IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC20-1167
L.T. CASE NO.: 2D19-1383

AIRBNB, INC.,

Petitioner,

v.

JOHN DOE and JANE DOE,

Respondents.
_____/

REPLY BRIEF OF PETITIONER AIRBNB, INC.

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I.
ARGUMENT

After a perfunctory acknowledgment that Airbnb's Terms of Service include a hyperlink to the AAA Rules (*see* Brief of Respondents ("the Does") at 1), the Does then retreat to attacking a strawman, in contending that Airbnb required Guests and Hosts to "track[] down and then read the AAA Rules" (Answer Brief at 8-9); merely "gave the Does an AAA website and phone number that could help them learn more about the rules" (*id.* at 32); "vaguely cross-referenced" them (*id.* at 51); and "direct[ed] the[m]" by "general reference" (*id.* at 33-34), such that "[e]ven if they had read every word of the 22-page agreement [they] would not have an answer on the question of who decides arbitrability" (*id.* at 31). *See* AAJ Amicus Brief at 20 ("bare reference").

To the contrary, Airbnb's Terms of Service did not only provide "an AAA website and phone number," and specify the Commercial Arbitration Rules and the Supplementary Procedures for Consumer-Related Disputes. It did give the Does "an answer," by hyperlinking to the AAA Rules, meaning that the Does did not have to "track[] down" anything. They had to click a button, which is more than

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has been held to be sufficient in the decisions we cited.

Those cited decisions hold that even without a hyperlink, where a contract both identifies a specific set of arbitration rules and unambiguously assigns the issue of arbitrability to the Arbitrator, such an incorporation will be sufficient. *See* Petitioners' Brief at 22-36. Two recent decisions support the many others that we cited.

One is an important Fourth District Court decision that post-dates and qualifies *Fallang Family Limited Partnership v. Privcap Companies, LLC*, 316 So. 3d 344 (Fla. 4th DCA 2021) ("*Fallang*"), discussed *infra*, upon which the Does place strong reliance. In *Laurel Point Care and Rehabilitation Center, LLC v. Estate of Desantis*, 2021 WL 2448355, *1 (Fla. 4th DCA June 16, 2021) ("*Laurel Point*"), the Court emphasized that the contract in *Fallang* made only "general reference to the 'AAA rules,' without specifying which subset of those rules would apply," whereas the agreement in *Laurel Point*, in "specifically referencing and incorporating [identified Arbitration Rules][,] was a 'clear and unmistakable' delegation of the authority to have the arbitrator decide" arbitrability.

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The other recent decision is *In re Checking Account Overdraft Litigation*, 2021 WL 1292305, *3 (11th Cir., April 7, 2021) ("*Account Overdraft*") — a class action brought by bank customers — in which the Court held: "We have repeatedly ruled that the reference or incorporation of AAA Rules with language providing that 'the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections to the existence, scope or validity of the arbitration agreement,' demonstrates a clear and unmistakable intent that the arbitrator should decide all questions of arbitrability."

A. AIRBNB'S TERMS OF SERVICE UNAMBIGUOUSLY DELEGATED THE ISSUE OF ARBITRABILITY TO THE ARBITRATOR.

1. The Decisions Addressing This Issue Overwhelmingly Support the Trial Court's Ruling. As the decisions we cited make clear, the question is not what the drafters of the agreement *could have* written, but what they *did* write. Instead of addressing these decisions, the Does 1) invoke their contention below (in even more pejorative language, *see infra*) that all of them simply rubber-stamped one previous decision (*see* Petitioners' Brief at 34-35); and

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2) cite cases in which there were no hyperlinks to arbitration rules, leaving only contractual language concerning arbitrability that was obviously insufficient. *See* Answer Brief at 48-49.

a. The Non-Florida Decisions, Even If Not Binding, Are Nevertheless Relevant and Persuasive, and Do Not Deserve the Does' Opprobrium. Contrary to the Does' contention (*see* Answer Brief at 23-24, 26, 34), we acknowledged that in deciding federal questions, this Court is bound only by U.S. Supreme Court decisions (*see* initial Brief at 18, 22 n. 8). However, the decisions that we cited are nevertheless relevant. Indeed, this Court has often surveyed the laws of other jurisdictions in fashioning Florida law.[1]

And the decisions that we cited certainly do not deserve such *ad hominem* condemnation as the Does' accusations that they are

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[1] *See, e.g., In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020) ("align[ing] Florida's summary judgment standard with that of the federal courts and of the supermajority of states"); *In re Amendments to Florida Evidence Code*, 278 So. 3d 551, 553 (Fla. 2019) (adopting *Daubert v. Merrill Dow Pharmacy, Inc.*, 509 U.S. 579 (1993), where "[t]he clear majority of state jurisdictions also adhere to the *Daubert* standard'" (internal citation omitted)); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) ("join[ing] what seems to be a trend toward almost universal adoption of [the defense of] comparative negligence"; contributory negligence "has been abolished in almost every common law nation in the world").

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merely "the product of inertia" (Answer Brief at 16); have "virtually nothing to say" (*id.* at 24); "shallow analysis" (*id.*); "cursory" (*id.* at 25); "short cut" (*id.*); "only persuasive value (and not much of that)" (*id.* at 26). *See* AAJ Amicus Brief at 19 ("irrelevant" "'judicial chorus'" — no more than "'herding'"); Bermann Amicus Brief at 10, 11 ("[N]one . . . provides any — let alone persuasive — analysis"; "[T]hey merely . . . 'join' the view of another circuit"; "bereft of reasoning").

Such disparagement is inappropriate (and most recently debunked by *Laurel Point* and *Account Overdraft*). An appellate court is not required to write an opinion at all, and not doing so carries no implication that it "overlooked or failed to consider the jurisprudence of this State in ruling upon the merits of the appeal," *Taylor v. Knight*, 234 So. 2d 156, 157 (Fla. 1st DCA 1970), or that "the case was not considered on the merits. Each and every appeal receives the same degree of attention." *Crittenden v. State*, 67 So. 3d 1184, 1185 n. 1 (Fla. 5th DCA 2011). The Does cannot so easily dismiss the overwhelming weight of authority.

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b. The Decisions Cited by the Does Are Inapposite, Because They Did Not Involve a Hyperlink to the Selected Arbitration Rules, and the Contractual Language Was Clearly Insufficient. The only decision cited by the Does that involved a hyperlink (Brief at 48), *Dupler v. Orbitz, LLC*, 2018 WL 6038309 (C.D. Cal. July 5, 2018), in fact enforced the consumer Plaintiffs' acceptance of Orbitz's Terms of Use. The Does also rely upon such decisions as *Burlington Residential Oil & Gas Co., LP v. San Juan Basin Royalty Trust,* 249 S.W. 3d 34, 39, 40, 42 (Tex. Ct. App. 2007) (Brief at 22), in which not only was there no hyperlink, but the contract in fact "*withheld* from the arbitrator the power to decide any additional questions, *including the question of arbitrability*" (emphasis added).

The additional cases cited by the Does are likewise unpersuasive:

-- *Fallang*: No hyperlink, and as the same Court noted in *Laurel Point*, the agreement in *Fallang* said only that disputes would be subject to arbitration, and that the "arbitrator shall be chosen by the AAA and the AAA Rules and Procedures shall apply." It did not "identify which subject-area version of the AAA Rules apply," and

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"[i[mportantly . . . did not attach any portions of the AAA Rules or explain where those Rules could be found." 316 So. 3d at 345, 348. Such a "general reference to 'AAA Rules' did not 'clearly and unmistakably' supplant the trial court's authority . . . ." *Id.* at 349. The Does have omitted all of these facts about *Fallang*.[2]

-- *Global Client Solutions, LLC v. Ossello*, 382 Mont. 345, 355, 367 P. 3d 36, 39 (2016): No hyperlink; "AAA Rules are not part of the record, and neither the [contract] nor Global's arguments specify which of the multiple sets of commercial or consumer AAA Rules are supposedly incorporated here."[3]

-- *Morgan v. Sanford Brown Institute*, 225 N.J. 289, 295, 137 A.3d 1168, 1172, 1179 (2016): No hyperlink; only general reference

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[2] *Fallang* also said in *dictum* that the AAA Rule itself is ambiguous (addressed *infra*).

[3] *See Giddings v. Media Lodge, Inc.*, 320 F. Supp. 3d 1064, 1069 n. 2 (D. South Dakota 2018) (*Global* rejected "mere reference to AAA Rules," without "specify[ing] which set of AAA Rules were incorporated"); *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 393 Mont. 396, 431 P.3d 911 (2018) (in *Global* "the language of the purported delegation provision was ambiguous, confusing . . . [with no] specification of the applicable [AAA] rule"). *Global* also found ambiguity in the word "administration" in the underlying contract (addressed *infra*).

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to Arbitration Rules; no statement that Arbitration would displace the right to sue.

-- *Flandreau Public School District No. 50-3 v. G.A. Johnson Construction, Inc.*, 701 N.W. 2d 430, 436-37 (S.D. 2005): No hyperlink; contract "silent on th[e] subject" of who decides arbitrability.

-- *Ajamian v. Cantor-CO2e, L.P.*, 137 Cal. Rptr. 3d 773, 203 Cal. App. 4th 771 (2012): No hyperlink; provisions concerning arbitrability conflicted.[4]

-- *Gilbert Street Developers, LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1194 (2009): No hyperlink; contract referenced only a "future [arbitration] rule." "[W]hat is being incorporated must actually exist at the time of the incorporation" (emphasis deleted); holds that incorporation of an AAA Rule *is* permissible if "'known or easily available,'" *quoting Troyk v. Farmer's Group, Inc.*, 171 Cal. App. 4th 1305, 1331, 90 Cal. Rptr. 3d 589 (2009).

-- *Ingalls v. Spotify USA, Inc.*, 2016 WL 6679561, *3 (N.D. Cal. Nov. 14, 2016): No hyperlink; reference to AAA website did not

[4] *Ajamian* also said that the rule did not make the Arbitrator the

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identify any existing rules.

No decision relied upon by the Does involved a hyperlink incorporation of an arbitration rule, nor provided a sufficiently specific reference to the rules that applied.

2. District Court's Rationales Are Insufficient.

a. Error in Holding That the Incorporation of or Hyperlink to Arbitration Rules Was Inadequate. The District Court said that the "[Terms of Service] itself [are] silent on the issue of who should decide arbitrability" (Decision at 606); "the AAA Rules were not attached to the agreement," which only "directed the [users] to AAA's website and phone number if they wished to learn more about what was in the AAA Rules" (*id.*) (incorrect); and "the AAA Rules . . . were referenced in the clickwrap agreement as a generic body of procedural rules . . ." (*id.*).

As noted, numerous decisions hold that even without a hyperlink, when the contract specifically identifies the applicable rules, which in turn unambiguously assign the issue of arbitrability to the Arbitrator, this satisfies the standard of clarity. *See*

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exclusive determinator of arbitrability (addressed *infra*).

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Petitioners' Brief at 22-36; *Laurel Point; Account Overdraft.* And if such an unambiguous reference is sufficient, then hyperlinking those rules in addition doubly forestalls any claim of ambiguity. As Judge Villani wrote (Opinion at 610), in an age of the Internet, "it should come as no surprise that contracting parties resort to incorporating material by reference--which in this instance includes the AAA Rules and specifically Rule 14(a), which allows the arbitrator to decide arbitrability in the first instance."

b. Error in Holding That The Word "Administered" in Airbnb's Terms of Service Is Ambiguous. The District Court held that an Arbitration is only "administered" after a determination of arbitrability, meaning that the Terms of Service did not incorporate Rule 7(a)-(b) (Answer Brief at 2, 17, 22, 37-39; AAJ Amicus Brief at 7). We asked (Brief at 2, 37): Would that not mean that a court's preliminary ruling as to subject-matter or personal jurisdiction is not part of its "administration" of a lawsuit? Or even more to the point — what about a motion to dismiss for improper venue, change of venue, or *forum non conveniens*? These determine the tribunal that decides the lawsuit. Are they also not part of a lawsuit's

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"administration"?

The Does do not respond. They cite one decision stating that the word "administered" was ambiguous — *Global Client Solutions,* 382 Mont. at 354, 355, 367 P.3d at 369. We cited several, including *Glasswall LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248 (Fla. 3d DCA), *review denied*, 2016 WL 3486432 (Fla. June 27, 2016), in which the contract said "administered," "administration," or "conducted," all of which were held to encompass the issue of arbitrability. Respectfully, the "administration" of an action includes any question relevant to its disposition, no less than a court's ruling concerning venue or *forum non conveniens* is part of the "administration" of a lawsuit.

c. Error in Holding That AAA Rule 7(a)-(b) Is Ambiguous. The District Court held that the Rule only gave the Arbitrator "the power to rule on his or her jurisdiction," without "remov[ing] that adjudicative power from a court of competent jurisdiction." The Does cite some supportive decisions, including *Fallang* (in which the facts were very different, *see supra* pp. 6-7), which says that "there can be instances, depending on the language of the

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arbitration agreement, in which the court and the arbitrator or arbitration panel can have *concurrent* jurisdiction to decide arbitrability . . . ." 316 So. 3d at 351 (emphasis in original).

But these decisions do not consider that Rule 7(a)-(b) gives the Arbitrator "*the* power to rule on his or her own jurisdiction" (emphasis added), without mentioning a court. The Does interpret "the" to mean "permits" (Brief at 41; *see id.* at 2, 17, 40-46), and contend that Rule 7(a)-(b) confers concurrent jurisdiction to determine who decides arbitrability. But that contention is not "[a]t the very least . . . reasonable" (Answer Brief at 44), because it necessarily would trigger a "race to the courthouse or arbitrator's forum to have [the] preferred decision maker be the first to rule on the issue." *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 849 (6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza Franchising LLC*, 141 S.Ct. 1268 (2021). Even an unambiguous statute (or rule) will not be construed to be unworkable or "absurd." *McCloud v. State*, 260 So. 3d 911, 918-19 (Fla. 2018).

The Does purport to "explain" how such a scheme would "very

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neatly" work (Brief at 45, 46). They say that "the Arbitrator [decides] arbitrability . . . if that is *the parties*' preference"; "Rule 7(a) allows *the parties* the option of having an arbitrator decide . . ." (*id.* at 45) (emphasis added). But what happens if "the parties" *do not agree*? The Does have no answer, and there is only one answer — the parties will race to their preferred forum.

Or is the Does' argument that the Arbitrator decides the question only if *both* parties agree, but the Court will do so at the request of only *one*? There is nothing to that effect in the rule, and more important, such an inequality would be unenforceable. The Does themselves cite *Global Client Solutions*, 382 Mont. at 355, 367 P.3d at 369 (Brief at 22, 39), in which the contract was unenforceable because the debtor was required to arbitrate, but the creditor was entitled to sue. Statutes (and rules) should not be interpreted to be unenforceable. *See License Acquisitions, LLC v. Debary Real Estate Tours Holdings, LLC*, 155 So. 3d 1137, 1146-47 (Fla. 2014).

As noted (Brief at 22-42), the overwhelming majority of courts, including Florida courts, have found that the AAA Rule confers

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exclusive authority in giving the Arbitrator "the" power to decide arbitrability.[5]

In a remarkable turnaround, the Does posit, for the first time, that Rule 7(a)-(b) is not in fact ambiguous, but rather says clearly that "[u]nder the FAA, [the] gateway 'arbitrability' decision is for the trial court, not an arbitrator" (Answer Brief at 18-19); its "plain text . . . allows for only the judicial determination of arbitrability" (*id.* at 28 n. 3). If this new argument were correct, there would be no issue to decide. But it is not correct, and the Does have cited no authority supporting it (*see id.* at 27-28). 9 U.S.C. §3 provides that a District Court should stay the case until the issue of arbitrability

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[5] The AAA Supplementary Procedures are silent on this issue, creating no conflict with Rule 7(a)-(b) of the Commercial Arbitration Rules. The Blair Amici (p. 4) are incorrect. The Supplementary Procedures do allow adoption of the Real Estate Arbitration Rules (*see* Blair at 5), but *after* arbitrability is decided. *See Account Overdraft*, *4 ("[W]e do not 'interrogate which specific AAA rules were incorporated through the contract's general incorporation language'"), *quoting JPay, Inc. v. Kobel*, 904 F.3d 923, 937 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 1545 (2019). And any amendment to the Terms of Service is not oppressive (*see* Blair at 5; AAJ Amicus Brief at 11& n. 2), because every time a Guest or Host logs in to the Airbnb website, he is required to assent to the conditions in effect at that time (and has the option not to assent). *See Account Overdraft*, *5 (rejecting the Amici's argument for that reason), *citing Larsen v. Citibank, FSB*, 871 F.3d 1295, 1317, 1321 (11th Cir. 2017) (same).

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is decided; 9 U.S.C. §4 says that a District Court has jurisdiction to entertain a petition to compel arbitration; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) says that the FAA ensures "judicial enforcement of privately made agreements to arbitrate" — here, the agreement to assign the question of arbitrability to the Arbitrator.

3. Sophistication Is Not an Issue.

a. The Does Had the Burden of Providing an Adequate Record. The Does' failure to offer evidence on this point is the beginning and end of the argument. Their statements that they "were consumers looking to book a vacation rental," "who could not possibly have navigated the interpretative maze" (Answer Brief at 46; *see id.* at 27, 49) have no record support.

The Does contend that it was Airbnb that failed to create a record on the issue of their sophistication (*see id.* at 49). However, while the party seeking arbitration has the initial burden of showing a valid arbitration provision, the burden then shifts to the opposing party to demonstrate that the agreement is not enforceable. *See* Petitioners' Brief at 20-21, *citing Green Tree Financial Corp.-*

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Alabama v. Randolph, 531 U.S. 79, 91-92 (2000). Moreover, as Appellants in the District Court, it was the Does' burden to make and provide an adequate record. *See* Rule 9.200, Fla. R. App. P.; *Francis-Harbing v. Electronics, LLC*, 254 So. 3d 523, 527 (Fla. 3d DCA 2018).

b. Sophistication of Users Is Not a Factor. Even if the Does had record support, their argument fails. The "clear weight of authority . . . enforc[es] arbitrability delegation via incorporation of the AAA Rules . . . regardless of the sophistication of the parties." *Davis v. USA Nutra Labs*, 303 F. Supp. 3d 1183, 1199 (D.N.M. 2018). *See* Petitioner's Brief at 44-49 & nn. 14, 15. In *Account Overdraft*, an action brought by bank account holders, the court said (*4): "We have never distinguished agreements involving sophisticated and unsophisticated parties"; "in fact, our precedent includes cases about agreements involving unsophisticated parties".

The Does have cited federal decisions holding that sophistication is a factor (*see* Answer Brief at 47-48 & n. 4).[6] But

[6] One of them, *Dupler v. Orbitz, LLC*, 2018 WL 6038309 (C.D. Cal. July 5, 2018) (*see id.* at 48), nonetheless enforced an e-commerce arbitration provision accepted by consumer Plaintiffs in Orbitz's

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none of them explains how this collateral issue would be litigated — that is, exactly how the parties' sophistication would inform the question of whether a contract is "clear and unambiguous" — how it could qualify that standard, short of precluding a hyperlink incorporation entirely. That in fact is what the Blair Amici advocate (Brief at 8-13, 17-20), on the ground that Arbitrators cannot be trusted to make objective decisions because they want to make money — an apprehension that would apply no less to contracts involving sophisticated parties.[7]

The Does offer no formula for evaluating this factor, contending only that "[a] party's sophistication is important because it speaks to that party's intent" (Answer Brief at 49), and protesting that they never considered who decides arbitrability (Answer Brief

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Terms of Use.

[7] No constitutional issue is implicated by an unambiguous arbitration provision (*see* Blair at 14). The Supreme Court's many decisions lauding arbitration make that clear. And the parade of horribles conjured by the Does and Amici as a result of applying Rule 7(a)-(b) to unsophisticated parties is a model of crying crocodiles, given their concession that if the language of the contract is not ambiguous (which they say is easy enough to do), it then *would* be enforceable, causing all of the asserted injustices they decry.

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at 27, 31, 32). But as the Supreme Court has held, the operative standard is whether the contract is unambiguous, and a contract is either unambiguous or it is not. If it is, then it does not matter whether a contracting party has even read it; he is bound.[8]

The cited decisions have the better of the argument. In any event, the Does have not provided an adequate Record.

B. IN THE ALTERNATIVE, THE ARBITRATION CLAUSE UNAMBIGUOUSLY APPLIES TO THE DOES' CLAIMS.

After stating that "Airbnb did not preserve this issue for review" (Brief at 52) (emphasis deleted), the Does then allow that "to be sure, '[h]aving accepted jurisdiction, [this Court] may review the District Court's decision for any error,'" *quoting Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 912 (Fla. 1995) (emphasis deleted).[9]

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[8] *See Allied Van Lines, Inc. v. Bratton*, 351 So. 2d 344, 347-48 (Fla. 1977) ("No party to a written contract in this state can defend against its enforcement on the sole ground that he signed it without reading it"), *quoted in Kendall Imports, LLC v. Diaz*, 215 So. 3d 95, 100 (Fla. 3d DCA 2017) (arbitration provision enforceable although the car purchaser did not and could not read it), *review denied*, 2017 WL 4161247 (Fla. Sept. 20, 2017).

[9] The Does themselves cite *Sanchez v. Wimpey*, 409 So. 2d 20, 21 (Fla. 1982) (Court has "discretion" to do so); *D.H. v. Adept Community Services, Inc.*, 271 So. 3d 870, 888 (Fla. 2018) (Court

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As the Does point out (*id.* at 54), the two relevant factors are the language of the complaint and language of the arbitration provision. Here we have the arbitration provision and the initial complaint, and the Does have told us that their Amended Complaint alleges negligence and breach of fiduciary duty arising from Airbnb's asserted failure to have "fully vetted and investigated" the Host "before [he] was allowed to use Airbnb's platform" (*id.* at 4; *see id.* at 55). They also point to Airbnb's website, stating that "your safety is our priority," and "all Hosts were fully vetted and investigated before being allowed to use Airbnb's platform" (*id.* at 3-4).

The arbitration provision applies to "any dispute, claim or controversy arising out of or relating to" Airbnb's Terms of Service, Members' use of its services, or its online platform. R. 78, Ex. 1-C, 1-G, ¶34 (at R. 137-38, 163-64). The Does' claims all concern their use of Airbnb's services and online platform. They literally "arise[]" under the Terms of Service, and certainly are "relat[ed]" to them (*see* Petitioners' Brief at 51-52) (which is not a "warped" reading of the Terms of Service, Answer Brief at 56). Thus, the Does are pursuing

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did consider such an issue; Does cite dissenting opinion).

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what assertedly were the benefits of their contract, while attempting to avoid its requirements.

The Does do not discuss the authorities we cited, and even their own authorities agree. In *Seifert v. U.S. Home Corp.*, 750 So. 2d 633 (Fla. 1999) (Answer Brief at 56-68), the arbitration provision only covered claims "arising out of" — not "related to" — the agreement — language that had to be narrowly construed. With no mention of tort claims, it did not "contemplate[] the existence and arbitration of future tort claims for personal injuries." 750 S. 2d at 642-43. *But,* the Court in *Seifert* also said that a clause like the one here, covering claims "'arising out of or related to' the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties including related tort claims." *Id.* at 637.

Thus in *Jackson v. Shakespeare Foundation, Inc.*, 108 So. 3d 587, 593 (Fla. 2013) (Answer Brief at 56), where the arbitration provision did say "arising out of or relating to," it covered a claim for fraudulent inducement — telling the prospective purchasers of

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property that it had no wetlands.[10] *Jackson* quoted *Seifert's* requirement that the claim have a "significant relationship" to the contract, meaning "either reference to, or construction of, a portion of [it]," 750 So. 2d at 637-38, and found a "clear contractual nexus" because "the fraud claim is inextricably intertwined with . . . the transaction from which the contract emanated and the contract itself," and "resolution . . . requires construction and consideration of . . . the contract." *Jackson* at 593, 594.

In *Telecom Italia S.p.A. v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001) (Answer Brief at 57), although the arbitration provision did say "relating to," the counterclaim in question was not based upon the language of the contract. It alleged only that the general "terms in [the] contract . . . were sufficiently harsh to show one party's motive to [tortiously] injure the other party," with no contention that the contract had been "designed to, expected to, or likely to exert any pressure [to commit the alleged torts, which] could have been [committed] even if TMI

[10] Compare the Does' Answer Brief at 57-58: "In fact, some of the Does' allegations involve representations that Airbnb made *before* the Does entered into the agreement" (emphasis in original).

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had no contractual relationship with WTC." *Id.* at 1116. *But*, the Court said, if there had been allegations of "excessive lease rates," "unjustified security deposits, and wrongful[] terminat[ion] [of] the circuit leases, these claims, if alleged as causes of action, would be plainly arbitrable as 'related to' the . . . contract." *Id.*

In *Dr. Kenneth Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 252 (5th Cir.1998), the plaintiff's false advertising claim was extrinsic to his medical-services contract, because the plaintiff "would suffer the same injuries regardless of the agreement or breach thereof."

In the instant case, could the Does have "suffer[ed] the same injuries regardless of the agreement or breach thereof"? Of course not. The Does could not even have booked the accommodation without accepting the Terms of Service. All of their claims literally arise under the Terms of Service and use of the platform, in alleging in both the initial and Amended Complaint that Airbnb had failed to ensure that the property did not contain surveillance devices, disclose that possibility, or advise them of privacy invasions in other properties. None of these claims could have been brought

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"regardless of the agreement or breach thereof."[11]

The more expansive language of Airbnb's Terms of Service is certainly satisfied. The phrase "'arising out of or related to'" "is the paradigm of a broad clause." *Collins & Aikman Products v. Building Systems, Inc.*, 58 F.3d 16, 20 (2d Cir. 1995). It "has been interpreted to encompass virtually all disputes between the contracting parties, including related tort claims," *Seifert*, 750 So. 2d at 637, that can be "described as having a 'significant relationship' to the contract — regardless of whether the claim is grounded in tort or contract law." *Jackson v. Shakespeare Foundation, Inc.*, 108 So. 3d at 593. *See* Petitioners' Brief at 53 n. 17. The claims here clearly qualify. This provides an independent basis for Airbnb's position, even if the issue of arbitrability should be decided by the Court.

II.
CONCLUSION

Respectfully, the Terms of Service unambiguously assign the issue of arbitrability to the Arbitrator. In the alternative, this Court

[11] The Does do not explain why they think that their argument is enhanced by hypothesizing that a claim might be brought against Airbnb by their guests (*see* Answer Brief at 58), given that any such guests would not be parties to the contract, and thus would not be

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should hold *de novo* that the arbitration clause applies to the Does' claims.

Respectfully submitted,

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subject to its requirement of arbitration.

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a), undersigned counsel hereby certifies that this brief is submitted in Bookman Old Style 14-point font and contains 3,975 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document via the Florida Court E-filing Portal, which will serve it via electronic mail upon all counsel on the attached Service List on this 16th day of August, 2021.

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