Intracoastal Ventures* involved an appraisal provision in an insurance contract. *Intracoastal Ventures*, 540 So. 2d at 163. Under it, if the insured and the insurer could not agree on the amount of a covered loss, the contract required them to each select "a competent independent appraiser." *Id.* Then the two selected appraisers were to choose "a competent, impartial umpire." *Id.* If the two appraisers could not agree, either or both parties could petition a judge in the state to select an umpire. *Id.* With the appraisers and umpire selected, the appraisers were to set the amount of the loss. *Id.* If they could not agree, they were to submit their differences to the umpire, and written agreement by any two of the three would establish the amount of the loss. *Id.* The Florida District Court of Appeal upheld the arbitration requirement because it found that the provision satisfied the requirements set forth by *Malone & Hyde*. *Id.* at 164.

The provision in *Intracoastal Ventures* differs with regard to "the form and procedure for arbitration," *Malone & Hyde*, 515 So.

2d at 366, in important respects from the arbitration agreement at issue here. Notably, the *Intracoastal Ventures* arbitration concerned only "amount of the loss." *Intracoastal Ventures*, 540 So. 2d at 163. For that reason, the provision had to establish only a form and procedure for determining the amount of the loss. By requiring both appraisers to be "competent" and "independent" and the umpire to be "competent and impartial," the provision necessarily demanded that all three decision-makers involved in the arbitration be competent appraisers—that is, that they adequately apply generally accepted appraisal methods in performing appraisals.

In other words, by requiring that the appraisers be "competent" and "independent" and the umpire by "competent and impartial," the arbitration provision in *Intracoastal Ventures* established the procedure by which the appraisal (and thus, the arbitration) would be determined—the application of generally accepted appraisal methods. Put simply, the *Intracoastal Ventures* provision effectively incorporated generally accepted appraisal methods, in conjunction with its specified procedure for breaking a tie between the arbitrators, as its procedural mechanism (rules) for conducting the arbitration once the arbitrators (appraisers and umpire) were selected.

In contrast, the Scientology provision ties the arbitration form and procedure to no set of rules other than the non-existent "binding religious arbitration procedures" of the Church. So unlike in *Intracoastal Ventures*, where anyone who read the arbitration

provision could understand the rules and procedure by which the subject matter there—amount of the loss—would be determined, here, the arbitration agreements give no idea of the form and procedure the arbitration itself will take. For that reason, the basis for upholding the *Intracoastal Ventures* agreement does not exist here.

As for *Greenbrook*, there, the parties adopted the Florida Arbitration Code, Fla. Stat. §§ 682.01-.22, as a part of their arbitration agreement. 450 So. 3d at 882. So there was no issue that the arbitration agreement did not set forth the form and procedure of the arbitration. *See id.* But again, that's not the situation here. Though Florida law governs the contract principles here, the parties did not adopt the Florida Arbitration Code, so those rules didn't apply to the arbitration here.

III.

Ultimately, the arbitration agreements at issue here are not valid under Florida law. They do not identify "the form and procedure" of the arbitration as Florida law requires. Worse yet, at the time they were entered and at the time of the so-called arbitration here, the agreements purported to incorporate non-existent rules and procedures. As a result, the Church was able to make up the arbitration rules as the arbitration progressed. We should not condone—let alone sanction—this type of arbitrary and unfair proceeding in the name of the Federal Arbitration Act. I respectfully dissent.