No. 22-804

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 South Carolina Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In analyzing the arbitration agreement between petitioner Lennar Carolinas LLC ("Lennar") and respondents Patricia Damico et al. ("Damico"), the South Carolina Supreme Court expressly relied on a preexisting rule of South Carolina law requiring courts to "view adhesive arbitration agreements with 'considerable skepticism,' as it remains doubtful 'any true agreement ever existed to submit disputes to arbitration.'" Pet. App. 21a (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 669 (S.C. 2007) (citations omitted)); *see id.* at 31a ("[W]hen a contract of adhesion is at issue, 'there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." (quoting *Simpson*, 644 S.E.2d at 669)).

Damico does not deny that the South Carolina Supreme Court applied a presumption hostile to the arbitration agreement in this case. Nor does Damico deny that the Federal Arbitration Act ("FAA") and this Court's precedents prohibit courts from interpreting adhesive arbitration agreements through a lens of skepticism they do not apply to other adhesive agreements. Damico does not even dispute that application of such an arbitration-specific rule would warrant summary reversal. *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").

Damico instead asserts only one main argument against review. According to Damico, the hostile presumption applied by the South Carolina Supreme Court is not "arbitration specific," but is a presumption South Carolina courts apply equally to *all* adhesive contracts.

No, it is not. South Carolina courts assuredly do not view all adhesive contracts with similarly strong skepticism. *See infra* at 5. Nor would it make sense to do so. A judicial presumption disfavoring enforcement of all consumer contracts would be commercially infeasible—it would create doubts about the meaning and enforceability of the terms of essentially every written consumer contract, including the now-ubiquitous electronic contracts that consumers enter with a single click on an I AGREE or ACCEPT button. Rather than condemn all consumer contracts to that fate of uncertainty and instability, South Carolina courts impose burdens uniquely on consumer *arbitration* agreements. *See infra* at 5. And Damico's response essentially concedes that if such an arbitration-specific rule does exist, then certiorari and even summary reversal is appropriate.

To escape that conclusion, Damico proffers the makeweight assertion that the South Carolina Supreme Court did not actually rely on the presumption at all. Of course it did. The opinion refers to it repeatedly and nowhere suggests that its comments are mere dicta other South Carolina courts—and hence this Court—can readily ignore. To the contrary, hostility to adhesive arbitration agreements was the lens through which it viewed the entire case.

Because the FAA strictly prohibits courts from applying such an arbitration-specific negative presumption in analyzing the meaning and enforcement of an arbitration agreement, the Court should grant certiorari or summarily reverse the decision below.

A. The Presumption Applied By The South Carolina Supreme Court Is An Arbitration-Specific, Now-Settled Rule Of South Carolina Law

Damico's opposition to certiorari asks this Court to ignore the South Carolina Supreme Court's express statement that under South Carolina law, courts must "view adhesive arbitration agreements with 'considerable skepticism,'" because when the contract is adhesive, "it remains doubtful 'any true agreement ever existed to submit disputes to arbitration.'" Pet. App. 21a (quoting *Simpson*, 644 S.E.2d at 669). According to Damico, that statement is not problematic because it is not actually arbitration-specific, but instead merely reflects a policy equally applicable to all adhesive contracts. In Damico's words, the decision below did "not single out arbitration clauses for special disfavor," but instead "applied a general public policy that governs all manner of contracts of adhesion, not just arbitration agreements." Opp. 8. On that basis, Damico contends that the decision below does not conflict with the many decisions of this Court and others requiring state courts to place arbitration agreements on an "equal footing" with other contractual agreements. *Id.* at 17-18.

Damico is wrong. Here is how the South Carolina Supreme Court treats other type of consumer contracts:

> Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 739 S.E.2d 882, 884 (S.C. 2013). Lower court decisions reflect that more permissive approach, upholding take-it-or-leave-it consumer contracts with little handwringing about their unconscionability. *See*, e,g., *Carew v. RBC Centura Bank*, 2014 WL 2579698, at *1 (S.C. Ct. App. Feb. 19, 2014); *Centura Bank v. Cox*, 2004 WL 6331130, at *3 (S.C. Ct. App. May 25, 2004).

In stark contrast, South Carolina courts regularly find ways to invalidate arbitration provisions in consumer contracts, including on the ground that some ancillary or subordinate provision infects and dooms the entire agreement. *See Rawl v. W. Ashley Rehab. & Nursing Ctr. - Charleston, SC, LLC*, 2021 WL 1023313, at *2 (S.C. Ct. App. Mar. 17, 2021); *York v. Dodgeland of Columbia, Inc.,* 749 S.E.2d 139, 149 (S.C. Ct. App. 2013). To show otherwise and prove that South Carolina law treats all adhesive consumer agreements the same, Damico inexplicably cites *Doe v. TCSC, LLC*, 846 S.E.2d 874, 880 (S.C. Ct. App. 2020). *See* Opp. 12. But *Doe* is yet another case refusing to enforce an arbitration provision. 846 S.E.2d

at 880. Damico's own authority thus exemplifies the hostility to arbitration embedded in South Carolina law.

Damico likewise misses the point in observing that the decision below cites two common-law cyclopedias observing that adhesive contracts are sometimes subject to extra scrutiny because of their take-it-or-leave-it nature. Pet. App. 21a (citing 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9). Nobody doubts that hoary principle. The problem is that South Carolina courts *invoke* the principle—explicitly or implicitly—only when an arbitration agreement is at issue. Again, Damico's citation merely illustrates the problem.

The discriminatory application of a presumption against enforcement of adhesive contracts is the federal issue presented here, not the ultimate question of how the specific contract here is properly construed under state law once the presumption is stripped away. Opp. 12. If this Court agrees that the arbitration provision "was not considered with the neutrality the [FAA] requires," *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018), the Court can either analyze the agreement neutrally itself, or remand for the South Carolina courts to reexamine the agreement without a strong presumption disfavoring enforcement.

There should be no doubt, however, that the South Carolina Supreme Court's interpretation of the agreement is wrong, confirming that the court applied a presumption against enforcement, rather than giving the agreement a reading that would facilitate enforcement of a voluntary agreement. Notably, Damico

herself does not even attempt to defend the court's bizarre distortion of § 16.5. That provision merely states that that the results of arbitration are preclusive to the extent allowed by "applicable law" and reiterates the normal "mutuality of parties" requirement of preclusion. Pet. App. 86a. To be sure, the provision may result in bifurcated proceedings and inconsistent verdicts, but that outcome results *inevitably* from the operation of arbitration clauses in complex, multiparty cases. Pet. 9. Even Damico does not disagree. The only explanation for the South Carolina Supreme Court's conclusion that this unexceptional provision is "wholly unreasonable and oppressive" (Pet. App. 25a) is that the court applied a presumption requiring the provision to be read in the most harshly negative light possible.

The same is true for the court's misreading of § 16.4. By its plain terms, that provision simply enables Lennar to join in an arbitration with Damico any subcontractors with whom Lennar also has arbitration agreements. According to the South Carolina Supreme Court, however, the provision somehow allows Lennar to force *Damico* to arbitrate any independent claims *she* may have against those subcontractors. Pet. App. 25a. The provision requires no such thing. Indeed, not even Damico contends that it requires her to arbitrate her own claims against subcontractors.

Damico's only defense of the court's interpretation is that *Lennar itself* had previously argued (in a stay proceeding) that Damico's claims against subcontractors were subject to arbitration. Opp. 13-14. Damico misstates Lennar's position. Damico at the time had asserted claims only against Lennar and six

subcontractors *collectively*—she did not assert separate claims singling out any individual subcontractors as having committed particular acts subjecting them to distinct liability. Her claims instead appeared to be entirely derivative of her claims against Lennar, which were subject to arbitration, and Lennar in turn had its own arbitrable claims against the same subcontractors for the same collective acts at issue in Damico's complaint. Lennar thus quite correctly argued that there were "no claims in the case"—as it was then pleaded and postured—that were "not *affected by* and *at issue* in the decision to compel arbitration." Opp. 13 (emphasis added).

Nowhere in that stay proceeding, or anywhere else below, did Lennar ever argue that if Damico did assert independent claims against subcontractors, § 16.4 somehow empowered Lennar to force those independent claims into arbitration. By imposing such a blatantly untenable construction on § 16.4—notably, a construction *no party before the court was urging*—the South Carolina Supreme Court confirmed that it was reading the arbitration agreement in the most negative possible light. That approach is not one South Carolina courts apply to other adhesive contracts.

B. The Presumption Was Essential To The Court's Analysis Of The Arbitration Agreement

Damico's other argument against certiorari is that the correcting the error in applying the antiarbitration presumption would not affect the outcome of the case because the presumption was not essential to the South Carolina Supreme Court's analysis.

Damico first contends that the court below invoked the presumption only as to the *procedural* unconscionability of the agreement and that it had no bearing on the court's *substantive* unconscionability analysis. Opp. 13 n.2. Not so. As the court clearly explained, the presumption arises only as a *result* of procedural unconscionability—courts view certain adhesive contracts with "considerable skepticism" precisely *because* the consumer cannot negotiate their terms when entering them. Pet. App. 21a. The South Carolina Supreme Court did exactly that here, presuming that simply because the arbitration agreement was adhesive, no reasonable consumer would ever willingly accept it. Because South Carolina courts do not normally apply such severe skepticism in analyzing the substantive unconscionability of other adhesive contracts, the court's analysis plainly violates the FAA.

The arbitration-specific presumption of substantive unconscionability played an equally clear role in the court's analysis of severability. Damico insists that the court separately rejected severance for independent reasons, Opp. 14, 20, but it is impossible to disaggregate the court's analysis as Damico proposes.

The court's first proffered reason for rejecting severance was that once the joinder and preclusion provisions were severed, there was "essentially nothing left" of the arbitration agreement. Pet. App. 30a. That assertion is facially incorrect: severance of the ancillary procedural provision obviously would leave standing the core *agreement to arbitrate*—the heart of the entire agreement. And the entire point of the agreement's severance provision is to *require* a court

to sever provisions whenever necessary to preserve the essence of the bargain, i.e., the arbitration agreement itself. The court's refusal to honor the agreement's severance command is yet more evidence of its hostility to arbitration.

In any event, the court itself evidently did not consider its "nothing left" theory by itself sufficient to justify its refusal to enforce the express severance provision. To the contrary, the court discussed at much greater length two reasons "honoring the severability clause . . . would violate public policy," Pat. App. 35a, both of which implicated the presumption against adhesive arbitration agreements, Pet. 9-11, 15. But such public policy concerns would arise *only* if there was something "left" after severance. And of course there was: arbitration. The court's perceived need to invoke public policy to override the arbitration clause shows why its flawed "nothing left" theory did not actually suffice to avoid the clause.[1]

C. The Court Should Not Delay Correcting The South Carolina Supreme Court's Error

Damico concludes with a few fleeting comments about whether this is the right time and the right case to reinforce the FAA's non-discrimination mandate.

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[1] If anything, the court's public policy discussion further confirms its anti-arbitration bias: enforcing the severance clause to strip away provisions *unfavorable* to homebuyers would, by the court's own account, make the arbitration process *even fairer* to homeowners, yet the court deemed that outcome an intolerable breach of South Carolina public policy.

Opp. 18-20. None of the comments is a serious objection to certiorari or summary reversal.

Damico first belabors the adhesive nature of the agreement, as if that feature made the case a poor vehicle for analyzing the treatment of arbitration agreements in adhesive consumer contracts. Opp. 19. Exactly the opposite is true. Almost all consumer contracts are non-negotiable adhesion contracts, yet South Carolina generally refuses to enforce such contracts only to the extent that they include arbitration clauses. *See supra* at 4–5. And this Court in any event has made clear that a state cannot rely on adhesion contract concerns to "frustrate [FAA's] purpose to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 n.6 (2011).

Damico next asserts that Lennar's brief to the South Carolina Supreme Court did not preserve its defense of Damico's unconscionability challenge to § 16.4 specifically. Opp. 19. But as Lennar's petition explained, Damico herself did not make an unconscionability challenge specifically to § 16.4 in her opening brief; rather, she challenged only the Court of Appeals' application of the *Prima Paint* severability doctrine and argued that the *entire agreement* was unconscionable. Pet. 5; *see* Br. of Pet'r's at 10, *Damico v. Lennar Carolinas, LLC*, No. 2020-1048 (S.C. July 8, 2021). In any event, the South Carolina Supreme Court itself expressly addressed the unconscionability of § 16.4 at length, which suffices to preserve an issue for this Court's review, as Damico admits. Opp. 19-20; *see Citizens United v. FEC*, 558 U.S. 310, 330 (2010) (Court's practice "permits review of an issue

not pressed below so long as it has been passed upon" (cleaned up)).

Finally, Damico proposes that the Court simply wait for another case applying the antiarbitration presumption to confirm that it really exists in South Carolina law. Opp. 18. But the decision speaks for itself, as do other South Carolina decisions treating arbitration agreements differently from other contracts. *See supra* at 4–5. The South Carolina courts' hostility to consumer arbitration agreements is as palpable as it is prohibited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 10, 2023