No. ____

IN THE

Supreme Court of the United States

LENNAR CAROLINAS, LLC,

Petitioner,

v.

PATRICIA DAMICO, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the South Carolina Supreme Court

PETITION FOR A WRIT OF CERTIORARI

David Marroso
Daniel Cooper
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 553-6700

Jonathan D. Hacker
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
jhacker@omm.com

Attorneys for Petitioner

QUESTION PRESENTED

Under the Federal Arbitration Act ("FAA"), an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court's precedents have repeatedly held that the FAA embodies an equal-treatment or anti-discrimination rule that prohibits states from applying state law rules that accord "suspect status" to arbitration agreements or otherwise treat them differently from other contractual agreements. In this case, however, the Supreme Court of South Carolina reviewed a contractual arbitration agreement under an adverse presumption that requires courts to view arbitration provisions in consumer homebuying contracts with "considerable doubt" and "considerable skepticism."

The question presented is:

Whether the Federal Arbitration Act prohibits courts from applying a state-law presumption expressly disfavoring enforcement of arbitration provisions in consumer homebuying contracts, when applicable state law does not subject other contractual agreements to the same adverse presumption.

PARTIES TO THE PROCEEDING

Petitioner is Lennar Carolinas, LLC.

Respondents are Patricia Damico; Brettany Buetow; Joshua Buetow; Bryant Camara; Cynthia Camara; Matthew Collins; Jonathan Douglass; Theresa Douglass; Chad England; Czara England; Lenna Lucas; Danny Morrow; Ellen Davis Morrow; A.C.& A. Concrete, Inc.; Alpha Omega Construction Group, Inc.; Builders Firstsource-Southeast Group, LLC; Civil Site Environmental; Coastal Concrete Southeast II, LLC; Coastal Concrete Southeast, LLC; Construction Applicators Charleston, LLC; Decor Corporation; Edward Dengg; Sylvia Dengg; DVS, Inc.; Guaranteed Framing, LLC; Knight's Concrete Products, Inc.; LA New Enterprises, LLC; Land/Site Services, Inc.; Manale Landscaping, LLC; Ozzy Construction, LLC; Raul Martinez Masonry, LLC; Anthony Ray; Stacey Ray; South Carolina Exteriors, LLC; Southern Green, Inc.; Spring Grove Plantation Development, Inc.; Super Concrete of SC, Inc.; TJB Trucking/Leasing, LLC; Volkmar Consulting Services, LLC; Knight's Redi-Mix, Inc.; and Myers Landscaping, Inc.

RULE 29.6 DISCLOSURE

Lennar Carolinas, LLC, is not a publicly held company. Its sole member is Lennar Homes, LLC, which is not publicly held. Lennar Homes, LLC's sole member is U.S. Home, LLC, which is not publicly held. U.S. Home, LLC's sole member is Lennar Corporation. Lennar Corporation is a publicly owned corporation. No publicly-held company owns ten percent or more of Lennar Corporation's stock.

RELATED PROCEEDINGS

Patricia Damico, et al., v Lennar Carolinas, LLC et al., No. 2014CP0802424, Court of Common Pleas of South Carolina, Ninth Judicial Circuit, Berkeley County, Judgment entered September 21, 2016.

Patricia Damico, et al., v Lennar Carolinas, LLC et al., Court of Appeals of South Carolina, Appellate Case No. 2016-002339, Judgment entered June 10, 2020.

Patricia Damico, et al., v Lennar Carolinas, LLC et al., Appellate Case No. 2020-001048, the Supreme Court of South Carolina, Judgment entered September 14, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lennar Carolinas, LLC., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The opinion of the Court of Common Pleas of South Carolina is unreported but available at 2016 WL 11549619 and reprinted at App. 50a. The opinion of the Court of Appeals of South Carolina is reported at 844 S.E.2d 66 and reprinted at App. 37a. The opinion of the Supreme Court of South Carolina is reported at 879 S.E.2d 746 and reprinted at App. 1a.

JURISDICTION

The Supreme Court of South Carolina filed its opinion on September 14, 2022. The Supreme Court of South Carolina denied petitioner's timely motion for rehearing on November 17, 2022. On February 2, 2023, the Chief Justice extended the deadline for filing this petition to February 22, 2023. This Court has jurisdiction under 28 U.S.C §1257(a). *See also* 9 U.S.C. § 16(a)(1)(C) (authorizing immediate interlocutory review of order refusing to compel arbitration).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract

> or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]

STATEMENT

Every year, thousands of home buyers sign contracts agreeing to resolve disputes with builders through arbitration. This case is about whether states may apply rules disfavoring enforcement of arbitration provisions that appear in consumer homebuyer contracts. The answer is no, as this Court's precedents have made clear time and again. Lower courts, however, continue to resist the message, as the decision below illustrates in unusually explicit terms. In determining whether the arbitration agreement at issue here is "unconscionable," the South Carolina Supreme Court expressly applied a strong anti-arbitration presumption that places a heavy fist on the scale against enforcement of arbitration agreements in homebuying contracts.

The decision directly contravenes the FAA's foundational principle that courts cannot accord suspect status to arbitration agreements or otherwise treat them differently from other contractual agreements. And it directly conflicts with myriad precedents of this Court and others articulating and applying that anti-discrimination rule. Certiorari is warranted to reinforce the lower courts' obligation to enforce the FAA and faithfully apply the precedents of this Court.

A. Factual Background

Plaintiffs below and primary respondents in this Court are several individuals (the "Owners") who own houses constructed and sold to them by petitioner Lennar Carolinas, LLC ("Lennar"). The houses at issue are in a community known as The Abbey at Spring Grove Plantation ("The Abbey") in Berkeley County, South Carolina. Lennar purchased several homesites at The Abbey from their previous owner, Spring Grove Development.

Between January 2011 and May 2013, each Owner entered into an individual contract (the "Purchase and Sale Agreement") with Lennar for the purchase of a lot and the construction of a home in The Abbey. Each Purchase and Sale Agreement contains an arbitration provision requiring the Owner to arbitrate any claims arising out of Lennar's construction of a home in The Abbey. This provision is separately numbered as § 16 and bears the heading "Mediation/Arbitration of Disputes."

By purchasing homes in The Abbey, the Owners also became party to three other agreements with Lennar: (1) covenants filed by the previous owner of the land (the "Covenants"), (2) the Lennar Warranty, and (3) the individual deeds (the "Deeds"). Each of these agreements also includes an arbitration provision, but they are not directly at issue here, for reasons explained in the next section.

B. Procedural Background

On December 12, 2014, the Owners filed a complaint in the South Carolina Court of Common Pleas against Lennar, Spring Grove Development, and certain subcontractors ("respondents by rule" in this Court), asserting various claims based on alleged construction defects in the homes. Lennar moved to compel arbitration under the FAA, arguing that the Owners' claims were subject to the arbitration provisions in their various contracts, including each Owner's respective Purchase and Sale Agreement. The Court of Common Pleas of South Carolina denied Lennar's motion, holding that when all the arbitration provisions in the Purchase and Sale Agreements, Covenants, and Deeds, are read together along with the entire Lennar Warranty, the overall contractual arrangement was unconscionable, precluding enforcement of the specific arbitration provisions within the contracts. App. 53a-71a.

Lennar appealed, and the Court of Appeals of South Carolina reversed, ordering the Owners' claims against Lennar to arbitration. The Court of Appeals found that the operative arbitration agreement between the Owners and Lennar was limited to the arbitration provision in § 16 of the Purchase and Sale Agreement, and that the FAA mandated enforcement of the provision. App. 46a-49a. The Court of Appeals held that the trial court had improperly invalidated the arbitration provision based on defects in the rest of the agreements, rather than severing the provision and analyzing it separately as required by *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395 (1967), and its progeny. App. 46a-48a.

The Owners appealed to the South Carolina Supreme Court. Their sole argument on appeal was that the *Prima Paint* severability doctrine did not apply and that the unconscionability of the overall contractual arrangement precluded enforcement of § 16 specifically. The Supreme Court disagreed, affirming the Court of Appeals' ruling that under *Prima Paint*, the court was required to determine whether § 16 was unconscionable when viewed on its own terms, leaving for the arbitrator to determine whether other provisions rendered the overall agreement unenforceable. App. 6a-8a.

The court did not, however, affirm the Court of Appeals' decision and compel arbitration on that basis. The South Carolina Supreme Court instead reached out to reverse and bar arbitration on a ground the Owners had not raised. Having correctly held that § 16 must be examined on its own terms, the court conducted that examination sua sponte and concluded that the provision by itself was unconscionable and unenforceable. App. 16a-36a.

The court objected in particular to two subparts of the provision, §§ 16.4 and 16.5. App. 23a-25a. Section 16.4 qualifies the basic arbitration agreement set forth in § 16.1, and provides in full:

> The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section. Buyer and Seller further agree (1) that any Dispute involving Seller's affiliates, directors, officers, employees and agents shall also be subject to mediation and arbitration as set forth herein, and shall not be pursued in a

> court of law or equity; (2) that Seller may, at its sole election, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and (3) that the mediation and arbitration will be limited to the parties specified herein.

App. 86a. In addition to expressly providing that any unlawful components of the arbitration provision may be severed, the provision ensures that Lennar can join in an arbitration with an Owner other parties potentially liable for the claims, to the extent such parties have arbitration agreements with Lennar. Meanwhile, Owners retain all their usual civil claims and remedies against any such parties.

Section 16.5 in turn reiterates that normal res judicata principles fully apply:

> To the fullest extent permitted by applicable law, Buyer and Seller agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any other arbitration, judicial, or similar proceeding shall be given preclusive or collateral estoppel effect in any arbitration hereunder unless there is mutuality of parties. In addition, Buyer and Seller further agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any arbitration hereunder shall be given preclusive or collateral estoppel effect in any other arbitration, judicial, or similar proceeding unless there is mutuality of parties.

App. 86a.

The South Carolina Supreme Court held that the foregoing two provisions were unconscionable, and it refused to enforce the provision requiring them to be severed from the remainder of the arbitration agreement.

As in most other jurisdictions, the unconscionability doctrine in South Carolina permits a court to invalidate a contract term only when it is both "procedurally" and "substantively" unconscionable. *See* App. 17a (citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (S.C. 1996); 17A Am. Jur. 2d Contracts § 272 (2016). The provision here is procedurally unconscionable, the South Carolina Supreme Court determined, because like most consumer contracts, it is a contract of adhesion where the key terms are "non-negotiable." App. 20a-22a. The court further recognized, however, that "a take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice." App. 18a. Rather, the "procedural" unconscionability of an adhesion contract must be coupled with "substantive" unconscionability, i.e., "the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them." App. 19a.

The court then held that §§ 16.4 and 16.5 could not survive that substantive unconscionability standard. The court began its analysis by applying an explicitly anti-arbitration presumption, explaining that under South Carolina law, "courts tend to view adhesive arbitration agreements with 'considerable skepticism,'" deeming it "doubtful 'any true agreement ever existed to submit disputes to arbitration.'" App. 21a (quoting

Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (citations omitted)).

Applying that openly hostile presumption to the arbitration provisions in § 16, the court held that the § 16.4 joinder provision was impermissibly one-sided because it supposedly contravenes the "fundamental principle of law that the plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries." App. 23a. "Giving Lennar the 'sole election' to include or exclude subcontractors in the arbitration proceeding," the court asserted, "strips [Owners] of that right." App. 23a-24a.

In fact, the joinder provision does not affect Owners' right to sue in any way—they can still sue anyone else in a civil proceeding. And absent the arbitration provision, if the Owners had brought a civil action against Lennar, Lennar would have the right to join other parties potentially liable for the Owners' injury or parties that Lennar itself may have claims against arising from the same conduct. Section 16.4 merely ensures that Lennar can exercise the same third-party joinder rights in arbitration, as to parties with whom Lennar has an arbitration agreement. But because the South Carolina Supreme Court read the provision with open hostility, it leapt to the conclusion that extending Lennar's joinder rights to arbitration created a profoundly unfair, one-sided litigation landscape.

The court took a similar approach to the res judicata language in § 16.5. That provision explicitly creates no rights not already available under "applicable law," and it reiterates the routine principle that preclusion cannot apply absent "mutuality of parties."

Again viewing the provision with "considerable skepticism," the South Carolina Supreme Court construed the anodyne provision as creating a unique "procedural defense to liability for Lennar" that is "wholly unreasonable and oppressive" to Owners. App. 25a. The provision is unfair, the court asserted, because under § 16.4, Lennar can decide for itself which third parties with Lennar arbitration agreements are joined in the Owner's arbitration. The result could be inconsistent verdicts with no recovery for the Owner—for example, Lennar might persuade an arbitrator to blame absent third parties for the Owner's injury, while the third parties persuade a court to blame Lennar.

As this Court has recognized, however, the FAA authorizes private parties to contract for "individualized arbitration procedures of their own design," even if "bifurcated proceedings"—and hence potentially inconsistent verdicts—are an "inevitable result" of the chosen procedures. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1923 (2022) (quotation omitted); *see Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (recognizing that enforcing individual arbitration agreements in multi-party proceedings may result in "possibly inefficient maintenance of separate proceedings in different forums"). Rather than respect the contractual choices about arbitration reflected in §§ 16.4 and 16.5, the court—viewing them in accordance with the hostile presumption mandated by South Carolina law—found them potentially inefficient and therefore oppressive.

Finally, the South Carolina Supreme Court declined to apply the severability provision written into

§ 16.4 and simply enforce the basic arbitration agreement without the joinder and res judicata provisions. The court's ruling was "based primarily upon two factors." App. 35a. First, the court again invoked the explicit anti-arbitration presumption South Carolina courts apply to adhesive consumer arbitration agreements. Because the arbitration agreement is a "contract of adhesion," the court warned, it must be reviewed with "considerable doubt that any true agreement ever existed to submit disputes to arbitration." App. 31a (quotation omitted). "Similarly," the court continued, "we find it considerably doubtful any true agreement ever existed to sever any oppressive provisions from the arbitration agreement," App. 31a—despite the unambiguous first sentence of § 16.4 expressly mandating severability.

Second, and relatedly, the court invoked a public policy concern about preventing "overreach" in homebuying arbitration agreements. App. 33a. Enforcing the severability clause by its plain terms, the court declared, would allow sellers to use such clauses to impose oppressive arbitration clauses, knowing that buyers would likely not challenge them, and if they did, courts would simply enforce the permissible provisions. Saying the quiet part out loud, the court sharply criticized the use of arbitration agreements in homebuyer contracts: "[W]e do not doubt that for every arbitration agreement that finds its way to court, there are thousands that exercise an in terrorem effect on homebuyers who respect their contractual obligations." App. 35a (quotation and alterations omitted). The court agreed that, to protect homebuyers who "simply comply with their

arbitration agreements rather than challenging them in court," South Carolina law "should provide a strong incentive for home builders not to overreach" by subjecting arbitration severability provisions to heightened scrutiny. App. 35a (quotation and alterations omitted).

Lennar filed a timely petition for reconsideration, arguing among other things that the court's opinion discriminated against arbitration in violation of the FAA. The petition was denied.

REASONS FOR GRANTING CERTIORARI

This case is a compelling candidate for certiorari, if not summary reversal. The FAA requires courts to treat all arbitration agreements—in all contexts—as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In other words, courts must "place arbitration agreements on equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017) (quotation omitted).

In holding the arbitration provision in the Purchase and Sale Agreement to be unenforceable, the South Carolina Supreme Court explicitly invoked a state-law presumption strongly disfavoring the recognition and enforcement of arbitration agreements in consumer homebuyer contracts. Its holding flatly violates the FAA's anti-discrimination rule and directly conflicts with multiple decisions of this Court, other state supreme courts, and federal circuits enforcing that important rule. As it stands, the South Carolina Supreme Court's ruling offers a roadmap for litigants

and other courts to circumvent the FAA and disregard otherwise clear arbitration agreements.

The decision's heavy reliance on an anti-arbitration rule embedded in South Carolina law is so directly and obviously contrary to this Court's precedents that summary reversal may well be warranted. At a minimum, the Court should grant certiorari and set the case for plenary consideration.

A. The South Carolina Supreme Court Decision Expressly Relies On An Anti-Arbitration Presumption In Direct Conflict With This Court's FAA Precedents

Congress enacted the FAA in "response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). To overcome that hostility, the statute requires courts to "'place arbitration agreements upon the same footing as other contracts.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)); *see Kindred Nursing Ctrs.*, 581 U.S. at 248. That foundational anti-discrimination rule prohibits courts from "singling out arbitration provisions for suspect status." *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In other words, "a court may not . . . 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 under state law." *Perry v. Thomas*, 482 U.S. 483, 491 n.9 (1987).

That principle applies fully to courts applying otherwise generally-applicable contract principles and defense to contract enforcement, such as the doctrine of "unconscionability." Under FAA § 2, written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). That provision allows enforcement of "generally applicable contract defenses, such as fraud, duress, or unconscionability," *Dr.'s Assocs.*, 517 U.S. at 686-87, but only so long as the defense applies to arbitration agreements the same way it would to any other agreement, *see*, *e.g.*, *Kindred Nursing Ctrs.*, 581 U.S. at 252; *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333, 339 (2011). In other words, "even rules that are generally applicable as a formal matter are not immune to preemption by the FAA." *Viking River*, 142 S. Ct. at 1917-18.

In *Concepcion*, for instance, the Court held that a court could not permissibly apply a facially neutral state-law "unconscionability" doctrine in a way that uniquely disfavored the enforcement of arbitration agreements. In that case, the Ninth Circuit had rejected an arbitration agreement as unconscionable because it violated a state-law rule prohibiting parties from contracting away the right to class-wide proceedings in consumer arbitration agreements. According to the Ninth Circuit, the state-law rule did not contravene the FAA because it was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009).

This Court reversed. The Court emphasized that, contrary to the Ninth Circuit's analysis, the FAA's anti-discrimination rule bars courts from applying "a doctrine normally thought to be generally applicable, such as . . .unconscionability . . . in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341. Put differently, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Id.* (quoting *Perry*, 482 U.S. at 493 n.9). In particular, the Court held, a court cannot rely on the adhesive nature of most consumer contracts as a basis for discriminating against consumer arbitration agreements. *Id.* at 346-47. Observing that "the times in which consumer contracts were anything other than adhesive are long past," the Court explained that while states may address "concerns that attend contracts of adhesion" in general, they cannot subject provisions *within* such contracts to special adverse rules that "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id*. at 346-47 & n.6.

The Court in *Kindred Nursing Centers* similarly rejected an effort to apply a generally-applicable rule in a manner that would uniquely disfavor arbitration agreements. In that case, the Kentucky Supreme Court had denied enforcement of an arbitration agreement pursuant to a court-made rule barring contractual waiver of the jury-trial right by an attorney-in-fact absent a "clear statement" of intent to waive the right. 581 U.S. at 252. Although the rule was

facially neutral, the Court explained, in substance it discriminated against arbitration because it was "too tailor-made to arbitration agreements" and because the court did not apply the same rule to other agreements waiving jury-trial rights. *Id.* at 252 & n.1.

The South Carolina Supreme Court's decision here cannot be reconciled with those precedents. Under the guise of the "unconscionability" doctrine, the South Carolina Supreme Court applied a longstanding state-law rule that expressly and strongly disfavors the enforcement of arbitration agreements in consumer homebuyer contracts. In the court's own words, South Carolina courts "view adhesive arbitration agreements with 'considerable skepticism,' as it remains doubtful 'any true agreement ever existed to submit disputes to arbitration.'" App. 21a (quoting *Simpson*, 644 S.E.2d at 669. And again: "[W]hen a contract of adhesion is at issue, 'there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." App. 31a (quoting *Simpson*, 644 S.E.2d at 669)). The court applied that "considerable skepticism" of homebuying arbitration agreements both in determining whether two provisions of the agreement rendered it substantively unconscionable and whether the agreement's unambiguous severability provision could be enforced as to those two provisions. *See supra* at 9-11.

The court was especially clear about the importance of the anti-arbitration presumption to its severability analysis. According to the court, that analysis was "based primarily upon two factors," the first being the presumption that a consumer would not willingly agree to an arbitration provision. App.

35a. "Similarly," the court emphasized, "we find it considerably doubtful any true agreement ever existed to sever any oppressive provisions from the arbitration agreement." App. 31a. The court then applied the same presumption to the other factor—a public policy of protecting homebuyers. In addressing that factor, the court proffered fierce (and notably unsupported) criticism of how arbitration agreements are used in consumer homebuying contracts: "[W]e do not doubt that for every arbitration agreement that finds its way to court, there are thousands that exercise an in terrorem effect on homebuyers who respect their contractual obligations." App. 35a (quotation and alterations omitted).

It is difficult to imagine a more blunt departure from the court's obligation under the FAA to construe and enforce arbitration agreements neutrally. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), this Court held that a merchant's religious objection to complying with a state law "was not considered with the neutrality that the Free Exercise Clause requires," based on comments made by state agency officials during administrative hearings, *id.* at 1731. The FAA requires similar neutrality as to arbitration agreements, and the violation of that requirement here is much starker—it is written expressly and repeated directly into the South Carolina Supreme Court's decision. By pervasively emphasizing the considerable doubt and skepticism it was applying to the arbitration provision, the court accorded it "suspect status," *Dr.'s Assocs.*, 517 U.S. at 687, and construed it "in a manner different from that in which it otherwise construes

nonarbitration agreements under state law," *Perry*, 482 U.S. at 491 n.9.

If the FAA's anti-discrimination rule means anything, the South Carolina Supreme Court's decision cannot stand. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (summarily reversing West Virginia Supreme Court decision adopting "interpretation of the FAA [that] was both incorrect and inconsistent with clear instruction in the precedents of this Court").

B. The South Carolina Supreme Court's Decision Conflicts With Other State Supreme Court And Federal Circuit Decisions Properly Enforcing The FAA's Anti-Discrimination Rule

The decision also conflicts with decisions of other state courts of last resort and federal circuits enforcing the FAA's anti-discrimination rule. The decisions are too many to catalogue exhaustively, but several exemplary decisions are especially close in point—decisions holding that arbitration provisions in consumer contracts and other adhesive agreements cannot be subjected to special adverse rules, burdens, or presumptions.

In *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151 (9th Cir. 2013), Montana courts had applied a common-law "reasonable expectations" doctrine generally governing adhesive contracts to invalidate consumer arbitration agreements unless they were explicitly explained to and signed by the consumer. The Ninth Circuit held that the FAA preempted the courts' construction of this generally-

applicable doctrine to impose a special adverse burden on consumer arbitration agreements. *Id*. at 1160.

Similarly, in *THI of New Mexico at Hobbs Center, LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014), the Tenth Circuit held that the unconscionability doctrine could not be applied to invalidate an adhesive arbitration agreement between a nursing home and its resident "based on the notion that arbitration is inferior to litigation in court." *Id.* at 1165.

And in *Virgil v. Southwest Mississippi Electric Power Association*, 296 So. 3d 53 (Miss. 2020), the Mississippi Supreme Court rejected a unconscionability-based challenge to the arbitration provision in an electric power cooperative's bylaws. The consumer plaintiffs asserted that the provision was unfairly unilateral and adhesive, but the court held that because they did not assert the same objection to other bylaw provisions, their challenge improperly "single[d] out the arbitration provision for disfavored treatment." *Id*. at 63; *see also Jorja Trading, Inc. v. Willis*, 598 S.W.3d 1, 6 (Ark. 2020) (rejecting challenge to arbitration agreement for lack of bilateral provisions: "This court has not required that every provision within a contract be bilateral. We therefore cannot require that every provision in an arbitration agreement be bilateral without violating the FAA because doing so would hold arbitration agreements to a more stringent analysis than other contracts.").

The South Carolina Supreme Court's decision again cannot be reconciled with these decisions. They correctly hold that the FAA—and this Court's precedents construing the FAA—prohibit application of any state-law rule uniquely hostile to arbitration

agreements, even if the rule derives from an otherwise generally applicable doctrine like "unconscionability." The same principle necessarily applies to a generally applicable "public policy" such as "protect consumer homebuyers." No matter what the state-law rule's foundation or objective, if the rule disfavors arbitration, it is invalid under the FAA. Period.

This Court should grant review—or summarily reverse—to ensure that lower courts respect and enforce the FAA's categorical anti-discrimination rule.

C. Enforcement Of The FAA's Anti-discrimination Rule Is An Important Issue Well Presented In This Case

Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," it is "a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012) (per curiam). This Court thus has repeatedly reviewed and reversed—even summarily reversed—state-court decisions that contravene the FAA. *See*, *e.g.*, *Kindred Nursing Ctrs.*, 581 U.S. at 255-56 (state court "flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts"); *Nitro-Lift Techs.*, 568 U.S. at 20 (state court "disregard[ed] this Court's precedents on the FAA"); *Marmet Health Care Ctr.*, 565 U.S. at 531 (state court erred "by misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (state court "fail[ed] to give effect to the plain meaning of the [FAA]").

The decision below not only reinforces the suspect status of all consumer arbitration agreements in South Carolina, but if allowed to stand, it will provide a roadmap to other state courts seeking to evade the FAA's anti-discrimination mandate. Courts may consider themselves free to review consumer arbitration agreements with open hostility; to override such agreements based on public policy concerns about protecting consumers; and to assume that routine severability provisions are deceitful and abusive instruments that exist mainly to trick consumers into abiding by arbitration agreements they would otherwise challenge.

The decision also puts at risk the validity of thousands of active homebuyer contracts in South Carolina and throughout the county. This Court has long recognized that "private parties have likely written contracts relying upon [its FAA precedent] as authority." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). So it is here. Many homebuyer contracts contain arbitration terms identical or similar to those deemed unconscionable by the South Carolina Supreme Court in this case. The decision below invites nationwide litigation over the validity of those provisions. And if other courts follow the South Carolina Supreme Court's lead, countless disputes previously subject to arbitration will be plunged into civil litigation, clogging the courts and frustrating the objective of expeditious recovery.

Certiorari—and perhaps summary reversal—is warranted to reinforce the integrity of this Court's precedents and to ensure that lower courts respect the anti-discrimination rule foundational to the FAA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David J. Marroso
Daniel Cooper
O'MELVENY & MYERS LLP
1999 Avenue of the Stars
Los Angeles, CA 90067
(310) 553-6700

Jonathan D. Hacker
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
jhacker@omm.com

Attorneys for Petitioner

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