No. 24-1092

IN THE

Supreme Court of the United States

MUNGO HOMES, LLC,

Petitioner,

v.

AMANDA LEIGH HUSKINS AND JAY R. HUSKINS,

Respondents.

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

BRIEF IN OPPOSITION

Matthew A. Nickles
ROGERS, PATRICK, WESTBROOK, & BRICKMAN, LLC
1513 Hampton Street
Columbia, SC 29201

Charles H. McDonald
BELSER LAW FIRM, PA
1325 Park St., #300 (29201)
Post Office Box 96
Columbia, SC 29202

Elizabeth Van Doren Gray
Counsel Of Record
Beth Burke Richardson
ROBINSON GRAY STEPP & LAFFITTE, LLC
2151 Pickens St., #500 (29201)
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400
egray@robinsongray.com

QUESTION PRESENTED

Whether the South Carolina Supreme Court applied a severability rule that disfavors arbitration in this case.

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BRIEF IN OPPOSITION

Petitioner asks this Court to grant certiorari to decide whether the South Carolina Supreme Court "erred" in this case by "applying a severability rule that disfavors arbitration." Pet. i. Just two terms ago, this Court denied a materially indistinguishable petition raising the same complaints about South Carolina severance law and accusing the state Supreme Court of defying this Court's arbitration decisions. *See Lennar Carolinas, LLC v. Damico*, 143 S. Ct. 2581 (2023). There is no reason for a different result here. Indeed, the trial court held that the FAA does not even apply to the contract in this case under a choice-of-law provision petitioner included in the arbitration clause, a ruling petitioner never challenged below and does not ask this Court to review. The petition should be denied.

STATEMENT OF THE CASE

1. Petitioner sold Respondents a house in Irmo, South Carolina. The purchase agreement included an arbitration clause, set out in a paragraph entitled "Arbitration and Claims." *See* Pet. App. 12a-13a. The clause required that any claims arising from the agreement be arbitrated "pursuant to the South Carolina Uniform Arbitration Act." *Id.* 30a. The agreement then limited the scope of arbitration to claims arising within 90 days of the demand for arbitration:

> Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other mater in question has arisen . . . . Any claim, dispute or other matter in question not asserted within said

> time periods shall be deemed waived and forever barred.

Pet. 8-9.

2. Respondents subsequently filed a lawsuit relating to the home sale and petitioner moved to compel arbitration. Respondents opposed arbitration, arguing that the agreement's time limitation for asserting claims was unconscionable and inseverable from the rest of the arbitration agreement.

Before addressing that argument, the trial court first considered whether the dispute was governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-402, or the state's Uniform Arbitration Act ("UAA"), S.C. Code Ann. §§ 15-48-10 – 15-48-240. Petitioner argued that the intrastate sale of a residential home did not involve interstate commerce as required for application of the FAA. Pet. App. 31a. *See also* 9 U.S.C. §§ 1-2. The trial court concluded that the contract "involved some level of construction, which likely involved interstate commerce." Pet. App. 34a. But it did not conclusively decide the question because even if the contract "may have involved interstate commerce, the parties freely agreed that the South Carolina Uniform Arbitration Act would govern." *Id*. 35a. Accordingly, the court held, the "arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision." *Id.* 44a.

The trial then rejected respondents' unconscionability challenge, finding that although respondents "lacked a meaningful choice to negotiate," the arbitration provision was "not onesided and oppressive." *Id*. 44a-45.

3. Respondents appealed. Before the court of appeals, petitioner did not challenge the trial court's determination that the parties had selected the UAA over the FAA in the agreement's choice-of-law provision. And the closest petitioner came to invoking the FAA was a passing citation to this Court's FAA decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 338 (2011), in a section of its brief addressing unconscionability, not severability. *See* Pet. App. 56a. Consequently, the court of appeals noted, but did not disturb, the trial court's "determin[ation that] the UAA governed the parties' dispute," observing that any difference in the two statutes "does not affect our analysis." *Id.* 19a n.4.

On the merits, the court of appeals found the time limits on arbitration unconscionable in light of a state statute precluding contractual shortening of statutes of limitations. *Id*. 24a (citing S.C. Code Ann. § 15-3-140). However, the court concluded that the unconscionable provision was severable and therefore compelled arbitration. *Id*. 26a.

4. The South Carolina Supreme Court granted certiorari. Before that court, petitioner conceded that the time restrictions on arbitrable claims "ran afoul" of the state statute. *Id.* 2a. But it insisted that the clause was severable under state law. *See* Resp. Final Br. § I.[1]

Petitioner also argued for the first time that "any other conclusion" on severability "would contradict the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)," by treating arbitration agreements differently from

[1] *Available at* 2024 WL 1745116.

other contracts. *Id.* 53a (citation to parallel reporter omitted). In a footnote, petitioner insisted that the FAA applied because the transaction involved interstate commerce. *See id.* 53a & n.3. But it did not address the trial court's holding that even if that were so, the parties had contracted to have their arbitration agreement governed by South Carolina's arbitration act instead. *Ibid*. In reply, respondents argued that petitioner had waived any reliance on the FAA by not challenging the trial court's choice-of-law analysis. Pet. Reply Br. 8 n.4.

The South Carolina Supreme Court reversed. The court did not address whether the case was governed by the UAA or the FAA, perhaps finding petitioner's invocation of the FAA waived or possibly agreeing with the court of appeals that the answer did not matter in this case. To decide severability, the court turned to centuries' old principles of general contract law, citing decisions and treatises describing those rules in a wide range of contexts, some involving arbitration agreements[2] but most not.[3] Under those general principles, the court explained, "whether an agreement can be modified so its remaining provisions survive depends upon what the parties intended." Pet. App. 3a; *see also id*. 4a (provision is "severable if

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[2] *See* Pet. App. 3a (citing *Smith v. D.R. Horton, Inc*., 417 S.C. 42 (2016)).

[3] *See* Pet. App. 3a (citing *Lewis v. Premium Inv. Corp*., 351 S.C. 167 (2002); 2 E. Allan Farnsworth, *Contracts* § 5-09 (4th ed 2004); Pet. App. 4a (citing *Pigot's Case*, 77 ER 1177 (1614); *United States v. Bradley*, 35 U.S. 343 (1836); Restatement (Second) of Contracts § 184 (1981); 8 *Williston on Contracts* § 19:70 (4th ed May 2024 Update); *Packard & Field v. Byrd*, 73 S.C. 1 (1905); *Scruggs v. Quality Elec. Servs.*, Inc., 282 S.C. 542 (Ct. App. 1984)); Pet. App. 5a (citing Restatement (Second) of Contracts §§ 178, 184).

consistent with the parties' intent"). The presence or lack of an express severability clause is one important indicia of that intent. *Id*. 3a. Another is whether the unenforceable part of the agreement is "an essential part of the agreed exchange." *Id*. 4a (quoting Restatement (Second) of Contracts § 184). The court also noted the Restatement's teaching that "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." *Id*. 5a (quoting Restatement (Second) of Contracts § 184 cmt. b).

Applying those universal rules to this specific contract, the court noted that although petitioner could have easily included an express severability provision, "the contract does not include a severability clause or any hint that the parties intended for the arbitration agreement to stand if any part of it fell." *Id.* 2a-3a. To the contrary, the agreement expressly provided that "the contract 'embodies the entire agreement' and that it can only 'be amended or modified' by a writing executed by both" parties. *Id.* 5a. Moreover, petitioner's choice to present the contract as a "'take it or leave it' proposition" was "forceful proof of" petitioner's "intent that the contract not be tinkered with." *Ibid*.

In addition, the court concluded that the time limits were an essential part of the agreement to arbitrate. *Id.* 5a-6a. The court found that petitioner had written the provision with the expectation that only a limited number of claims would be subject to arbitration. *Id*. 6a. Eliminating the time limits would

be inconsistent with that purpose because it would "rewrite the arbitration agreement to expand the statute of limitations by several orders of magnitude." *Ibid*.

Finally, the court noted that adhering to the parties' evident intent was consistent with contract law's general treatment of contracts of adhesion of all types, and the State's concern about contracts of adhesion in home sales in particular. *Id.* 6a-7a. As other courts and treatises have noted in a variety of contexts, too easy severance of unconscionable or illegal terms from such contracts creates an incentive for abuse. *Id*. 7a. "If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provision." *Id*. 7a-8a (quoting *McKee v. A&T Corp.*, 191 P.3d 845, 861 (Wash. 2008)).

Taking all these considerations into account, the court held the unlawful portion of the arbitration agreement was not severable and reversed the lower court's order compelling arbitration. *Id.* 8a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide whether the South Carolina Supreme Court applied a "severability rule that disfavors arbitration" in this case. Pet. i. That request should be rejected. The decision below is fully consistent with the FAA and this Court's decisions interpreting that statute. Nor does petitioner identify any conflict between the decision below and the decision of any other state court of last resort or federal court of appeals. Moreover, this case is an unsuitable vehicle for deciding any question about the FAA because the trial court held that petitioner had contractually agreed that its arbitration agreement would be governed by the South Carolina Uniform Arbitration Act rather than the FAA, a ruling petitioner never appealed and has not asked this Court to review.

I. The Decision Below Does Not Conflict With The Decisions Of This Court Or The FAA.

When it applies, the FAA permits courts to refuse to enforce an arbitration agreement based on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Petitioner does not dispute that one such valid ground is that the arbitration clause contains an unlawful provision that is inseverable from the rest of the arbitration agreement under the severability standards applied to any contract.

Instead, petitioner emphasizes that in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court held that courts must apply such generally applicable contract principles to the arbitration agreement itself, in isolation from the rest

of the contract. *See* Pet. 14. That means, in effect, that "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Here, however, the question is whether a provision found to be *within* an arbitration clause is severable from the rest of the agreement to arbitrate. Nothing in *Prima Paint* or the FAA precludes a court from applying general contract law principles in that context to deny severance. Indeed, this Court recognized as much in *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63 (2010). There, the Court specifically held open that the entirety of an arbitration agreement might be invalidated if it contained unconscionable provisions regarding discovery or fee-shifting. *See id*. at 74.

Petitioner appears to dispute none of this. Instead, it argues that: (1) the illegal provisions in this particular contract should not have been considered part of the arbitration agreement, *see* Pet. 17, 28; and (2) the South Carolina Supreme Court's application of state severability law discriminated against arbitration agreements, *id*. 26. These case-specific, fact-bound objections would not merit this Court's review even if they had merit, but neither does.

A. The South Carolina Supreme Court Reasonably Concluded That The Illegal Provision Was Part Of The Arbitration Agreement.

Even if the FAA applied to this case, *but see infra* § IV, the South Carolina Supreme Court's determination that the illegal time limits were part of the arbitration agreement is entirely reasonable. The offending provision is part of a paragraph entitled

"Arbitration and Claims." Pet. App. 12a. That paragraph has only four sentences, and the time limits take up two of them. *Ibid*. Most importantly, the limitation expressly addresses what claims may be presented *in arbitration*: "Each and every *demand for arbitration* shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen . . . ." *Ibid*. (emphasis added). Thus, petitioner's claims that the illegal provisions here "had no bearing on the agreement to arbitrate itself," Pet 17, and "did not affect the arbitration proceeding itself," *id*. 18, are simply wrong. The illegal provisions dictated which claims could be arbitrated, declaring that only claims arising within 90 days of the demand for arbitration were eligible.[4]

Petitioner cites to no authority from this Court or any other holding that provisions dictating the scope of arbitrable claims are somehow not part of the agreement to arbitrate. Certainly, the provisions are more clearly a part of the arbitration agreement than the fee-shifting and discovery limitations discussed in *Rent-A-Center*, which had a far less direct connection with the basic agreement to arbitrate. 561 U.S. at 74. *Rent-A-Center* likewise disproves petitioner's suggestion (Pet. 17) that the *Prima Paint* rule requires treating every provision of an arbitration clause as

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[4] Accordingly, it is not true, as petitioner assumes, that an identical provision in another contract would have been severed if located under a separate subheading (say, "Jurisdiction"). *See* Pet. 34. The limitation is part of the arbitration agreement not simply because of its placement, but because it expressly limits the "demand[s] for arbitration" that can be made. Pet. App. 30a-31a.

severable from the specific agreement to submit to arbitration.

Petitioner may disagree with the South Carolina Supreme Court's characterization of this specific provision in this particular contract, but it cites to no decision from this Court addressing the question, much less precluding the state court's answer. Nor does petitioner provide any reason why deciding such a fact-bound, case-specific question would be worth this Court's time.

B. The South Carolina Supreme Court Neutrally Applied General Contract Law Severance Principles.

Petitioner complains that even if the timing provision were part of the arbitration agreement, the South Carolina Supreme Court violated the FAA by applying "inconsistent severability rules" specific and hostile to arbitration. Pet. 3; *see also, e.g.*, *id*. 12 (accusing state court of placing "arbitration agreements on unequal footing with all other contracts in South Carolina."). Not so. Even if the FAA applied, the South Carolina Supreme Court neutrally applied general contract law severance principles drawn from sources that are not specific to arbitration.

For example, the court explained that the touchstone of severance is the parties' intent, citing to non-arbitration cases dating back a century or more and general treatises on contract law. *See* Pet. App. 4a. It quoted and applied the Restatement's general rule that severance is permitted when the unlawful term "is not an essential part of the agreed exchange" and was bargained for "in good faith and in accordance with reasonable standards of fair dealing." *Id*. at 4a-5a (quoting Restatement (Second) of Contracts § 184)).

The court then applied these general contract principles to the facts of this case, taking into account the lack of an express severability clause, the lengths to which petitioner went to preclude any alteration of the contract, and the importance of the time limitation to the evident purposes of the arbitration agreement, concluding that the parties would not have intended the arbitration clause to survive the elimination of the unlawful limits on the scope of claims subject to arbitration. *Id.* 6a-7a.

Petitioner does not even acknowledge most of this analysis, much less explain why it is wrong, far less why any such error would offend the FAA. Section 2 permits invalidation of arbitration agreements under generally applicable state law principles; it does not convert every error in the application of those neutral principles into a violation of federal law.

As the Question Presented ultimately acknowledges, the only potential federal question in this case is whether the court below applied "a severability rule that disfavors arbitration" or a "public policy defense to arbitration that conflicts with the FAA." Pet. i. The closest petitioner comes to identifying any such arbitration-disfavoring rule or policy is to complain about the court's invocation of the "public policy concerns *Damico* eloquently addressed" regarding severance of unlawful terms from contracts of adhesion for the purchase of a home. *Id.* 17; *see also id*. 26. The petition in *Damico* tried the same gambit, claiming that the policy "expressly and strongly disfavors the enforcement of arbitration agreements in consumer homebuyer contracts." Pet. 15, *Lennar Carolinas, LLC v. Damico*, No. 22-804. This Court denied certiorari, no doubt because the policy is

manifestly not specific to arbitration agreements and does not disfavor arbitration. Instead, the policy is skeptical of severance of *any* unlawful term from *any* portion of a contract of adhesion (not just arbitration clauses), particularly contracts of adhesion for home purchases. The rule is founded in universal principles of contract law recognized by the Restatement and general contract law treatises without reference to arbitration in particular. *See* Pet. App. 5a (quoting Restatement (Second) of Contracts § 184 cmt. b); *id*. 6a (citing 2 E. Allan Farnsworth, *Contracts* §§ 5-10 (4th ed. 2004) and *Williston on Contracts* § 19:70); *id*. 8a (citing Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 Stan. L. Rev. 869, 901-04 (2011)).

Petitioner cites no authority from this Court holding that applying such universal rules to an arbitration provision somehow violates the FAA.[5]

II. There Is No Circuit Conflict.

The decision below does not conflict with the law of any circuit or any other state court of last resort either.

Petitioner asserts (Pet. 5) a conflict with the Fourth Circuit's recognition that state law may not "single out arbitration agreements for disfavored treatment." *Dhruva v. CuriosityStream, Inc.*, 131 F.4th 146, 153 (4th Cir. 2025) (quoting *Kindred*

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[5] Petitioner also faults the South Carolina Supreme Court for failing to cite to the FAA, but does not acknowledge its own failure to challenge the trial court's determination that the FAA does not apply by virtue of the contract's choice-of-law provision. Regardless, even if the FAA applied, petitioner cites nothing in the FAA or this Court's decisions requiring such citation so long as the decision conforms to the FAA's requirements.

Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 248 (2017)) (cleaned up). But petitioner does not seriously claim that the decision below held that states can disfavor arbitration. Instead, petitioner simply claims that the decision in this case violated settled principles of FAA law by "improperly appl[ying] state contract law regarding severability." Pet. 27. That is both wrong for the reasons discussed above and does not establish any legal principle in conflict with the Fourth Circuit's quotation of this Court's black-letter FAA law.

Petitioner also claims that admitted dicta in *In re Cotton Yard Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007), "strongly suggest[s]" that the Fourth Circuit would have allowed severance in this case. Pet. 24. The need for such speculation only confirms that there is no actual on-point conflict. Moreover, the cited passage was not discussing severance, but rather whether a shortened limitations provision would be unenforceable in the first place (*i.e.*, because it deprived the plaintiff of an "adequate and accessible substitute forum"). 505 F.3d at 290. The panel's inconclusive, non-binding musings on that topic are incapable of generating a conflict of authority that warrant's this Court's attention.[6]

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[6] The same is true of the unpublished, unappealed district court decision in *Fitzgerald v. Faucette*, 2024 WL 5087128 (D.S.C. Dec. 12, 2024) (cited at Pet. 21). That case, too, decided no question of severability. Instead, the court held that the time limitation in that case did not apply *by its own terms* to the dispute in that case. *See Fitzgerald v. Faucette*, 2024 WL 5290929, at *5 (D.S.C. April 23, 2024) (magistrate recommendation) (quoting contract as providing that the

Petitioner's unfounded prediction that federal courts will disregard the South Carolina Supreme Court's severability precedents in the future thus has no basis. And if such a conflict unexpectedly arises, this Court can consider intervening at that time.

III. Petitioner's Complaints About The South Carolina Supreme Court's Decisions In Other Cases Provide No Basis For Review.

Unable to establish a conflict between the South Carolina Supreme Court's decision in this case and any decision of this Court or any court of appeals, petitioner resorts to claiming that review is needed because the South Carolina Supreme Court has defied the FAA in *other* cases, evincing a sweeping hostility toward arbitration this Court should rebuff. That would not be a basis for certiorari in *this* case even if the charges of defiance were well founded. And, in any event, they are not.

1. Serious claims require serious proof. But although petitioner breathlessly proclaims that the South Carolina Supreme Court has "continuously ignored the FAA," it cites only three cases to support that assertion—the decision in this case and two others, *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596 (2022) and *Smith v. D.R. Horton, Inc.,* 417 S.C. 42 (2016). *See* Pet. 2; *see also id.* 13-19. Even worse, none of these cases remotely supports petitioner's claims of systemic defiance of the FAA.

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limitation period "will not apply" in "any state or jurisdiction were a statute or binding court decision prohibits a shorter contractual statute of limitations.").

Start with *Damico*. Despite its extensive description of the case, petitioner is notably vague about how the decision conflicts with the FAA. *See* Pet. 15-17. Petitioner appears to raise the same objection the defendant in that case pursued in this Court, namely that the FAA precludes state courts from applying a presumption against severance of illegal provisions from contracts of adhesion generally, or adhesive home purchase agreements in particular. Pet. 17; *compare Damico* Pet. 15-17. That objection is wrong for the reasons given above—the policy is derived from neutral principles of contract law that apply broadly to adhesive contracts of all sorts and to provisions of home purchase agreements having nothing to do with arbitration. Petitioner notably cites no case in which the South Carolina Supreme Court has refused to apply the policy to a non-arbitration contract.

The complaints about *D.R. Horton* are similarly off-base. That decision expressly acknowledged *Prima Paint*'s severance rule. *See* 417 S.C. at 48. Petitioner simply claims that court misapplied that rule on the facts of the case before it by "defin[ing] the arbitration agreement too broadly." Pet. 14. But Petitioner points to nothing in *Prima Paint* that dictates how to decide which subparagraphs of a "Warranties and Dispute Resolution" provision constitute the relevant arbitration agreement. And even if the South Carolina Supreme Court were wrong to conclude that the "subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision," *D.R. Horton*, 417 S.C. at 48, that

case-specific error would hardly show a systemic resistance to arbitration and the FAA.[7]

2. Petitioner also argues that review in this case is warranted because the South Carolina Supreme Court has, in other cases, "incorrectly declared that there is no federal policy favoring arbitration." Pet. 3. That argument is baseless as well.

Petitioner relies principally on *Palmetto Constr. Grp. LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639 (2021), in which, it is true, the South Carolina Supreme Court stated that there is no "public policy–federal or state–'favoring' arbitration." *Id.* 20 (quoting *Palmetto Constr. Grp. LLC*, 432 S.C. 633, 639 (2021)). But read in context, the statement simply repeats what this Court has held both before and since. Quoting one of this Court's arbitration decisions, *Palmetto* explained that there "is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Palmetto*, 432 S.C. at 639 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior University*, 489 U.S. 468, 476 (1989)). "Therefore, when considered in the proper context," the court explained, "our statements that the law

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[7] Petitioner notes that "now Chief Justice of the South Carolina Supreme Court Kittredge" wrote "a strong dissent" in *D.R. Horton*, but fails to acknowledge that the Chief Justice joined the decision in this case. *See* Pet. 15; Pet. App. 8a. Moreover, Justice Kittredge authored the opinion of the court in *Damico*. *See* 437 S.C. at 596. Thus, rather than suggesting an entrenched hostility toward enforcement of arbitration clauses, the rulings authored by and joined by Justice Kittredge demonstrate an even-handed, case-specific approach by the South Carolina Supreme Court to enforcing arbitration provisions.

'favors' arbitration mean simply that courts must respect and enforce a provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy–federal or state–'favoring' arbitration." 432 S.C. at 639. For that reason, the court in *Palmetto* rejected the defendant's insistence that arbitration-related decisions be afforded a special right to interlocutory appeal, *ibid*., a holding petitioner notably does not dispute.

This Court has since made the same points in nearly identical terms. In *Morgan v. Sundance*, 596 U.S. 411 (2022), the Court explained its "frequent use of the phrase" "policy favoring arbitration" is "merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Id*. at 418. "Or in another formulation: The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" *Ibid*. (quoting *Prima Paint*, 388 U.S. at 404 n.12).[8] Thus, the "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Ibid*.

Whether, given this understanding, it is misleading to say that there is a federal "policy favoring arbitration," is a question of semantics, not substance, and not one worthy of this Court's time.

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[8] To be sure, this Court has held that the FAA's policy requires that the *scope* of arbitration agreements—*i.e.*, what kinds of claims are subject to an arbitration provision—be construed liberally. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983). But petitioner does not claim that the South Carolina Supreme Court has been flouting that instruction, much less that it did so in this case.

IV. This Case Presents A Poor Vehicle For Resolving Any Question About The FAA.

Even if the petition otherwise presented a cert-worthy question about the FAA, this case would present a poor vehicle for resolving it because the trial court held, and petitioner never challenged on appeal, that the FAA does not apply to this arbitration agreement.

As described, the trial court held that although the contract in this case might satisfy the FAA's interstate-commerce requirement, petitioner elected to include a choice-of-law provision dictating that the state arbitration act would apply instead. Petitioner did not challenge that holding in the court of appeals, which expressly acknowledged the trial court's holding. And while petitioner belatedly tried to invoke the FAA in the South Carolina Supreme Court, it again failed to acknowledge, let alone challenge, the trial court's choice-of-law ruling. The South Carolina Supreme Court did not disturb the trial court's ruling either. Indeed, the court did not address the question at all, perhaps because the issue was waived or because it believed, like the court of appeals, that the choice of law made no difference. *See supra* pp. 3-4.

Whether the FAA or state law controlled this case may not have mattered to the courts below, but the choice of law does matter to *this* Court, which has no jurisdiction to review a state court's application of state law. *See* 28 U.S.C. § 1257; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (Court lacked jurisdiction to review state law severance question). Accordingly, before this Court could reach any FAA question in this case it would have to wade through a thicket of preliminary issues that could preclude it

from reaching the federal question it had granted certiorari to decide. It would have to decide, first, whether petitioner waived any argument that the FAA applies by failing to challenge the trial court choice-of-law determination on appeal. *See Street v. New York*, 394 U.S. 576, 582 (1969) ("[W]hen, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."). And even if petitioner got past waiver, the Court would then have to decide whether the trial court was right—*i.e.*, whether petitioner contractually agreed that the arbitration agreement would be governed by state law rather than the FAA. And even if the Court agreed with petitioner on that point, the Court would still have to decide whether there was sufficient interstate commerce involved in the intrastate sale of this particular residential home to trigger the FAA. Those fact-bound questions do not warrant this Court's review. And if this Court decided that the FAA did not apply for any of the above reasons, it would not reach the question petitioner asks this Court to decide.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Elizabeth Van Doren Gray
Counsel Of Record
Beth Burke Richardson
ROBINSON GRAY STEPP & LAFFITTE, LLC
2151 Pickens St., #500 (29201)
Post Office Box 11449
Columbia, SC 29211
(803) 929-1400
egray@robinsongray.com

Matthew A. Nickles
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BELSER LAW FIRM, PA
1325 Park St., #300 (29201)
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