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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr. Circuit Court Judge

Appellate Case No. 2023-001479
Case No. 2021-CP-02-00889

Julianne Foster .....Respondent,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC of South Carolina, and Airbnb, Inc., ... Defendants,

of which

Airbnb, Inc., is the.....Appellant,

and

Rhett Riviere is a.....Respondent.

Petition for a Writ of Certiorari

C. Mitchell Brown
E-Mail: mitch.brown@nelsonmullins.com
Blake T. Williams
E-Mail: blake.williams@nelsonmullins.com
Matthew A. Abee
E-Mail: matt.abee@nelsonmullins.com
Nelson Mullins Riley & Scarborough LLP
E-Mail: matt.abee@nelsonmullins.com
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 799-2000

Richard A. Harpootlian
E-Mail: rah@harpootlianlaw.com
1410 Laurel Street
Columbia, SC 29201
(803) 252-4848

Beattie B. Ashmore
E-Mail: beattie@beattieashmore.com
650 East Washington Street
Greenville, SC 29601
(865) 467-1001

Attorneys for Appellant Airbnb, Inc.

INTRODUCTION

Airbnb, Inc. ("Airbnb") petitions this Court under Rule 242, SCACR, to issue a writ of certiorari to review the Court of Appeals' opinion in *Julianne Foster v. Rhett Riviere, et al.*, Op. No. 2025-UP-297 (S.C. Ct. App. filed August 20, 2025) (the "Opinion"). The circuit court below denied Airbnb's motion to compel arbitration, rejecting Airbnb's direct benefits estoppel position, accepting Plaintiffs' "outrageous torts" exception to arbitration, declining to find a contractual delegation of the waiver question to the arbitrator, and finding that Airbnb waived its arbitration rights. The Court of Appeals essentially affirmed in result, declining to address whether there was a binding arbitration right in the first place, whether there was a delegation of the waiver question to the arbitrator within the arbitration contract at issue, or whether there was an applicable "outrageous torts exception." Instead, the Court of Appeals skipped over those questions and concluded that there had been a litigation-conduct waiver of arbitration rights. The Opinion on waiver presents novel legal questions and simultaneously conflicts with this Court's and the United States Supreme Court's precedent. As a result, this Court should grant Airbnb's Petition, reverse the Court of Appeals, and remand to the Court of Appeals respecting the direct benefits estoppel and outrageous torts exception issues.[1]

First, the Court of Appeals' opinion conflicts with binding precedent from both this Court and the United States Supreme Court. The Court of Appeals should not have decided the waiver question because "whether this Arbitration Agreement can be enforced or applies," is a question that was validly delegated to the arbitrator in the arbitration contract at issue. In this regard, the Opinion conflicts with this Court's opinion in *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 389, 892 S.E.2d 112, 118 (2023). Assuming *arguendo* that it was proper for the Court of

[1] Alternatively, this Court could choose to address those issues itself.

Appeals to address the waiver question rather than delegating it to the arbitrator, the Opinion misapplies the traditional waiver test in violation of the United States Supreme Court's opinion in *Morgan v. Sundance*, 142 S. Ct. 1708, 1714 (2022). Rather than determine whether there was an intentional relinquishment of a known right, the Court of Appeals ruled Plaintiff had established an implied waiver due to alleged discovery costs incurred by Plaintiff. *Morgan's* teaching is that waiver questions must be decided in the arbitration context just as they would be in any other contractual context. This did not occur here.

Second, assuming the issue of litigation-conduct waiver is not delegated and should be decided by the courts, the Court of Appeals failed to address the novel question and argument by Airbnb that Plaintiff's amendment of the complaint to change the theory or scope of the case reinforced or revived what otherwise was found to have been a waived right to compel arbitration. Plaintiff originally asserted only two claims against Airbnb, negligence and negligence per se, in a narrow, 83-paragraph Complaint. Nearly two years later (and over Airbnb's objections), Plaintiff expanded the litigation significantly, filing a 257-paragraph Amended Complaint and adding five claims, including a claim under the South Carolina Unfair Trade Practices Act. Although Airbnb answered both complaints, it expressly *reserved* its arbitration rights in both pleadings and moved to compel arbitration just six months after the significantly expanded Amended Complaint became operative. Courts in other jurisdictions have determined that a large expansion of a lawsuit can "revive" arbitration rights which would otherwise have been found as waived. The Court of Appeals did not address the novel question, or Airbnb's arguments, concerning how waiver should be approached in the context of a greatly expanded and changed lawsuit. Certiorari should thus be granted by this Court.

Further, certiorari is appropriate for this Court to direct the proper steps in the analysis of this matter—the Court of Appeals should have determined whether there was a binding arbitration contract that affected the parties first, and if so, whether the issue of waiver was delegated to the arbitrator to decide by the applicable contractual language. In the process of doing so, the Court of Appeals would also need to pass upon the question of the outrageous torts exception. The Court of Appeals failed to follow this process, which was an error this Court should correct. Then, the Court of Appeals further erred in its waiver ruling. Certiorari should thus be issued.

QUESTIONS PRESENTED FOR REVIEW

The issues presented are:

I. Because waiver is not a question of whether "a contract existed in the first place," but involves the "right to invoke an arbitration provision," did the Court of Appeals err in failing to determine whether the question of waiver was to be determined by an arbitrator under this Court's opinion in *Sanders v. Savannah Highway Automotive Company*?

II. Assuming *arguendo* the court and not an arbitrator should have decided the waiver question, did the Court of Appeals err in its waiver ruling because Petitioner expressly reserved its rights to compel arbitration at all stages, there was a non-waiver provision in the Terms of Service in the controlling contract, and the motion to compel arbitration was made within six months of a dramatically expanded and contested Amended Complaint asserting new claims?

III. Whether certiorari and remand are appropriate to require the Court of Appeals to address Airbnb's direct benefits estoppel and remaining arguments.

STATEMENT OF THE CASE AND FACTS

In 2019, Plaintiff's friend, Michelle Jain, booked a rental property in Aiken, South Carolina through the Airbnb online marketplace for herself and several friends, including Plaintiff. (Am. Compl. ¶¶ 93, 100; R. at 161–62.) This property was owned by Defendant Chase Enterprises, which Defendant Rhett Riviere manages. (*Id.* ¶¶ 89–91; R. at 161.) Defendant Katherine Thomas held herself out to be the "host," or account manager, for the property. (*Id.* ¶ 95; R. at 162.)

Plaintiff alleges she and her friends "paid the Defendants to rent the Airbnb property." (*Id.* ¶ 100; R. at 162.)

Airbnb's Terms of Service governed this transaction. (*See* Airbnb's Mot. Compel Arbitration, Ex. A: Terms of Service, AIRBNB-000272–314 ("Terms of Service"); R. at 507–49.) Plaintiff's friend agreed to Airbnb's Terms of Service when she created her Airbnb account and used it to book the rental. (*See* Am. Compl. ¶¶ 93–95; R. at 161–62; Pl.'s Resp. in Opp'n to Mot. Compel Arbitration at 2; R. at 551.)[2] Plaintiff's friend agreed to the Terms of Service on April 11, 2019. (*See* Reply in Support Mot. to Compel Arb., Ex. A: User Information; R. at 606–12; Brown Ltr. Judge Maddox dated June 14, 2023; R. at 625–50.)[3]

The Terms of Service in effect at the time of the booking provide in bold on page one:

> **Please note: Section 19 of these Terms contains an arbitration clause and class action waiver that applies to all Airbnb Members. If your country of residence is the United States, this provision applies to all disputes with Airbnb. If your country of residence is outside of the United States, this provision applies to any action you bring against Airbnb in the United States. It affects how disputes with Airbnb are resolved. By accepting these Terms, you agree to be bound by this arbitration clause and class action waiver. Please read it carefully.**

(Terms of Service at 272; R. at 507.) Section 19 is entitled "Dispute Resolution and Arbitration Agreement," and provides that it applies to all residents of the United States. (*Id.* at 290–93; R. at 525–28.) Section 19.4 then states in bold:

> **Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to**

[2] As hosts, Riviere and Thomas also agreed to the Terms of Service as a condition of listing their properties on the Airbnb's online marketplace. (Airbnb's 3d Party Compl. ¶ 1; R. at 320–21.)

[3] The other prerequisites to a valid arbitration agreement are also present. The Arbitration Agreement in the Contract specifically provides that the transaction involved interstate commerce and the rental transaction at issue involved the payment of funds over the interstate wires between Airbnb, a Delaware entity with its principal place of business in California and Plaintiff's friend, a South Carolina resident. (Terms of Service at 291, § 19.6; R. at 526.)

> **these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding individual arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.**

(*Id.* at 291; R. at 526.)

A. Plaintiff's Original Complaint

On April 28, 2021, Plaintiff sued Defendants Riviere, Thomas, Chase Enterprises, and Airbnb in Aiken County. (Compl.; R. at 83–93.) Plaintiff alleges that during the time she was staying at the property, Defendant Riviere had a hidden camera placed in a bedroom which captured recordings of her in various stages of undress. (*Id.* ¶ 29; R. at 86.) Plaintiff's original 83-paragraph complaint asserted only two claims against Airbnb: negligence/gross negligence and negligence per se. (Compl. ¶¶ 35–44, 71–83; R. at 83–93.)

On August 3, 2021, Airbnb moved to dismiss the complaint for failure to state a claim on the grounds that Plaintiff had not established that Airbnb had a duty to protect Plaintiff from the criminal acts of third parties. (Mot. to Dismiss; R. at 1233–36.) The motion was denied, and Airbnb filed its answer expressly reserving its right to compel mandatory contractual arbitration. (Airbnb's Ans.; R. at 109.)

B. Plaintiff's Amended Complaint

Nearly eighteen months after first suing, Plaintiff moved to amend the Complaint. (Mot. to Amend; R. at 1729–32.) On November 30, 2022, the circuit court granted the motion, (Order Granting Pl. Leave to Amend Compl.; R. at 33–37), and Plaintiff filed the Amended Complaint that same day, (Am. Compl.; R. at 145–83). The 257-paragraph amended pleading asserted twelve

claims and new factual allegations. (*Id.*) Plaintiff added two claims for premises liability and a claim for unfair trade practices against all Defendants. (Am. Compl. ¶¶ 182–88, 246–57; R. at 173, 180–82.) Plaintiff also added three new claims against Airbnb only: negligent hiring, supervision, or retention of employees; negligent hiring, supervision, or retention of employees or alternatively independent contractors; and vicarious liability for invasion of privacy. (*Id.* ¶¶ 136–61, 162–81, 196–213; R. at 166–70, 174–77.)[4] Plaintiff also requested additional remedies, including injunctive relief, treble damages, fees, and interest. (*See* Am. Compl. ¶ 257; R. at 182.)

On January 20, 2023, Airbnb again moved to dismiss. (Mot. Dismiss Am. Compl.; R. at 1254–60.) The circuit court denied the motion. (Order, May 25, 2023; R. at 38–40.) So on April 20, 2023, Airbnb answered and crossclaimed against Thomas for breach of contract, contractual indemnification, and equitable indemnification. (*See* Airbnb's Ans. to Am. Compl.; R. at 184–317.) On the first page of this answer, Airbnb again expressly reserved its right to compel mandatory contractual arbitration and to amend its answer and assert crossclaims. (*Id.*; R. at 184.) Airbnb filed a third-party complaint against Riviere as ordered by the circuit court, who ruled that Plaintiff's unilateral dismissal of Riviere was effective despite Airbnb having not joined that stipulation. (Form 4 Order, May 25, 2023; R. at 41; Airbnb's 3d Party Compl.; R. at 320–33.)

C. The Motions to Compel Arbitration

Before the circuit court ruled on Airbnb's Motion to Dismiss the Amended Complaint, (Order, May 25, 2023; R. at 38–40), Airbnb moved to compel arbitration of the expansive Amended Complaint. (Airbnb's Mot. Compel Arb.; R. at 490–506.) It separately moved to stay

[4] A month after amending her complaint, Plaintiff entered into a confidential settlement with Riviere. (*See* Hr'g Tr. 19:4–8, April 5, 2023; R. at 352.) Plaintiff and Riviere filed a stipulation purporting to dismiss Riviere on December 20, 2022. (Stipulation of Dismissal; R. at 1932–33.) Airbnb did not join the stipulation. (*Id.*) Airbnb reserves all rights respecting this settlement.

the litigation. (Mot. Stay; R. at 688–89.) About a week later, Riviere also moved to compel arbitration of Airbnb's claims against him. (Riviere's Mot. to Compel Arb.; R. at 1858–61.)

On July 26, 2023, Judge Maddox denied Riviere's motion to compel arbitration. (Order Denying Riviere's Mot. to Compel.; R. at 50–56.) Riviere filed his notice of appeal. (Riviere's Not. of Appeal; R. at 1978–90.)[5] On September 13, 2023, the circuit court denied Airbnb's motion to compel arbitration. (Order Denying Airbnb's Mot. to Compel Arb.; R. at 67–80.) Airbnb timely filed and served its Notice of Appeal. (Airbnb's Not. of Appeal; R. at 1991–2020.)[6]

D. The Court of Appeals' Opinion

On August 20, 2025, the Court of Appeals issued the Opinion. *See Julianne Foster v. Rhett Riviere, et al.*, Op. No. 2025-UP-297 (S.C. Ct. App. filed August 20, 2025).[7] Airbnb timely petitioned the Court of Appeals for Rehearing and Rehearing *en banc*. (Pet. for Rehearing, Sep. 4, 2025.) The Court of Appeals denied that Petition on November 24, 2025.[8] Airbnb now petitions for certiorari to review the Court of Appeals' Opinion.

ARGUMENT

The Court should grant certiorari and reverse the Court of Appeals. The Court should remand to the Court of Appeals to follow the process of determining whether a contractual

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[5] This appeal proceeded separately. *See Julianne Foster v. Rhett Riviere, et al.*, No. 2023-001211.

[6] Riviere and Airbnb jointly moved Judge Maddox to acknowledge the automatic stay of the litigation under *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023). (Joint Mot. to Acknowledge Automatic Stay; R. at 702–09.) Judge Maddox entered an order acknowledging the automatic stay, and otherwise staying the proceedings as an exercise of his discretion. (Order Granting Stay; R. at 62–66.)

[7] That same day, the Court of Appeals issued its unpublished opinion reversing the circuit court's denial of Riviere's motion to compel arbitration. *See Julianne Foster v. Rhett Riviere, et al.*, Op. No. 2025-UP-298 (S.C. Ct. App. filed August 20, 2025). No party sought rehearing, so the Court of Appeals issued its remittitur to the circuit court. (Remittitur, Sep. 5, 2025.)

[8] The undersigned certifies the Court of Appeals denied its Petition for Rehearing.

arbitration right controls, if so whether it delegates to the arbitrator questions of waiver, and only if waiver is determined to be a matter for the court should waiver be addressed. Assuming *arguendo* waiver was matter for the court, this Court should reverse the Court of Appeals and the circuit court and find no waiver.

I. The Court of Appeals' Opinion conflicts with this Court's opinion in *Sanders*.

The Court of Appeals should not have addressed the waiver issue in the first place. That issue deals not with the formation of a contract containing the arbitration agreement, but with the enforceability of that arbitration agreement. Thus, the Opinion conflicts with this Court's opinion in *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 389, 892 S.E.2d 112, 118 (2023).

The United States Supreme Court has explained that parties may have different types of disputes within the arbitration context. *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148–49 (2024). "A contest over the merits of the dispute is a first-order disagreement, the resolution of which depends on the applicable law and relevant facts. The parties may also have a second-order dispute—whether they agreed to arbitrate the merits—as well as a third-order dispute—who should have the primary power to decide the second matter." *Id*. (cleaned up). A third-order dispute, "who should have the primary power to decide," is implicated here. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). "As long as the parties' agreement delegates the arbitrability question to an arbitrator 'by clear and unmistakable evidence,' a court may not override the contract and decide the arbitrability question." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 700, 869 S.E.2d 859, 864 (Ct. App. 2022) (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. 63, 69 (2019)).

The United States Supreme Court includes waiver in its list of issues encompassed within the concept of "arbitrability" such that an "arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 84 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). Other courts agree. Whether a party has waived its arbitration right is "a dispute about whether this Arbitration Agreement can be enforced" (Terms of Service at 291, § 19.4; R. at 526), so the issue is only appropriate for the arbitrator to decide. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *Airbnb, Inc. v. Rice*, 518 P.3d 88, 91 (Nev. 2022) ("[W]hen a contract delegates the arbitrability question to the arbitrator, a court has no authority to decide whether the arbitration agreement applies to the dispute, even where the argument for arbitrability is wholly groundless."); *Chatman v. Jimmy Gray Chevrolet*, 2016 WL 4975044, at *6 (N.D. Miss. 2016) ("Given that the waiver issue goes to the scope of arbitration, which in this case must be decided by the arbitrator given the existence of the delegation clause, unquestionably, the issue must be decided by the arbitrator and not this Court."); *Coulter v. Experian Info. Sols.*, No. 20-cv-01814, 2021 WL 735726, at *4–5 (E.D. Pa. Feb. 25, 2021) ("This provision constitutes a 'clear and unmistakable' delegation clause under *Henry Schein* and delegates the exclusive authority to resolve 'all issues' to the arbitrator, including whether Defendant waived its right to arbitrate.") (alterations omitted); *Cline v. Equifax Info. Servs.*, No. 22-cv-02021, 2023 WL 3872392, at *3 (S.D. Ind. May 30, 2023) ("This language demonstrates the parties' intent to arbitrate even issues of substantive arbitrability that would otherwise be decided by a court. Whether Experian delayed too long and therefore participated too much in this litigation before seeking arbitration is an issue of arbitrability.") (alteration and citation omitted); *Ewers v. Trans Union*, No. 22-cv-02474, 2023 WL 5435921 (S.D. Ind. Aug. 17, 2023) (same).

The Terms of Service in the applicable contract here include clear terms that arbitrability questions have been delegated. Those Terms of Service provide that if "there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue." (Terms of Service at 291, § 19.4; R. at 526.) This delegation clause is what should have prevented the lower courts from resolving any questions of arbitrability, including whether Airbnb waived its rights to enforce the arbitration agreement.

By holding that Airbnb waived its arbitration rights, the Court of Appeals implicitly held that the delegation clause in the Terms of Service does not apply to the waiver issue. (Slip Op. at 3.) That implied ruling conflicts with this Court's holding in *Sanders* that questions of enforceability must be decided by an arbitrator. In *Sanders*, car buyers argued that the car dealership could no longer enforce an arbitration provision in a purchase agreement because the dealership had assigned that agreement to a third-party financing company. *Sanders*, 440 S.C. at 380–81, 892 S.E.2d at 113–14. The dealership argued under *Prima Paint* that the arbitrator should determine whether the assignment prevented enforcement of the arbitration provision considering the agreement's delegation clause, but the circuit court and this Court rejected that argument. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). This Court reversed, holding that a "challenge to a party's right to invoke" arbitration agreements are to be decided by an arbitrator when such issues have been delegated. *Id*. at 383, 892 S.E.2d at 115. In so holding, the Court distinguished formation and enforcement issues. *Id*. at 385, 892 S.E.2d at 116. Whether "a contract existed in the first place," is a question for the courts; "whether the contract *continued* to exist after a certain point" so that it could still be enforced by the party moving to compel is properly decided by the arbitrator. *Id*. at 389, 892 S.E.2d at 118.

Sanders is consistent with "waiver" being a "like defense[ ] to arbitrability." *Howsam*, 537 U.S. at 84. So too is *Sanders* consistent with the other courts around the country that have held that waiver must be decided in the first instance by an arbitrator in the face of a delegation clause. Such deference to an arbitrator makes sense because waiver deals with a party's conduct *after* formation of the contract containing the arbitration clause and directly bears on whether that party continues to have the right to enforce that arbitration clause. *Sanders*, 440 S.C. at 389, 892 S.E.2d at 118 (contrasting formation with continued enforceability). By contrast, the Court of Appeals' decision to address waiver here conflicts with this Court's opinion in *Sanders*, warranting this Court's intervention to reconcile the conflict.

II. The Court of Appeals erred in declining to address Airbnb's direct benefits estoppel and remaining arguments.

Several additional important arguments were left unresolved by the Court of Appeals because of its decision not to follow the process of determining applicable arbitration contractual rights first, then whether arbitrability decisions were delegated to an arbitrator, then if waiver not delegated, whether there was waiver. This Court should grant certiorari and remand to the Court of Appeals to follow the above process. Certain of the issues are laid out below.

A. Direct benefits estoppel applies given Plaintiff's repeated reliance on the Terms of Service to plead and litigate her claims.

Although Plaintiff was not a signatory to the arbitration agreement between her friend and Airbnb, Plaintiff is estopped from avoiding the requirement to arbitrate. South Carolina law estops non-signatories from avoiding an arbitration clause when they receive a direct benefit from the contract containing the clause. *Wilson v. Willis*, 426 S.C. 326, 344, 827 S.E.2d 167, 177 (2019).

The Court of Appeals failed to correct (because it did not address the issue) the circuit court's misapplication of the direct benefits estoppel test in denying Airbnb's motion to compel

arbitration. (Order at 5 n.3; R. at 71.) Direct benefits estoppel applies here because Plaintiff is seeking to enforce the contract between Airbnb and her friend. Although Plaintiff pleads tort and other non-contractual claims, the substance of her claims—that Airbnb owed a special duty to Plaintiff because Plaintiff stayed as a guest at a property rented through Airbnb—arises solely from the specific provisions in the rental contract and must be determined by reference to it. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 ("When a claim depends on the contract's existence and cannot stand independently—that is, the alleged liability 'arises solely from the contract or must be determined by reference to it'—equity prevents a person from avoiding the arbitration clause that was part of that agreement.") (citation omitted).

First, the only alleged relationship between Plaintiff and Airbnb would be through the rental transaction booked under the Terms of Service. Plaintiff's Amended Complaint references Airbnb's rental agreement specifically: "Plaintiff was in a special relationship with Defendant based on the rental agreement between the parties." (Am. Compl. ¶ 222; R. at 178; *see also id*. ¶ 224; R. at 178 (referencing the importance of knowing about cameras before making the decision to "enter into the contractual relationship.").) Plaintiff also relies on Airbnb's contractual relationship to establish the alleged duty owed to her: "Airbnb owed a duty to Plaintiff because Plaintiff has a special relationship with Airbnb**,** by virtue of their staying at an accommodation rented through Airbnb . . . ." (*See* Am. Compl. ¶ 140; R. at 167.) Similarly, when contending that Airbnb has sufficient control over the property to support a claim for premises liability, Plaintiff asserts that "Airbnb controls the entire transaction. . . . They control the terms . . . . They can control all of the terms of the rental Airbnb is in control of." (*Id.* at 13:18–23; R.at 346.)

Second, Plaintiff points to and relies on Airbnb policies, terms, and standards many times to support the claims in her Amended Complaint. Plaintiff references Airbnb's privacy policy,

(Am. Compl. ¶ 249; R. at 181), content policy, (*id*. ¶ 62–63; R. at 155), and cancellation policy, (*id*. ¶ 66; R. at 155–56), and asserts that Airbnb has an in-person inspection policy, (*id*. ¶ 73; R. at 157). Plaintiff specifically references standards and policies related to recording devices to form the basis of her claims, alleging:

- "Airbnb represents that it has developed 'community standards to help guide user behavior and codify the company's values' as to certain subjects, including safety, security, fairness, authenticity, and reliability." (Am. Compl. ¶ 84; R. at 160.)
- "Airbnb states that its Hosts are required to inform guests of any cameras or recording devices on their property, even if they are turned off, and undisclosed cameras and recording devices are never permitted to be located in private spaces, such as a bedroom or bathroom." (*Id*. ¶ 85; R. at 160.)
- "Thus, due to Airbnb's own restrictive policies, guests must rely entirely on Airbnb to ensure their accommodations are safe and secure." (*Id*. ¶ 154; R. at 169.)
- "To the extent policies were in place, those policies were not enforced, ignored and/or violated." (*Id*. ¶ 242; R. at 180.)

Plaintiff cites Airbnb's policies and standards that she alleges support her claims another 18 times throughout her Amended Complaint. (*See*, *e.g.*, Am. Compl. ¶¶ 47, 59–61, 66–68, 72, 73, 86, 96, 139, 144, 146, 170, 172, 200, and 215; R. at 153–57, 160, 162, 167–68, 171, 175, 177.)[9] Each of these 19 references were added by Plaintiff for the first time in her Amended Complaint. Plaintiff cannot assert contractual provisions from the Terms of Service to her benefit while shunning the obligations under the arbitration provision in the same agreement. This is exactly the type of "unfairness" and "injustice" that the direct benefits estoppel doctrine seeks to remedy. *See Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012).

[9] The Terms of Service incorporate the policies or standards Plaintiff claims apply. (Terms of Service at 272–73, 286, and 293; R. at 507–08, 521, 528.)

As a result, Plaintiff is estopped from avoiding the arbitration clause, and the Court of Appeals erred in failing to address whether Airbnb may enforce the agreement.

B. Granting certiorari to correct the remaining erroneous rulings not addressed by the Court of Appeals is also necessary.

The circuit court also declined to enforce the arbitration agreement on the grounds that an outrageous act occurred that was unforeseeable to reasonable consumers—the so-called "outrageous torts exception" to arbitration. (Order at 8; R. at 74–75.) The Court of Appeals declined to consider this ruling. Hence, the Court should grant certiorari to correct this legal error by the circuit court, or it should remand to the Court of Appeals with instructions to consider it.

In South Carolina, the outrageous torts exception permitted "parties whose claims arose out of an opponent's 'outrageous' tortious conduct to avoid arbitration." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016). Whether the "exception" applies is a question properly delegated to an arbitrator. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 702, 869 S.E.2d 859, 865 (Ct. App. 2022) (discussing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)); *Doe v. TCSC, LLC,* 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020). Thus, the circuit court initially erred by endorsing the idea that a court—rather than an arbitrator—may apply the "exception" in the face of a valid delegation clause.

Assuming *arguendo* the circuit court could have considered this "exception," it does not apply. Plaintiff brings no claim of outrageous conduct against Airbnb, although she sued Riviere for invasion of privacy and intentional infliction of emotional distress. (Am. Compl. ¶¶ 189–95, 214–20; R. at 174, 177–78.)

In any event, the exception is no longer viable in South Carolina. Although the FAA allows courts to invalidate arbitration agreements based on generally applicable contract defenses, 9

U.S.C. § 2, courts cannot apply arbitration-specific defenses. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). And even when analyzing defenses of general applicability, courts cannot employ those defenses in a manner which would subject arbitration agreements to special scrutiny. *See*, *e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements . . . ."). The outrageous torts exception offends these basic principles. South Carolina's outrageous torts exception is "unique" and "restricted" to the field of arbitration. *Parsons*, 418 S.C. at 11, 791 S.E.2d at 133 (Pleicones, J.) (plurality opinion). No South Carolina precedent has definitively addressed whether the doctrine remains viable following *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), although two justices in *Parsons* would have held that the "exception cannot survive." *Id*. at 13, 791 S.E.2d at 134.[10]

All of our state court cases that have applied the outrageous torts exception since it was created in *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) have focused explicitly on arbitration.[11] The one attempted application of the exception outside of the arbitration context was reversed by this Court. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 333–34, 755 S.E.2d 437, 444 (2014) ("[H]owever, we reverse the portion [of the Court of Appeals opinion] finding that the outrageous and unforeseeable torts exception to

[10] Three justices in Parsons, in statements spread across multiple, non-plurality opinions, expressed their view that *Concepcion* did not eliminate the doctrine under South Carolina law.

[11] *See*, *e.g.*, *Timmons v. Starkey*, 389 S.C. 375, 378, 698 S.E.2d 809, 810 (2010); *Partain v. Upstate Auto. Grp*., 386 S.C. 488, 493–94, 689 S.E.2d 602, 605 (2010); *Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 553, 666 S.E.2d 294, 297 (Ct. App. 2008).

arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.").

South Carolina's unique application of the exception only to arbitration requires the exception to yield to the contrary precedent in *Concepcion*. This Court should grant certiorari to correct this legal error by the circuit court or remand to the Court of Appeals to address the issue.

III. The Court of Appeals mentions *Morgan v. Sundance* in passing but nevertheless applies an outdated and erroneous waiver analysis.

Assuming *arguendo* that the question of waiver should be addressed by the court and not delegated to an arbitrator here, the Opinion's waiver analysis conflicts with recent United States Supreme Court precedent. Shortly before Airbnb moved to compel arbitration in this case, the United States Supreme Court reaffirmed the FAA's equal-footing principle in holding that courts could not create arbitration-specific variants of the waiver analysis. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022). *Morgan* emphasized the general waiver rule of "voluntary relinquishment of a known right" and noted that the analysis should focus on the actions of the party who held the right. *Id.* This repeats the principle that courts cannot create arbitration-specific rules to refuse to enforce an otherwise valid arbitration agreement. *See Doctor's Assocs.,* 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9. Further, waiver "is an affirmative defense and the burden of proof is upon the party who asserts it." *Provident Life*, 317 S.C. at 478, 451 S.E.2d at 929.

While the Court of Appeals does cite *Morgan*, it does not apply it. For example, the Court of Appeals' two references to parties generally incurring attorneys' fees and costs misapprehends the waiver test to be applied. Whether Plaintiff incurred fees and costs in this litigation has no bearing on whether Airbnb voluntarily relinquished a known right. *See Janasik*, 307 S.C. at 344, 415 S.E.2d at 387–88. Similarly, the Court of Appeals' conclusion that the parties would not have to incur discovery costs in arbitration misapprehends the extent to which the discovery involved

in this case would be available in an arbitration before the American Arbitration Association ("AAA"). (Slip Op. at 3.) As set forth in the parties' Arbitration Agreement, the AAA's Consumer Rules apply. (Terms of Service at 291–92, §§ 19.2, 19.6–19.8; R. at 526–27.) Those Rules empower the arbitrator to manage any necessary exchange of information among the parties, including "depositions, interrogatories, document production, or by other means . . ." Rule 20(a), Am. Arbitration Assoc. Consumer Rules (May 1, 2025), https://www.adr.org/rules-forms-and-fees/consumer/consumer-arbitration-rules-and-mediation-procedures-2025/.

Airbnb consistently noted in its pleadings that it was reserving the right to compel arbitration, and it stated at the outset of the case that it may seek to compel arbitration. (Order at 12; R. at 78.) Airbnb expressly reserved its right to compel arbitration in the first paragraph of its original Answer and its Answer to the Amended Complaint, satisfying the notice requirement of Rule 8, SCRCP. (*See* Airbnb's Answer; R. at 109; Airbnb's Ans. to Am. Compl.; R. at 184.) Thus, Airbnb made clear that it was maintaining this right and was not voluntarily relinquishing it. *See*, *e.g.*, *Soriano v. Experian Info. Sols., Inc.*, No. 2:22-cv-197-SPC-KCD, 2022 WL 6734860, at *3 (M.D. Fla. Oct. 11, 2022) (highlighting the importance of a party's pleading of arbitration as an affirmative defense in assessing waiver); *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pleaded arbitration as a defense in its two filed answers and in the initial case management conference). Expressly reserving its arbitration rights in a filed pleading is the opposite of knowingly relinquishing the right to compel it. This is especially true in the wake of *Morgan*'s return to the traditional waiver analysis. Nonetheless, the Court of Appeals concluded an implied waiver existed.

For these reasons, this Court should grant certiorari to resolve the conflict between the Opinion and *Morgan*.

IV. The Court of Appeals' Opinion raises novel questions of state and federal law about the waiver of arbitration rights when plaintiffs amend their complaints.

Lastly, this Court's certiorari review is necessary to correct the Court of Appeals' mistaken waiver analysis, assuming *arguendo* it was correct to engage in it in the first place.

A. Plaintiff's Amended Complaint changed the theory or scope of the case, thereby reinforcing and reviving Airbnb's right to compel arbitration.

The Court of Appeals erred in holding that Plaintiff carried her burden of showing that Airbnb waived its arbitration rights. In so holding, the Court of Appeals focused on the time passing between when the original complaint was filed in April 2021 and when the Amended Complaint became operative in November 2022. (Slip Op. at 3.) Plaintiff originally only asserted two causes of action against Airbnb. (Compl. ¶¶ 35–44, 71–83; R. at 87–88, 91–92.) Those two claims only relied on 24 factual allegations focused only on Airbnb's alleged shortcomings as it related to Plaintiff. (Compl. ¶¶ 11–34; R. at 84–87.) When amending the Complaint, however, Plaintiff's pleading ballooned to 257 paragraphs, and three new claims against Airbnb (and five new claims overall). (Am. Compl. ¶ 136–61, 162–81, 182–88, 196–213, 221–32, 246–57; R. at 145–83.) This included some 25 references to Airbnb's Terms of Service. (*See* Am. Compl. ¶¶ 47, 59–61, 66–68, 72, 73, 78–79, 84–86, 96, 139, 144, 146, 154, 170, 172, 200, 215, 222, and 242; R. at 153–58, 160, 162, 167–69, 171, 175, 177–78, 180.) Plaintiff amended both the scope and theory of the case against Airbnb. Plaintiff significantly changed the factual allegations that are incorporated into, and form the basis of, every claim Plaintiff raised—new and old. (Compl. ¶¶ 123, 136, 162, 182, 189, 196, 214, 221, 233, 246; R. at 165–66, 170, 173–74, 177–80.) Plaintiff also included new allegations about stays at Airbnb unrelated to her own. For example, Plaintiff amended the complaint to allege that other instances not involving Plaintiff or the property at issue placed Airbnb on notice of certain alleged dangers. (Am. Compl. ¶ 6; R. at 146.) Plaintiff's

Amended Complaint also added new discussion about incidents (unrelated to this property or this plaintiff) in California, Florida, Maine, and Texas. (*Id.* ¶¶ 7–10, 79–82; R. at 146–47, 158–60.)

Plaintiff presumably intends to introduce evidence about other matters in support of her claim for violation of South Carolina's Unfair Trade Practices Act, claiming that Airbnb's actions "have affected and continue to affect other consumers and have the potential of repetition," so the acts "have an adverse impact on the public." (*Id.* ¶¶ 7–10, 252; R. at 146–47, 181.) A central element of such a claim requires demonstrated impact on the public interest, which is shown through capability of repetition, *see Crary v. Djebelli,* 329 S.C. 385, 387, 496 S.E.2d 21, 22–23 (1998), significantly expanding the scope of this lawsuit, *Daisy Outdoor Adver. Co. v. Abbott,* 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996). Plaintiff's discovery confirms an expansion of the litigation to address this element, as the discovery sought shifted focus from her particular stay, to not only include other non-parties' reservations at the particular property at issue and even *all* Airbnb properties, guests, and hosts nationwide. (*See*, *e.g.*, Mot. to Compel (Request for Production No. 48); R. at 749–53; Mot. to Compel (Request for Production No. 34); R. at 802.)

Despite raising this issue to both the circuit court and Court of Appeals, neither court addressed the impact of the Amended Complaint. Courts around the country have held that a plaintiff's expansion of the litigation directly impacts the waiver analysis: "[when] a plaintiff files an amended complaint which changes the theory or scope of the case, the [d]efendant is allowed to plead anew as though it were the original complaint filed by the [p]laintiff." *Haarslev, Inc. v. Nissen*, No. 5:19-CV-06128-BCW, 2023 WL 2782313, at *7 (W.D. Mo. 2023) (quoting *Troisi*, 2009 WL 10710732, at *2); *Cannon Equip. Co. v. Troisi*, No. CV 08-2391 (PAM/AJB), 2009 WL 10710732, at *2 (D. Minn. 2009). Some courts even refer to an amendment as having "revived" a previously waived right to compel arbitration, or to developments in a case as requiring the party

to be "relieved" of a prior waiver. *See Solis v. Experian Info. Sols., Inc.*, No. 22-cv-00102-CJC-KESx, 2022 WL 4376077, at *3 (C.D. Cal. 2022) ("The Court need not—and therefore does not—decide whether Experian in fact waived its right to compel arbitration, because Cantong's amended complaint revived the right even if it were waived."); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc*., 50 F.3d 388, 391 (7th Cir. 1995) ("The shape of the case might so alter as a result of unexpected developments during discovery or otherwise that it might become obvious that the party should be relieved from its waiver and arbitration allowed to proceed."). These courts include at least one federal district court in South Carolina. *Brown v. Green Tree Servs., LLC,* 585 F. Supp. 2d 770, 782 (D.S.C. 2008) (holding that where the amended complaint altered the lawsuit significantly by adding allegations, the defendant would not have been "deemed to have waived its right to compel arbitration merely because of the delay [of 13 months]").

Further, in *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011), the Eleventh Circuit held that an amended complaint that "merely assert[ed] new claims based on the same operative facts as the claims" from the first complaint was still sufficient to revive the right to compel arbitration. *Id*. at 1203. The Eleventh Circuit explained that the "unforeseen alteration in the shape of the case" was sufficient "in plain fairness" to allow the defendant to compel arbitration despite a prior waiver. *Id*. at 1204. Plaintiff's Amended Complaint goes further than the amendment in *Krinsk*. Indeed, by the amendment, Plaintiff shifted focus from Airbnb's actions in relation to Plaintiff to an expansive review of any hidden camera incident nationwide. In so doing, Plaintiff also expanded the relief sought. No longer was Plaintiff seeking only actual, compensatory, special, consequential, and punitive damages, but also liquidated and treble damages, attorneys' fees, and pre- and post-judgment interest. (*Compare* Compl. at 11; R. at 93; *with* Am. Compl. at 38; R. at 182.) Plaintiff added a new claim seeking injunctive relief under the

SCUTPA—relief Plaintiff could not have sought under her prior claims. (*See* Am. Compl. ¶ 257; R. at 182.) As one state supreme court has explained in the arbitration-waiver context, the state "UTPA claim broadens the scope of the proceeding by such a magnitude that it fundamentally transforms the litigation," thereby reviving the right to compel arbitration. *Hudson v. Citibank (S. Dakota) NA*, 387 P.3d 42, 50 (Alaska 2016). Plaintiff's expansion of the "theory or scope of the case," revived any arbitration rights previously waived. *Haarslev*, 2023 WL 2782313, at *7; *Krinsk*, 654 F.3d at 1202–03.

Rather than analyzing the impact of the amended pleading, the Court of Appeals did not address the issue, and instead focused on the entire procedural history of the case, concluding that Airbnb had impliedly waived its arbitration rights because it "actively participated in discovery for a prolonged period of time, including filing multiple answers, multiple motions to dismiss, taking depositions, etc." (Slip Op. at 3.) The Court of Appeals instead should have focused only on Airbnb's actions from when the Amended Complaint became operative on November 30, 2022, (Am. Compl.; R. at 143–83), until the day it moved to Compel Arbitration on May 15, 2023, (Mot. to Compel Arbitration; R. at 490.) Only six months passed between the Amended Complaint becoming operative and Airbnb moving to Compel Arbitration.

The roughly six months that passed here are insufficient to establish waiver. Generally, South Carolina courts have found waiver only after a party has waited years—not mere months—to move to compel arbitration. *Compare Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (more than five-year delay in seeking to compel arbitration was sufficient to constitute waiver of right to compel arbitration), *and Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 666, 521 S.E.2d 749, 753-54 (Ct. App. 1999) (two-year delay), *with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581,

585 (2003) (thirteen-month delay insufficient), *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (same).

While there was some discovery during that six-month period, including the deposition of Plaintiff and document requests to some of the parties, those minimal acts are insufficient to establish waiver for two reasons. *First*, the very same discovery would have been available to both parties in arbitration. Although the discovery contemplated by those Rules and our Rules of Civil Procedure are different, it is not the case that the parties would not have incurred fees and costs for *any* discovery in arbitration. *Second*, the main driver of discovery costs in this case arose from Plaintiff's pursuit of expansive, nationwide discovery to support the SCUTPA claim added in the Amended Complaint. (*See*, *e.g.*, Mot. to Compel (Request for Production No. 48); R. at 749–53; Mot. to Compel (Request for Production No. 34; R. at 802.) This included requests for discovery about nationwide hosts and guests that were non-parties to the litigation. (*Id.*) Airbnb had to oppose Plaintiff's efforts to secure this expansive discovery. *See Hollman v. Woolfson*, 384 S.C. 571, 577–78, 683 S.E.2d 495, 498–99 (2009) (holding that it was an abuse of discretion for the trial court to require the production of the non-parties' contact information and then to authorize the plaintiff's counsel to contact those non-parties even where a SCUTPA claim was asserted). Airbnb should not be penalized for taking this defensive posture in the face of such discovery abuses by Plaintiff.

The Court of Appeals was also incorrect in relying on "multiple motions to dismiss," filed during the life of the case. During the short six months that applies to the waiver analysis, Airbnb filed only one motion to dismiss as it relates to the operative Amended Complaint. (Mot. to Dismiss; R. at 1254.) That said, the circuit court had not yet ruled on the motion to dismiss by the time Airbnb moved to Compel arbitration. Airbnb filed its arbitration motion nearly two weeks

before the circuit court entered its order denying the motion to dismiss the Amended Complaint. (*Compare* Mot. to Compel Arbitration; R. at 490, *with* Order; R. at 38.) In any event, merely answering or moving to dismiss is insufficient to establish waiver, and the Court of Appeals erred concluding otherwise. *See Hall v. UBS Fin. Srvs.*, No. 6:19-cv-3316-TMC, 2022 WL 2076543, at *2 (D.S.C. Oct. 25, 2022); *Hobbs v. Yodel Techs. LLC*, No. 4:19-cv-0009-CDL, 2021 WL 816946, at *5 (M.D. Ga. Mar. 3, 2021) (compelling arbitration after movant (1) joined co-defendant's motions to dismiss and for judgment on the pleadings, along with two other motions, (2) retained and disclosed expert witnesses, and (3) served deposition notices on plaintiff's two experts). The minimal procedural activity during the short six-month period from when the Amended Complaint became operative until Airbnb moved to Compel arbitration contrasts sharply with the waiver cases cited by the Court of Appeals. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 514–15, 788 S.E.2d 216, 219 (2016). There, over the course of three years, the parties engaged in extensive litigation involving a TRO, appointment of a Guardian *ad litem*, multiple motions to compel, at least two depositions, and even an appeal before the defendant moved to compel arbitration. *Id*. at 511–12, 788 S.E.2d at 217. The record here does not show the same degree of court involvement or the same extent of litigation on the operative pleading before moving to compel arbitration. This is especially true when the record the Court reviews under the waiver analysis is limited to the short six months between when the Amended Complaint became operative and when Airbnb moved to compel arbitration.

The impact of an amended pleading expanding the scope of the litigation on the waiver analysis has not yet been addressed by this Court. As a result, the Court should grant certiorari to decide these important and novel legal questions.

B. The Court of Appeals ignored the non-waiver provision in the Terms of Service applicable to Plaintiff's claims.

This Court has also not yet addressed the impact that a non-waiver provision in a party's contract may have on the arbitration-waiver analysis. The Court should grant certiorari to address this novel legal question that has only partially been addressed by our Court of Appeals.

The Terms of Service applicable to Plaintiff's stay includes a broad non-waiver provision: "Airbnb's failure to enforce any right or provision in these Terms will not constitute a waiver of such right or provision unless acknowledged and agreed to by us in writing." (Terms of Service at 294, § 22.5; R. at 529.) This contractual provision must mean something. *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (prohibiting contractual interpretation that would render "provisions in the contract meaningless or superfluous."). The Court of Appeals was wrong to ignore it just because Airbnb raises the provision in the context of a motion to compel arbitration. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017) (applying the FAA's "equal-treatment principle"). There is support in South Carolina, albeit unpublished, for the proposition that a non-waiver provision prevents implied waiver of a party's arbitration rights. *See Catwalk, LLC v. Sea Pines S. Beach Owners' Ass'n, Inc*., No. 2016-000637, 2018 WL 774827, at *1 (S.C. Ct. App. Feb. 7, 2018). Outside the arbitration context, some courts hold that non-waiver provisions "are valid and enforceable and they preclude waiver and estoppel clauses as a matter of law." *Popeyes Louisiana Kitchen, Inc. v. Fla. Pop, LLC*, 723 F. Supp. 3d 1196, 1203 (S.D. Fla. 2024) (quotation omitted); *see also Matter of First River Energy, LLC*, 986 F.3d 914, 929 (5th Cir. 2021) ("Moreover, Delaware courts have consistently held that the existence of an express non-waiver provision precludes a contracting party from arguing that the other party's conduct waived a contractual right.") (citation and quotation omitted). There is no reason a non-waiver provision should be treated differently in the arbitration context here.

The Court of Appeals makes passing reference to *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999), to note that waiver could be found even in the face of a non-waiver provision. (*See* Slip Op. at 3.) However, the court in that case was interpreting a non-waiver provision in the AAA Rules, not a direct non-waiver provision in the applicable contract. *Id*. at 666, 521 S.E.2d at 754 (citing Rule 48(a), AAA Construction Industry Arbitration Rules). Moreover, the facts of *Liberty Builders* stand in contrast to the facts here, because the party moving to compel arbitration there did so on the eve of trial and despite being the very same party that filed the lawsuit in the first place. *Id*. at 660, 521 S.E.2d at 750. These factual differences matter because, as the Court of Appeals correctly noted, (*see* Slip Op. at 3), the waiver question "depends on the facts of each case." *Evans v. Accent Manufactured Homes, Inc*., 352 S.C. 544, 550, 575 S.E.2d 74, 77 (Ct. App. 2003) (quoting *Liberty Builders*, 336 S.C. at 665, 521 S.E.2d at 753).

This Court should also grant certiorari to address the novel question the Court of Appeals failed to fully address: whether South Carolina courts should interpret contracts according to their plain meaning by enforcing the non-waiver provision to preclude an implied waiver of Airbnb's arbitration rights. After all, "the function of courts is to adjudge and enforce contracts as they are written and entered into by the parties. . . . When such contracts are capable of clear interpretation, the court cannot exercise its discretion as to the wisdom of such contract or substitute its own for that which was agreed, upon where its provisions are clear, unambiguous and free from doubt." *Charles v. Canal Ins. Co.*, 238 S.C. 600, 608–09, 121 S.E.2d 200, 205 (1961).

CONCLUSION

For the reasons stated above and in Airbnb's prior briefing, the Court should grant certiorari, reverse the Court of Appeals and the circuit court and remand the matter for entry of an order dismissing Plaintiff's claims without prejudice and compelling her to submit her claims against Airbnb to arbitration. Failing this, the Court should grant certiorari, reverse the Court of Appeals, and remand for consideration of the remaining issues Airbnb presented for review below.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: */s/ C. Mitchell Brown*
C. Mitchell Brown, South Carolina Bar 012872
E-Mail: mitch.brown@nelsonmullins.com
Blake T. Williams, SC Bar 100794
E-Mail: blake.williams@nelsonmullins.com
Matthew A. Abee, SC Bar No. 101100
E-Mail: matt.abee@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

RICHARD A. HARPOOTLIAN, P.A.
Richard A. Harpootlian, SC Bar No. 2725
E-Mail: rah@harpootlianlaw.com
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848

BEATTIE B. ASHMORE, PA
Beattie B. Ashmore, SC Bar No. 10419
E-Mail: beattie@beattieashmore.com
650 East Washington Street
Greenville, SC 29601
(865) 467-1001

Attorneys for Airbnb, Inc.

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