No. 24-1092

IN THE

Supreme Court of the United States

MUNGO HOMES, LLC,

Petitioner,

v.

AMANDA LEIGH HUSKINS, *et vir.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

REPLY OF PETITIONER

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REPLY

I. The Federal Arbitration Act applies to the arbitration agreement because new home construction contracts involve interstate commerce.

The Federal Arbitration Act ("FAA") requires that "a contract . . . evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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; App. 47a (emphasis added). Thus, the FAA applies to any contract evidencing a transaction involving interstate commerce. While the FAA "allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions," *DIRECTV v. Imburgia*, 577 U.S. 47, 53-54 (2015), this Court has made clear that a choice-of law provision selecting state law to govern a contract involving interstate commerce does not "waive" a party's rights under the FAA. *See Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 474 (1989).[1] Here, Respondents contend that the FAA is inapplicable because the arbitration agreement at issue purports to be also governed by the South Carolina Uniform Arbitration Act. Opp. 2. This argument is tantamount to an argument that application of the FAA to an arbitration agreement in a contract dealing with interstate commerce can be waived—an argument that has never been recognized by this Court and is inconsistent with this Court's prior holdings.

1. As the Court explained in *Volt*, "[t]his argument fundamentally misconceives the nature of the rights created by the FAA." *Volt*, supra, at 474.

In *Volt*, for example, this Court affirmed that the FAA applies to a contract despite the contract invoking state procedural rules. *See Volt*, supra. The Court held that selection of state procedural rules does not offend the FAA *to the extent they do not conflict with the FAA*. *Id.* at 477. In other words, state procedural rules are applicable, unless such procedural rules operate to undercut the FAA.

As this Court explained, "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitrable process—simply does not offend the rule of liberal construction set forth in *Mose H. Cone*, nor does it offend any other policy embodied in the FAA." *Id.* at 476 (citing *Moses H. Cone Mem'l Hosp. v. Mercury, Constr. Corp.*, 460 U.S. 1 (1983)).

The Court continued, "[w]here, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA[.]" *Id.* at 479.

To the contrary, Respondents advance a position that would be inconsistent with the FAA by applying State procedural rules to the gatekeeping question of arbitrability, rather than simply applying State procedural law to the arbitration itself—sidestepping the FAA in a matter that indisputably involves interstate commerce.

Finally, Respondents' new argument that Petitioner "belatedly tried to invoke the FAA" and waived appellate review under the FAA is not accurate. Opp. 18. Petitioner argued before the South Carolina trial court, court of appeals, and supreme court—every available level of state

judicial review—that the FAA applies to this contract involving interstate commerce. *See* App. 51a-59a.

Accordingly, Respondents' position that the FAA does not govern this contract concerning a transaction involving interstate commerce is without merit.

II. Respondents' argument that the South Carolina Supreme Court was not bound by this Court's jurisprudence regarding severability is inconsistent with the Federal Arbitration Act.

This Court has consistently reaffirmed, "as a matter of substantive federal law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2010). This rule applies in state court proceedings as well. *Id.* at 449. Respondents seek to circumvent this rule by broadening the scope of the agreement to arbitrate to include an ancillary provision purporting to shorten the time period in which a claim may be brought.[2]

This Court rejected a similar argument in *Rent-A-Center W., Inc. v. Jackson*. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010). In that case, this

2. The South Carolina Supreme Court below described the provision that purported to shorten the limitations period as "no 'ancillary logistical concern' of the arbitration agreement; it was a brash push to accomplish through arbitration something our statutory law forbids." Pet. App. 5a-6a. While the interpretation of the parties' contract is one of state law, this inaccurate description highlights the South Carolina Supreme Court's bold refusal to acknowledge the FAA's preemption of State law, and this Court's long standing jurisprudence. *See Moses H. Cone Mem'l Hosp.*, supra, at 24-25.

Court considered a challenge to a contract labeled as an arbitration agreement. *Id.* This Court explained:

> In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific "written provision" to "settle by arbitration a controversy" that the party seeks to enforce.

Rent-A-Center, supra, at 72 (footnote omitted).

Respondents argue it was proper for the South Carolina Supreme Court to broaden the scope of the agreement to arbitrate, in opposition to Section 2, in order to invalidate it. They argue that the provision limiting the time in which a claim could be brought "dictat[es] the scope of arbitrable claims[,]" and thus is part of the specific agreement to arbitrate. Opp. 9.

However, the parties unambiguously agreed to arbitrate, as the arbitration agreement at issue here provides that: "[a]ny claim, dispute, or other matter in question between the parties hereto arising out of this Agreement or the breach thereof . . . shall be resolved by final and binding arbitration[.]" Pet. App. 12a. Indeed, Respondents concede that they did, in fact, agree to the terms of the Contract, including the agreement to arbitrate disputes.[3]

3. Specifically, Respondents alleged in their complaint that they "entered into an enforceable and valid contract with [Petitioner.]" (R. p. 24).

Instead, they challenge, as the court below did, the ancillary provision purporting to shorten the limitations period. However, Respondents' challenge to the statute-shortening provision should have been heard by the arbitrator in the first instance because the challenge was not to the arbitration provision specifically. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20-21 (2012) (quoting *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("when parties commit to arbitrate contractual disputes, it is a mainstay of the [FAA's] substantive law that attacks on the validity of the contract, as distinct from the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not the federal or state court[]'")).

To the extent Respondents' argument creates any doubt about the scope of the arbitration clause, this Court has explained that "any doubts concerning the scope of arbitrable issues *should be resolved in favor of arbitration*[.]" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added); *See also Volt*, supra, at 475 (quoting *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("in construing an arbitration agreement within the coverage of the FAA, 'as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability[]'")); *Id.* at 476 ("in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of [the FAA] . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor if arbitration[]") (citing *Perry v. Thomas*, 482 U.S. 483, 493, n. 9 (1987)).

Here, the South Carolina Supreme Court refused to resolve any doubts, to the extent there were any, in favor of arbitration. Similarly, Respondents also highlight the South Carolina Supreme Court's notice that the contract lacked of a severability clause as evidence that the parties did not intend to arbitrate their disputes.[4] Opp. 5, 11. While this conclusion brazenly ignores *Prima Paint's* severability requirement, it also violates the plain language of Section 2, which requires a court to enforce an arbitration agreement according to its terms, barring some generally applicable contract defense. 9 U.S.C. § 2; *Prima Paint Corp., Inc. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *see also Southland v. Keating*, 465 U.S. 1, 11 (1984) ("nothing in the [FAA] indicat[es] that the broad principle of enforceability is subject to any additional limitations under state law[]).

Accordingly, the FAA and this Court's binding interpretation thereof required the South Carolina Supreme Court to sever the arbitration agreement from the remainder of the contract in evaluating its enforceability.

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4. While the lack of a severability clause may have given the South Carolina Supreme Court an "easy out" here under state severability rules, that Court has also previously refused to sever terms from an arbitration agreement even when the subject contract contains a severability clause. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 624, 879 S.E.2d 746, 761 (2022) ("[g]iven that the subject matter of the contract involves new home construction, and South Carolina has a history of expanding its common law on contracts so as to protect new homebuyers, we find honoring the severability clause here—particularly because it goes to a material term of the arbitration agreement—would violate public policy[]"). This inconsistency highlights the South Carolina Supreme Court's ongoing hostility to arbitration and the FAA.

III. Respondents' suggestion that state-specific public policy and contract law supplants federal substantive law in the context of arbitration agreements involving interstate commerce is inconsistent with the FAA and this Court's prior decisions.

As this Court has consistently explained, it is "beyond dispute" that the FAA "'embodies a national policy favoring arbitration,' . . . and 'a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural laws to the contrary*[.]'" *AT&T Mobility v. Concepcion*, 563 U.S. 333, 345-46 (2011) (quoting *Buckeye*, supra, at 443 and *Mose H. Cone*, supra at 24) (internal citations and alterations omitted) (emphasis added)). Additionally, the "Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content *or a refusal to recognize the superior authority of its source*." *DIRECTV, Inc.*, supra, at 53 (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990) (emphasis added)). In the matter at bar, the South Carolina Supreme Court unambiguously disregarded this "elementary point of law[.]" *Id.*

As Respondents concede, the South Carolina Supreme Court relied only on state-specific public policy that purports to protect consumers purchasing new homes. Opp. 11-12; Pet. App. 6a ("[w]e conclude Mungo's manipulative skirting of South Carolina public policy goes to the core of the arbitration agreement and weighs heavily against severance[]"); Pet. App. 7a ("[t]he contract was for a consumer purchase of a new home, which brings into play public policy concerns *Damico* eloquently addressed. We have been steadfast in protecting home buyers from

unscrupu[]lous and overreaching terms, and applying severance here would erode that laudable public policy[]").[5]

To justify the South Carolina Supreme Court's application of state public policy and contract law, while refusing to even acknowledge the FAA's existence in its opinion, Respondents describe the policies and contract rules as "universal principles of contract law . . . without reference to arbitration in particular." Opp. 12. However, the "public policy" described by the South Carolina Supreme Court has not been used as a "generally applicable contract defense," but rather primarily as a means to invalidate arbitration agreements in homebuilder contracts. *See e.g. Damico*, supra.

Presumably, Respondents seek to trigger Section 2's "saving clause," which permits an arbitration agreement to be invalidated only by "generally applicable contract defenses." *Concepcion*, supra, at 340. The saving clause, however, "does not save defenses that target arbitration either by name *or by more subtle methods*[.]" *Epic Sys. Corp v. Lewis*, 584 U.S. 497, 507 (2018) (emphasis added).

Here, Respondents have never challenged or suggested that they did not explicitly agree to arbitrate disputes between the parties, nor made any suggestion that generally accepted contract defenses such as duress or failure of consideration are applicable. Respondents only challenge the statute-shortening provision.

This Court has previously rejected the applicability of state public policy or contract law to the enforceability

5. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

of arbitration agreements which the FAA govern. *See Buckeye*, supra, at 446 ("we cannot accept the Florida Supreme Court's conclusion that the enforceability of the arbitration agreement should turn on 'Florida public policy and contract law'"); *see also generally Concepcion*, supra, at 357 (Thomas, J. concurring) ("[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made[]").

In *Buckeye*, for example, the Florida Supreme Court below had concluded "'Florida public policy and contract law' . . . permit[s] 'no severable or salvageable, parts of a contract found illegal and void under Florida law.'" *Buckeye*, supra, at 446 (internal citations omitted). However, as this Court concluded, "*Prima Paint* makes this conclusion irrelevant." *Id.*

The same conclusion applies in the current matter. *Prima Paint* renders irrelevant the South Carolina Supreme Court's conclusion that South Carolina-specific public policy permitted the state court to sever an allegedly unenforceable term from the otherwise-valid arbitration agreement. *See* App. 6a.

Like the State court in *Buckeye*, the South Carolina Supreme Court expressly applied state-specific public policy and contract law to invalidate an arbitration agreement that was otherwise enforceable under Section 2 of the FAA. To make matters worse, the South Carolina Supreme Court could not even be bothered to reference the FAA, *Prima Paint*, or any other decision of this Court, decisions which are binding on it.[6]

6. In *Buckeye*, as here, the contract at issue contained terms that were purportedly illegal under state law, yet those illegal

Respondents try to obfuscate the South Carolina Supreme Court's failure to follow binding federal law by claiming the state-specific public policy applies to all contracts, asserting that South Carolina's public policy "is skeptical of severance of *any* unlawful term from *any* portion of a contract of adhesion . . . particularly contracts of adhesion for home purchases." Opp. 12 (emphasis in original). This argument misses the point. South Carolina's public policy is inapplicable to this arbitration agreement.[7] *Buckeye*, supra, at 446. Rather, this Court's precedent required the court below to apply *Prima Paint's* severability rule as a matter of federal substantive law, and it declined to do so. *Id.*

This Court has consistently "rejected the proposition that the enforceability of [an] arbitration agreement turn[s] on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action." *Id.* (citing *Southland* at 10). Therefore, the South Carolina Supreme Court unmistakably applied state-specific public policy which specifically conflicts with the FAA. Despite no specific challenge to the agreement to arbitrate itself, the South Carolina Supreme Court nevertheless refused

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terms did not have any relevance to the only question that was before the Court—did the parties agree to arbitrate? *See generally Buckeye*, supra.

7. As to adhesion contracts, this Court has acknowledged that "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, supra, at 346-47. And moreover, this Court has explained that states are free to take steps addressing their concerns with adhesion contracts. *Id.* at 346-47, n. 6. Those steps, however, "cannot conflict with the FAA or frustrate its purpose to ensure private arbitration agreements are enforced according to their terms. *Id.*

to enforce an arbitration agreement where the FAA mandated enforcement.

For these reasons, the South Carolina Supreme Court's opinion cannot be reconciled with the FAA or this Court's long-term jurisprudence interpreting the FAA, and therefore, should be reversed and vacated.

CONCLUSION

For the reasons described in the Petition and herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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