No. _____

# In The
# Supreme Court of the United States

BARRY CLARKE,

*Petitioner,*

vs.

FINE HOUSING, INC., and RRJR, L.L.C.,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina**

## PETITION FOR WRIT OF CERTIORARI


ASHLEY G. ANDREWS
LAFOND LAW GROUP, P.A.
544 Savannah Highway
Charleston, South Carolina 29407
(843) 762-3554
E-mail: andrews@lafondlaw.com
*Attorneys for Petitioner*

THOMAS R. GOLDSTEIN*
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
P. O. Box 71121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net
*Attorneys for Petitioner*

**Counsel of Record*



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

Did the South Carolina Supreme Court's invalidation of Petitioner's contract based on its sudden adoption of a universal rule of decision constitute an impairment of the obligation of contracts in contravention of Art. I, Sec. 10 of the Constitution of the United States and this Court's decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)?

## LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

All of the parties are set forth fully in the caption except that the defendant, RRJR, L.L.C., never filed a responsive pleading and the trial court adjudged them in default prior to trial. No party has a parent corporation or is owned in any part by a publicly held company.

## STATEMENT OF RELATED CASES

The Charleston County Court of Common Pleas entry of judgment dated September 28, 2017. (App. page 27)

The South Carolina Court of Appeals August 12, 2020, Opinion No. 20-UP-238 (App. page 17)

The January 4, 2023, decision of the South Carolina Supreme is reported at ___ S.C. ___, ___ S.E.2d ___ (Opinion No. 28126) (2023) and reprinted at App. page 1. The decision of the South Carolina Supreme Court denying reconsideration is unreported and reprinted at App. page 60.

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## BASIS FOR JURISDICTION

This Petition seeks to review the final decision of the South Carolina Supreme Court entered January 4, 2023, invalidating the Petitioner's contract. Petitioner timely requested reconsideration and therein raised the federal question of Impairment of the Obligation of Contracts. The South Carolina Supreme Court entered its Order Denying Reconsideration on February 10, 2023. This Court's jurisdiction arises under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

Article I, § 10: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts."

## STATEMENT OF THE CASE

Petitioner seeks this Court's review in accordance with Rule 10(c) because the South Carolina Supreme Court decided an important federal question—Impairment of the Obligation of Contracts—in a way that conflicts with relevant decisions of this Court, particularly *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Petitioner raised the impairment of contracts issue to the South Carolina Supreme Court in his Petition for Rehearing as Ground No. 1: "The Court misapplies well-settled principles governing the Court's review of contracts freely entered into by willing parties, and Opinion No. 28126 impairs the ability of parties to enter into contracts freely and voluntarily." App. page 62. Petitioner further pointed out to the South Carolina Supreme Court in his Petition for Rehearing (App. page 74) that Opinion No. 28126 violated Article I, Sec. 10 of the U.S. Constitution: "Courts cannot substitute their view of the sagacity of a contract for that of the parties. This is a power that courts do not possess. See U.S. Constitution, Art. I, § 10: 'No state shall . . . pass any . . . Law impairing the Obligation of Contracts.' "

This case began as a standard contract dispute to be decided by ordinary South Carolina state law contract principles (and as controlled by the South Carolina Recording Statute, § 30-7-10, S. C. Code, ann.[1]) Based on those principles, Petitioner prevailed at the trial court. On appeal, however, the appellate courts, particularly the South Carolina Supreme Court, adopted a revolutionary, universal rule of decision that not only invalidated and impaired Petitioner's right to contract—and all other contracts of a similar type—but also invites mischief by third-party strangers to a contract to thwart the intentions of the parties. At this point, since the South Carolina Supreme Court's ruling obviously and categorically impaired Petitioner's vested rights under this contract, Petitioner filed a request for reconsideration in which he made the federal claim that the South Carolina Supreme Court's ruling impaired the obligations of this contract—obligations that the Petitioner was entitled to enforce. See App. at

[1] This Court took up a recording statute's effect on insurance contracts in *Sven v. Melin*, ___ U.S. ___ (2018), where the Petitioner argued Minnesota's recording statute "interfered" in a decedent's contractual decision designating a divorced spouse as beneficiary on a life insurance policy. Justice Gorsuch's dissent drives home the point: The framers "took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority." Of course, the difference between the majority and the dissent in *Sven* disappears here because there is no allegation of retroactive application of the S. C. recording statute. Here, it was Respondent Fine Housing's negligence in failing to check property records before making a loan that gave rise to the dispute.

page 62, quoted above on page 2. The South Carolina Supreme Court denied the request for reconsideration, thus making the Petitioner's claim of Impairment of the Obligation of Contracts ripe and timely for review by this Court.

Barry Clarke and Group Investment Company, Inc. entered into negotiations allowing Clarke to use up to ½ of the parking at 2028 Pittsburgh Avenue and allowing him a right-of-first-refusal to purchase 2028 Pittsburgh "should [RRJR, L.L.C.] wish to sell." (App. page 89.) (Group Investment Company, Inc. changed its name in March, 2007 to RRJR, L.L.C. John and Robin Robinson owned and operated both companies. Both companies can be referred to as "The Robinson's" for convenience.) The Robinson's and Clarke reduced their agreement to writing on January 8, 1999, and recorded it at the Register of Mesne Conveyance for Charleston County on January 27, 1999 at Deed Book C 319 at Page 791 (App. page 89). The recorded lease contains the right-of-first-refusal that gives rise to this dispute.

After RRJR, L.L.C. transferred title to the Respondent, Fine Housing in December 2013, without notifying Petitioner, Clarke learned of the transfer in March 2014 by word of mouth, and after failing to reach an accord with Respondent, Petitioner filed suit seeking specific performance of his recorded right-of-first-refusal on May 28, 2015. Respondent, Fine Housing, timely answered. RRJR never answered or attempted to participate, and the Petitioner filed an

Affidavit of Default with the Court on August 3, 2015. (Record on Appeal, Vol. 1, page 60)

The Court of Common Pleas entered a written Order on September 28, 2017, finding that Respondent failed to notify Petitioner of RRJR's intent to sell, and required the plaintiff to tender the sum of $350,000.00 within 60 days to Fine Housing in order to exercise his right-of-first-refusal. (App. page 27)

The Court of Appeals reviewed the decision of the circuit court without granting oral argument, and on August 12, 2020, the Court of Appeals issued Opinion No. 20-UP-238 (App. page 17) in which it found the right-of-first-refusal is not enforceable on the single ground that it lacked specificity in three particulars.

On October 15, 2020, Petitioner asked the South Carolina Supreme Court to review the decision of the Court of Appeals (Record on Appeal, Vol. 2, page 507), and on May 28, 2021, the Supreme Court of South Carolina granted Petitioner's request for writ of certiorari. On January 4, 2023, the Supreme Court issued Opinion No. 28126 (App. page 1), affirming the Court of Appeals as modified. The South Carolina Supreme Court invalidated the contract between Clarke and the Robinson's based on Fine Housing's allegation that the contract is too vague to be enforced because it did not contain a precise description, method for determining price, or a specified time of performance. On February 10, 2023, the Supreme Court of South Carolina denied Petitioner's request for rehearing (App. page 60) making any petition for certiorari to this Court due on or

before May 11, 2023. Petitioner filed a petition for writ of certiorari to this Court on May 8, 2023.

## REASON FOR GRANTING THE WRIT

**The South Carolina Supreme Court unconstitutionally invalidated Petitioner's contract based on its sudden adoption of a universal rule of decision that constitutes an impairment of the obligation of contracts in contravention of Art. I, Sec. 10 of the United States Constitution and this Court's decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)**

The South Carolina Supreme Court invalidated the contract between two willing parties based on a third-party's, Fine Housing's, challenge, 18 years after the fact, that the recorded contract/right-of-first-refusal is too vague. Fine Housing was not involved in the formation of the contract and is not a beneficiary of the contract. Rather, 18 years after two willing parties entered into a recorded agreement, Fine Housing lent money to RRJR, L.L.C. and **failed to examine the chain of title** prior to loaning RRJR money. In invalidating the recorded contract, the South Carolina Supreme Court invaded and impaired a contract between willing parties, not only violating Article I, Sec. 10, but also ignored well-established and controlling precedent from this Court and opening an unprecedented door inviting any third-party stranger to any contract to challenge the intention of the contracting

parties. After the State Supreme Court invalidated the contract, the Petitioner brought the constitutional error to the Court's attention that it had improperly impaired the Petitioner's right to contract. See App. page 74: "Courts cannot substitute their view of the sagacity of a contract for that of the parties. This is a power that courts do not possess. See U.S. Constitution, Art. I, § 10." While impairment of contract cases are rare, the principle is far from moribund.

> Although it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history. Nonetheless, the Contract Clause remains a part of the constitution. It is not a dead letter. And its basic contours are brought into focus by several of this Court's 20th-century decisions.
>
> . . .
>
> "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."

*Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). (emphasis in original)

Even before this country adopted a constitution, the drafters discussed the importance of a guarantee of the fundamental right to contract. In Federalist 44, James Madison wrote " . . . laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former [bills of attainder and *ex-post-facto* laws] are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted." James Madison, *The Federalist*, No. 44, January 28, 1788.

In short, the South Carolina Supreme Court decision under review represents state (judicial) interference violating Article I, Sec. 10 and overruling the legislatively established legal procedure enacted through the South Carolina Recording Statute, § 30-7-10, S.C. Code, ann., impairing the fundamental right to contract between private parties. (Obviously, state action can regulate contracts that are rationally related to matters of public welfare that are subjects of traditional states' police powers, but none of those concerns are implicated here. For example, in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461 (1955), this Court unanimously held that regulations governing the dispensing and filling of eyeglass prescriptions could be regulated as "rationally related" to public health. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike

down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Here the recorded agreement does not invoke the State's regulatory police powers—see discussion of *Sven v. Melin*, ___ U.S. ___ 2018, page 3 above—because: first, the application of the recording statute gives the contract effect as to third parties, and second because it is between two private parties and does not implicate a zone of regulation falling under well understood concepts police powers. See *Treigle v. Acme Homestead Assn*., 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575 (1936): "Such an interference with the right of contact cannot be justified by saying that in the public interest the operations of building associations may be controlled and regulated, or that in the same interest their charters may be amended." (Court invalidated Louisiana law that modified the rules for withdrawal from membership of a building and loan association.) State action may impair a contract but only where the regulation is rationally related to the government's exercise of traditional police powers. For example, this Court struck down the use of racial restrictive covenants even though they were freely negotiated contracts between private parties because the private contracts discriminated based on race and ethnicity. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948): "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State

legislation, and **State action of every kind** which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." (emphasis added) Here, the right-of-first-refusal is a freely negotiated contract between two willing parties of equal bargaining power. However, the South Carolina Supreme Court substitutes its view for the wisdom of the parties to the bargain and strikes it down, and this Court has repeatedly held this is not a power courts constitutionally possess. The South Carolina Supreme Court cannot shift the responsibility for the lender's negligence in failing to examine the title prior to making a loan onto the Petitioner without violating fundamental constitutional rights to contract.

In *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed. 687 (1879), this Court held:

> It is doubtless, true, that a State may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the 5th section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive **or the Judicial Department of the State**. (Court dismissed a writ of mandamus demanding removal after Virginia excluded minorities from jury service, denying

> Petitioners fair trials. The Court dismissed the removal on the ground that the writ came too late, after conviction instead of before trial.) (emphasis added)

This Court has an unbroken and well-developed body of case law instructing courts that contracts must be enforced unless they are illegal or violate public policy. The right to contract is fundamental and must be enforced because contracts between private parties are **presumed** to be legal and enforceable, and if there is an ambiguity, the Court must interpret it to render it legal and enforceable where the wording can be harmonized and lends itself to a logically acceptable construction. *Walsh v. Schlecht*, 429 U.S. 401, 97 S.Ct. 679, 50 L.Ed2d 641 (1977). In *Allied Structural Steel Company v. Spannaus*, *op. cit*. this Court invalidated Minnesota's pension protection Act because it invaded the private contractual agreement between Allied and its employees:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

The South Carolina Supreme Court violated this fundamental constitutional and controlling principle

of contract construction because it derived an alleged ambiguity by reading clauses in isolation and made no effort to harmonize them. Equally perplexing—and overlooked by the state courts—is the lack of recognition that Respondent, Fine Housing, **admits** it was not a party to the recorded agreement and that it overlooked the recorded right-of-first-refusal prior to extending a loan to Robinson. Not only legally, but also logically, it is impossible for a stranger to a contract to complain about a putative ambiguity in a contract it never negotiated, never drafted, never signed, never reviewed and was not a third-party beneficiary. As this Court said in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212, 131 L.Ed.2d 76: "It is a cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other." Here, the state appellate courts vetoed the Agreement by allowing a stranger to the contract—and not a beneficiary—to contest it and then making no attempt to harmonize the various provisions and created an ambiguity that disappears by reading the document as a whole.

Here, the right-of-first-refusal is carefully drawn to be the opposite of a "restraint" on alienation, reserving to the Seller unrestricted discretion, and the state appellate courts violated Petitioner's constitutional rights by allowing a third-party stranger to the contract to interfere in the terms reached by willing parties. This is a violation of the Article I, § 10 constitutional guarantee. A survey of case law across South

Carolina (and the nation) reveals rights-of-first-refusal are routinely struck down as "restraints" when they restrict the seller as to timing or price. The leading cases in South Carolina, *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997) and *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996) demonstrate the legal error here because both adhere to the constitutional guarantee of the right to contract. In *Webb*, the Court struck down a right-of-first-refusal because it violated the Rule Against Perpetuities and dictated the manner in which the selling price was calculated. The year before, the same court upheld a right-of-first refusal in *Minter* that involved a right-of-first-refusal less precise than the one here where the plaintiff's right was defined as "first right of refusal on any other Grease Monkey sites developed by GOCT in Richland or Lexington County, South Carolina."

Here, the right-of-first-refusal does not violate the Rule against Perpetuities, and it does not tie the seller's hands. Neither the South Carolina Court of Appeals nor the South Carolina Supreme Court gave the slightest indication what minimum, objective terms they would accept as an antidote to "vagueness," thus impairing a contract while leaving everyone to grope in the dark as to what minimum terms they would find acceptable. This impermissibly impairs the Constitution's guarantee of the right to contract freely. It is the South Carolina Supreme Court's vagueness in failing to identify the minimum objective criteria in the Opinion under review that demonstrates the constitutional violation. The trial court, finding for the Petitioner,

carefully explained why there is no vagueness impediment. See App. at pages 40-50 and 55-56:

> The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract. If the language is clear and unambiguous, the language alone determines the contract's force and effect. [citations omitted] On the issue of whether their right of first refusal is or is not too ambiguous to enforce is an issue analyzed by the Court of Appeals in 1996 in the so-called "Grease Monkey" case, *Minter v. GOCT, Inc*., 322 S.C. 525, 473 S.E.2d 67 (1996) . . . The plaintiff alleged the agreement contained a provision giving Carolina Properties a "first right of refusal on any other Grease Monkey sites developed by GOCT [322 S.C. 527] in Richland or Lexington counties."
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> . . .
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> The testimony of William S. Minter in the Grease Monkey case and the testimony of the plaintiff here is almost identical.

The trial court went on to conclude that the intention of the parties is clear, and that every contract in South Carolina is required to be performed in a "reasonable time" in a "reasonable manner" by operation of law. The Supreme Court reversed, leaving the parties searching for an ineffable Goldilocks zone between too restrictive and not restrictive enough, which is an insufficient reason to impair a contract. As this Court said in *Walsh v. Schlecht*, 97 S.Ct. 679, 429 U.S. 401, 50

L.Ed. 2d 641 (1977), contracts are presumed to be legal and enforceable and an ambiguously worded contract should not be interpreted to render it illegal and unenforceable where the wording lends itself to a logically acceptable construction which renders it legal and enforceable. *Walsh* illuminates the error infusing the South Carolina Supreme Court's Opinion because the South Carolina Court went out of its way to read provisions in isolation to force an illogical conclusion when it is far simpler to read the separate provisions as part of a whole and reach a more plausible conclusion. By reading provisions in isolation, the Court improperly and unconstitutionally deprived the Petitioner of his right to contract and to receive benefit of his bargain—all because a third party lender failed to examine the chain of title prior to executing the loan documents.

On this point, the trial court found (App. at page 49):

> Finally, the defendant contends the right of first refusal is too ambiguous and indefinite to be enforced because it does not contain a time for performance or a method of determining price. As to the time for performance, every contract in South Carolina contains within it implied terms of good faith and reasonableness. In a contract for the sale of land, where a contract does not contain a "time is of the essence" clause, the Court supplies the time for performance as being "reasonable":
>
> It is well established in this state that time is not of the essence of a contract to convey land

> unless made so by its terms expressly or by implication from the nature of the subject matter, the object of the contract or the situation or conduct of the parties. When the contract does not include a provision that time is of the essence, the law implies that it is to be done within a reasonable time; and the failure to incorporate in the memorandum such a statement does not render it insufficient. *Speed v. Speed*, 213 S.C. 401, 49 S.E.2d 588 (1948).

*Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690 (Ct. App. 1989)

Opinion No. 28126 violates Art. I, Sec. 10 and charts a course through waters already mapped by this Court. By failing to obey the constitutional prohibition of Art. I, Sec. 10, and by failing to adhere to the controlling precedent of this Court, the Supreme Court of South Carolina violates the U.S. Constitution and leaves any party lacking the necessary tools to draft an enforceable right-of-first-refusal thereby impairing them all and inviting mischief by any third-party challenger. The South Carolina Supreme Court's impairment of Petitioner's contract impairs all similar contracts, violating Article I, Sec. 10 of the U.S. Constitution, and for this reason, the Petitioner respectfully prays for a writ of certiorari to review Opinion No. 28126.

## CONCLUSION

Petitioner prays that this Court grant review of the decision below.

Respectfully submitted,

ASHLEY G. ANDREWS
LAFOND LAW GROUP, P.A.
544 Savannah Highway
Charleston, South Carolina 29407
(843) 762-3554
E-mail: andrews@lafondlaw.com
*Attorneys for Petitioner*

THOMAS R. GOLDSTEIN*
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
P. O. Box 71121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net
*Attorneys for Petitioner*

**Counsel of Record*