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

BRIEF IN OPPOSITION

John C. Hayes, IV
THE HAYES LAW FIRM, LLC
180 E. Bay St., Ste. 202
Charleston, SC 29401

Jesse Sanchez
THE LAW OFFICE OF JESSE SANCHEZ, LLC
751 Johnnie Dodds Blvd., Ste. 200
Mount Pleasant, SC 29464

Kevin K. Russell
Counsel of Record
GOLDSTEIN, RUSSELL & WOOFTER, LLC
1701 Pennsylvania Ave. NW
Ste. 200
Washington, DC 20006
(202) 240-8433
kr@goldsteinrussell.com

QUESTION PRESENTED

Whether the South Carolina Supreme Court applied a state-law presumption expressly disfavoring enforcement of arbitration provisions in consumer homebuying contracts in this case.

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BRIEF IN OPPOSITION

This petition need not detain the Court long. Petitioner argues the court below violated the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, by "applying a state-law presumption expressly disfavoring enforcement of arbitration provisions in consumer homebuying contracts." Pet. i. Because the court did nothing of the sort, there is no error, no conflict with any decision of this Court, no circuit split, and no reason for review.

STATEMENT OF THE CASE

Petitioner Lennar Carolinas LLC constructed homes in a development in Berkely County, South Carolina. Petitioner drafted and required respondents to sign form purchase and sale agreements that contained an arbitration clause. Pet. App. 9a. After closing on their new homes, respondents experienced flooding and foundation damage caused by petitioner's improper construction of the homes and grading of the property and roads surrounding them. C.A. E.R. 28 (Complaint ¶¶ 9-10). In response to these and other serious design and construction defects in their homes, respondents filed suit against petitioner and several of its subcontractors in South Carolina state court.

1. Petitioner moved to compel arbitration, but the trial court denied the motion, holding that the contract as a whole, including its arbitration provision, was unconscionable. Pet. App. 53a-71a. The state intermediate court of appeals reversed, faulting the trial court for failing to limit its unconscionability analysis to the arbitration provisions as required by this Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Pet.

App. 46a-49a. The intermediate court of appeals did not, however, examine whether the arbitration provision standing alone was unconscionable. *Id*. 49a.

2. The South Carolina Supreme Court accepted review. The court began by affirming that the FAA applied to the sale of new homes given that the "transactions here manifestly involve interstate commerce." Pet. App. 13a. The court also agreed with petitioner that under *Prima Paint* the arbitration provision must be enforced unless that provision, evaluated on its own, is unconscionable. Pet. App. 12a-16a. The court agreed with respondents, however, that the court of appeals "erred in failing to analyze whether" the arbitration agreement "contained unconscionable terms that would render the agreement to arbitrate unenforceable." *Id*. 16a. The court then undertook that analysis itself and concluded that the provision was unconscionable. *Id*. 16a-27a.

a. The court began by emphasizing that the "FAA provides that any arbitration provision contained within a written contract involving interstate commerce must be enforced except for 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Pet. App. 17a (quoting 9 U.S.C. § 2). Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Ibid*. (quoting *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

The court then explained that under South Carolina law "unconscionability is defined as [1] the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with

[2] terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Pet. App. 17a (citation and internal quotation marks omitted). With the FAA front of mind, the court again emphasized that this "general description of unconscionability applies to all contract terms, not merely arbitration provisions." *Ibid*. (citing *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also id*. 19a ("As noted, under South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike.").

The court then applied the two traditional unconscionability prongs to this case, starting with meaningful choice. The court explained that the question turns on, "among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant." Pet. App. 20a. Given these considerations, "courts tend to view adhesive arbitration agreements with 'considerable skepticism,'" "given that one party to an adhesion contract 'has virtually no voice in the formulation of the[] terms and language'" used in the contract. Pet. App. 20a-21a (citations omitted). For this proposition, the court cited to a general contract law treatises that identified this skepticism as applying to contracts of adhesion generally, not to arbitration agreements in particular. *Ibid*.

Turning to the facts of this case, the court found that that respondents "lacked a meaningful choice in their ability to negotiate the arbitration agreement" for two reasons. Pet. App. 22a. First, the court found

it "manifest that the purchase and sale agreement is a contract of adhesion." *Ibid*. Second, "the sophistication of [respondents], as individual homebuyers, pales in comparison to Lennar." *Ibid*. Neither consideration turned on anything specific to arbitration.

Moving on to the substantive prong of the unconscionability analysis, the court found that "provisions in paragraphs 1, 4, and 5 required the Court to invalidate the arbitration agreement." Pet. App. 23a. Of these, the court found paragraph 4 to be "the most egregious," noting that petitioner "made no attempt in its brief to defend paragraph 4 from [respondents'] unconscionability challenge." *Id*. 23a & n.8.[1]

The court explained that paragraph 4 allowed petitioner "at its sole discretion" to include its "contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration" and that the arbitration "will be limited to the parties specified herein." Pet. App. 23a. Accordingly, petitioner could force respondents into arbitration – and preclude them from litigating against – parties with whom they had no arbitration agreement, or strategically pick and choose participants in the arbitration in order to allow it to cast blame on non-participants from whom respondents could not recover in the arbitration. *Id*. 24a-25a. In addition, paragraph 5 would allow

[1] Instead, petitioner made the strategic decision to argue exclusively that respondents had failed to preserve any arguments based on paragraph 4. *See* Lennar Carolinas, LLC's Respondent Br. 19-20, *Damico, et al. v. Lennar Carolinas, LLC*, No. 2020-1048 (S.C. S.Ct.).

petitioner to take inconsistent positions in the arbitration and proceedings involving other parties. *See id*. 24a (paragraph 5 provided that "no factual or legal findings made in the arbitration is binding in any other arbitral or judicial proceeding 'unless there is mutuality of parties.'"). "In this case," for example, it would be "possible for the arbitration defendants to blame the remaining circuit-court defendants for Petitioners' damages, and vice versa." *Ibid*. The court held that the oppressiveness of these provisions, combined with the lack of any meaningful choice, rendered the arbitration provision unconscionable. *Id*. 25a.

b. The court refused to sever the unconscionable aspects of the arbitration agreement and, consequently, held the agreement to arbitrate unenforceable. Pet. App. 27a. The court noted that petitioner had not asked for severance in its state supreme court briefing, but the court nonetheless addressed the question "in the interest of judicial economy." *Ibid*. The court then refused severance on two independent grounds, only one of which petitioner challenges in this Court.

First, the court "decline[d] to blue-pencil" the agreement by excising "a material term of the arbitration agreement" in order to "enforce the remaining fragmented agreement." Pet. App. 29a-30a. "Succinctly stated," the court explained, "once we sever the unconscionable terms of the arbitration provisions, there is essentially nothing left." *Id*. 30a. Petitioner does not even mention this holding, much less ascribe any error to it. *See* Pet. 9-11, 15-17.

Second, the court separately addressed "two additional, important considerations in this case that

bear on severability." Pet. App. 30a. For one thing, "given the adhesive nature of the contract here," the court found it "considerably doubtful any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) (Petitioners) had no hand in drafting or negotiating any of the language of the arbitration agreement." *Id*. 31a (citation and internal quotation marks omitted).

"The second additional consideration" was that "this contract involves a consumer transaction" and, in particular, a "contract to purchase a new home." Pet. App. 31a. The court observed that "South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers." *Ibid*. The court noted that in other contexts, such as cases involving non-compete provisions in employment contracts, courts have refused severance as inconsistent with public policy on the ground that allowing it would encourage overreach by contract drafters. *Id*. 33a-34a. When such severance is allowed, the courts have explained, those drafting contracts can include unconscionable or otherwise illegal provisions in contracts knowing that often the provisions will not be challenged and believing that even if they are, the worst that will happen is that the illegal provisions will be excised. Pet. App. 33a-35a. So long as severance is available, then, drafters have no reason *not* to include overbearing and illegal provisions in adhesive contracts, and every reason to include them. *Ibid*. As a result, courts have consistently found severance inconsistent with public policy in a range of cases involving employment and consumer contracts. *Ibid*.

The South Carolina Supreme Court concluded that the same general legal principles applied to this case involving a contract of adhesion for purchase of a new home and refused severance as inconsistent with public policy. Pet. App. 35a.

3. Petitioner subsequently moved for rehearing, claiming that respondents had not adequately challenged the conscionability of the arbitration provisions standing alone and that the court had misinterpreted paragraph 4. *See* Lennar Carolinas, LLC's Petition for Rehearing 5-14, *Damico v. Lennar Carolinas LLC*, No. 2020-1048 (S.C. S.Ct.). In their opposition, respondents demonstrated that they had preserved the argument and that the court had adopted the interpretation of paragraph 4 that petitioner had repeatedly pressed during the appeal. *See* Petitioner's Return to Lennar Carolinas' Petition for Rehearing 1-4, 6-10, *Damico*, No. 2020-1048 (S.C. S.Ct.) ("Petr. Return Br."); *see also infra* pp. 13-14. The court denied the petition. Pet. App. 79a.

REASONS FOR DENYING THE PETITION

The petition makes a simple argument. It claims that in holding the arbitration provision in this case 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." Pet. 11. That, petitioner says, violates "the FAA's anti-discrimination rule," in conflict with the decisions of this Court and other circuits and, therefore, warrants plenary review or, perhaps, summary reversal. That simple argument, however, fails for an equally simple reason: its premise is entirely false.

The South Carolina Supreme Court acknowledged that the FAA prohibits invalidating arbitration provisions based on "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." Pet. App. 17a (quoting *AT&T Mobility L.L.C.*, 563 U.S. at 339). As a result, it emphasized, "the same principles of unconscionability apply to contract terms and arbitration provisions alike." Pet. App. 19a. Petitioner thus cannot claim that the court below openly flouted this Court's established anti-discrimination rules. Instead, petitioner simply claims that in this particular case, the court misapplied the principles it acknowledged. Such a case-specific claim of error would not warrant this Court's review even if it were well-founded. But the claim in this case has no foundation at all.

The South Carolina Supreme Court held that the arbitration provision in the specific contract before it was unconscionable by neutrally applying general principles of contract law. While those principles may view consumer contracts of adhesion with skepticism – specifically, in deciding whether a consumer had a meaningful choice whether to accept the contract terms – those principles do not single out arbitration clauses for special disfavor or otherwise violate the FAA. Likewise, the court's severance decision applied a general public policy that governs all manner of contracts of adhesion, not just arbitration agreements. Petitioner cites no case from this Court or any other drawing those holdings into question. And even if it could, this case is a particularly poor candidate for plenary review or summary reversal because nothing in the outcome turned on the handful of sentences in the opinion to which petitioner objects.

I. The Petition Is Premised On A Mischaracterization Of What The South Carolina Supreme Court Held.

Petitioner acknowledges that the FAA "allows enforcement of "generally applicable contract defenses, such as fraud, duress, or unconscionability . . . so long as the defense applies to arbitration agreements the same way it would to any other agreement." Pet. 13 (quoting *Dr.'s Assoc., Inc*., 517 U.S. at 686-87). And petitioner does not object to South Carolina's standard test for unconscionability, which asks (1) whether the party challenging enforcement had a "meaningful choice" to accept the provision, and (2) whether the terms of the agreement are substantively oppressive. Pet. App. 17a. Instead, petitioner asserts that in applying that test to the arbitration provision in this case, the Court "invoked a state-law presumption strongly disfavoring recognition and enforcement of arbitration agreements in consumer homebuyer contracts," Pet. 11, pointing to passages in the court's "meaningful choice" and severance analysis, *see id*. 15-16. But one need only read the opinion to see that is not true.

A. The South Carolina Supreme Court Did Not Apply Any Arbitration-Specific Skepticism To This Contract.

1. Petitioner begins by pointing to the portion of the opinion applying the first unconscionability prong, *i.e.*, whether there was an "absence of meaningful choice on the part of one party." Pet. App. 17a. In that passage, the court explained that although contracts of adhesion are non-negotiable, they are not "per se unconscionable." Pet. App. 20a. "However, given that one party to an adhesion contract 'has virtually no

voice in the formulation of the terms and language' used in the contract, courts tend 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 (cleaned up). Although the court necessarily applied this rule of skepticism to an arbitration provision in this case, there is nothing arbitration-specific about the principle, which applies to *any* term of an adhesive consumer contract. This is made clear in a number of ways.

First, the sentence itself explains that the skepticism arises from the fact that the contract is one of adhesion – one in which the plaintiff "has virtually no voice" – not because it is an arbitration provision. Pet. App. 21a.

Second, the contested sentence is immediately followed by citation to authorities identifying this skepticism of adhesive contracts as a general principle of contract law, not as a rule disfavoring arbitration. Pet. App. 21a. The court thus quoted 17A Am. Jur. 2d *Contracts* § 274, as establishing that although adhesive contracts are not automatically unconscionable, "[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that the contract is procedurally unconscionable because it suggests an absence of meaningful choice." Pet. App. 21a. The court likewise quoted 17 C.J.S. *Contracts* § 9, as providing that a "consumer transaction which is essentially a contract of adhesion may be examined by the courts with special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting." Pet. App. 21a. Neither treatise even mentions arbitration

provisions. *See* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9.

Third, when the court repeats the idea later in the opinion, it again does so without limitation (or even reference) to arbitration: "As mentioned above, *adhesion contracts* 'are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties.'" Pet. App. 30a-31a (emphasis added). And, again, the court cites contract treatises describing general principles of contract law without reference to arbitration. *Ibid*.

To be sure, at some points, the court also quotes an arbitration decision, *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24–25 (2007). *See* Pet. App. 21a, 31a. But *Simpson* likewise simply applied a general skepticism about whether consumers have a meaningful choice in accepting terms in a contract of adhesion. *Simpson* involved an arbitration provision in a contract to purchase a car. The South Carolina Supreme Court noted that Ohio courts had decided a series of cases in that context and "adhered to the idea that that sales agreements between consumers and retailers 'are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties.'" *Simpson*, 373 S.C. at 26. That skepticism, again, was premised in the type of contract and transaction, not on the fact that the provision involved arbitration. *Ibid*. (Ohio courts "characterize automobiles as a 'necessity' and factor this characterization into a determination of whether a consumer had a 'meaningful choice'"). *Simpson* then "agree[d] with the rationale of the Ohio courts" and therefore "proceed[ed] to analyze this contract between a consumer and automobile retailer with

'considerable skepticism.'" *Id*. at 27 (again, not mentioning arbitration provision in particular); *see also Doe v. TSC, LLC*, 430 S.C. 602, 613 (2020) (car sales contracts are subject to "'considerable skepticism,' given the bargaining disadvantage a customer faces . . . and the reality that car ownership is often a necessity in modern society") (quoting *Simpson*, 373 S.C. at 27).

When the court below cited to *Simpson*, it made clear it was applying the same universal rule of contract law to this particular contract. *See* Pet. App. 31a ("In particular, *when a contract of adhesion is at issue*, 'there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.'") (quoting *Simpson*, 373 S.C. at 26) (emphasis added); *see also ibid*. ("Similarly, *given the adhesive nature of the contract here*, we find it 'considerably doubtful' any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that *the less sophisticated and less powerful party(s) (Petitioners) had no hand in drafting or negotiating any of the language of the arbitration agreement*.") (emphasis added).

2. Petitioner also implies that the court below misconstrued the meaning of paragraphs 4 and 5 of the arbitration agreement in finding them unconscionable. Pet. 8-9. This Court, however, has no jurisdiction to review that purely state-law determination. *See* 28 U.S.C. § 1257(a). And even if it did, such a fact-bound claim of error would not warrant this Court's review.

Perhaps recognizing as much, petitioner attempts to manufacture federal jurisdiction by accusing the

South Carolina Supreme Court of interpreting the contract with "open hostility" to arbitration. Pet. 8; *see also id.* 16. But there is no basis for that claim. Instead, the court gave paragraph 4 the meaning petitioner itself had repeatedly ascribed to the provision when that interpretation suited petitioner's strategic interests.[2]

Petitioner now says that paragraph 4 "does not affect Owners' right to sue in any way" and only allows *petitioner* to arbitrate against subcontractors with whom it has an arbitration agreement. *Id*. 8. But respondents *did* try to sue some of the subcontractors, only to have that litigation stayed at petitioner's insistence in light of petitioner's demand for arbitration. Petr. Return Br. 7-9. After the trial court lifted the stay on the ground that respondents had no arbitration agreements with the subcontractors, petitioner appealed. It argued that under the arbitration provision, "regardless of whether Plaintiffs make claims against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case are subject to arbitration." *Id*. 8 (quoting petitioner's brief, citation omitted). Accordingly, petitioner insisted, there "are no claims in the case which are not affected by and at issue in the decision to compel arbitration." *Ibid*. Petitioner even attempted to prevent respondents

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[2] Petitioner notably does not, and cannot, claim that the court applied the *Simpson* rule of skepticism in interpreting these provisions. As discussed above, that rule views with a skeptical eye only the claim that consumers have a meaningful choice in accepting the terms of a contract of adhesion. *See supra* pp. 9-12. The court did not apply, or even cite to, that rule in construing paragraphs 4 or 5. *See* Pet. App. 23a-27a.

from later settling their claims with some of the subcontractors, again arguing that "[e]very party in the case is subject to an arbitration agreement and every cause of action in the case will be part of the arbitration." *Id.* 9 (quoting petitioner's motion, citation omitted).

When that interpretation no longer served its interests, petitioner attempted to change position. But nothing in the FAA shields petitioner from facing the consequences of its strategic choices and unrelenting overreach.

B. The South Carolina Supreme Court's Severance Decision Was Not Founded In Anti-Arbitration Bias.

Petitioner's complaints about the court's severance ruling follow the same pattern, mischaracterizing the court's application of a general rule to the facts of this case as the court adopting an arbitration-specific rule in contravention of the FAA.

The severance analysis is laid out in two subsections. In subsection A, the court refused severance on the ground that it would require improper "blue-penciling" of the agreement. Pet. App. 29a. "Succinctly stated," the court explained, "once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left." *Id.* 30a. Petitioner raises no objection to this fully independent ground of decision and, indeed, ignores it altogether. *See* Pet. 10 (failing to acknowledge subsection A and claiming, instead, that "[t]he court's ruling was 'based primarily upon'" the factors discussed in subsection B) (quoting Pet. App. 35a).

Although the holding in subsection A was sufficient ground in itself to deny severance, the court also discussed, in subsection B, "two additional, important considerations" that "bear on severability." Pet. App. 30a. The first is the one already discussed: "that this arbitration agreement – and, indeed, the purchase and sale agreement as a whole – is a contract of adhesion." *Ibid*. When "a contract of adhesion is at issue," the court explained, "there arises considerable doubt that any true agreement existed" either to "submit disputes to arbitration" or to "sever any oppressive provisions of the arbitration agreement." *Id*. 31a. For the reasons already discussed, this was simply an application of contract law's general skepticism over whether consumers have a meaningful choice when presented with a contract of adhesion. *See ibid*. (citing same general contract treatises as before).

The "second additional consideration" was that "this contract involves a consumer transaction" and in particular "the purchase of a new home." Pet. App. 31a. The court noted that South Carolina "has a deeply-rooted and long-standing policy of protecting new home buyers." *Ibid*. And it concluded that allowing severance of unconscionable provisions in such a contract contravened that public policy by emboldening the drafters of such agreements to include unconscionable terms. *Id*. 31a-33a.

Petitioner says this passage shows a "fierce" opposition to arbitration. Pet. 16. But, in fact, it illustrates a sensible concern that severing *any* unconscionable provision in a home purchase contract will encourage drafters to include such overbearing terms in their contracts, knowing that there is a

considerable potential upside to including them and no real downside. *See* Pet. App. 33a ("We are specifically concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.") As before, the court drew on a body of scholarship and case law addressing not arbitration provisions, but general contract law principles as applied in various contexts. *See* Pet. App. 33a-34a (citing authorities addressing non-compete provisions in employment contracts and overbearing provisions in nursing home agreements); *id*. 35a (citing 17A Am. Jur. 2d *Contracts* § 238).

Petitioner nonetheless insists that lurking beneath the surface was a judicial distaste for "how arbitration agreements are used in consumer homebuying contracts." Pet. 16. But if there were any recriminations in the opinion, it was not toward arbitration but rather toward the use of *severability* clauses to encourage drafters to include unconscionable provisions of *all kinds* in their contracts, Pet. App. 33a-34a, and towards petitioner's unconscionable overreaching in multiple aspects of the homebuying contract at issue here, many having nothing to do with arbitration. *See id*. 25a-26a (observing that "unconscionability pervades the various agreements between the parties"); *id.* 27a (noting agreement terms that are "absurd, factually incorrect, and grossly oppressive").

II. The Decision Below Does Not Contravene The FAA Or This Court's Precedents.

Having based its petition on a mischaracterization of the opinion below, petitioner makes no argument that what that court actually held is in conflict with the FAA or any decision of this Court. Nor could it. As petitioner acknowledges, the FAA "allows enforcement of 'generally applicable contract defenses, such as fraud, duress, or unconscionability' . . . so long as the defense applies to arbitration agreements the same way it would to any other agreement." Pet. 13 (quoting *Dr.'s Assocs.*, 517 U.S. at 686-87). That is all that happened in this case.

Nor did the court apply unconscionability doctrine "in a way that uniquely disfavored the enforcement of arbitration agreements." Pet. 13 (citing *Concepcion*, 563 U.S. at 341). While a state rule imposing class arbitration may "stand as an obstacle to the accomplishment of the FAA's objectives," precluding drafters of contracts of adhesion from including oppressive terms like those involved in this case does nothing to "interfere[] with fundamental attributes of arbitration." 563 U.S. at 344.

Nor were the principles applied in this case "too tailor-made to arbitration agreements." Pet. 15 (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 252 & n.1 (2017)). Instead, as discussed, the court engaged in a straight-forward application of general principles drawn from other contexts and general contract law.

III. There Is No Circuit Conflict.

There also is no circuit conflict. Petitioner's half-hearted claim to the contrary amounts to nothing more than the assertion that other circuits adhere to the FAA's proscription against anti-arbitration discrimination, while the decision in this particular case did not. *See* Pet. 17 (claiming that decision here conflicts with circuits' holdings that "arbitration provisions in consumer contracts and other adhesive agreements cannot be subjected to special adverse rules, burdens, or presumptions"). That transparent attempt to transform a request for fact-bound error correction into a circuit conflict has no merit, including because the court below committed no such error.

But even if the Court had some doubt about the decision below, intervention at this point would be premature. If the South Carolina Supreme Court has adopted the discriminatory rule petitioner accuses it of announcing in this case, and if the question presented is truly recurring and important, the issue will arise in future litigation. At that point, this Court will be able to determine with greater confidence whether South Carolina has departed from the circuit consensus and take corrective action if necessary.

IV. This Case Is An Unsuitable Candidate For Either Plenary Review Or Summary Reversal.

Finally, even setting everything else aside, this case presents an unsuitable candidate for either plenary review or summary reversal because the asserted error had no bearing on the outcome in this case.

To start, petitioner does not even claim in this Court that respondents had a meaningful choice to accept the terms of their arbitration agreement, much less demonstrate that the state court would reach a different conclusion if it approached the question without its allegedly improper skepticism. To the contrary, the court found it "manifest" that respondents had no meaningful role in drafting the agreement, which was presented to them with only "a few blank spaces to fill in" and with terms that were "non-negotiable." Pet. App. 22a. The court further found that "the sophistication of [respondents,] as individual homebuyers, pales in comparison to Lennar." *Ibid*. (emphasis added). The court thus found no meaningful choice based on the adhesive nature of the contract and "the significant disparity in the parties' bargaining power," *ibid*., neither of which is open to genuine dispute.

As for substantive unconscionability, petitioner "made no attempt in its brief [to the South Carolina Supreme Court] to defend paragraph 4 from [respondents'] unconscionability challenge." Pet. App. 23a. n.8. Its effort to mount a defense in its petition here is both too late and outside this Court's jurisdiction to resolve, posing a question of purely state law. Nor is there any reason to think the state courts would reach a different conclusion in any remand.

Petitioner's complaints about the court's severance ruling look a gift-horse in the mouth – petitioner did not ask for severance in the South Carolina Supreme Court and the court addressed it only "in the interest of judicial economy." Pet. App. 27a. Because the court excused petitioner's waiver,

this Court has jurisdiction to review that portion of the decision. But that does not mean the Court must overlook petitioner's omission in deciding whether to exercise its certiorari discretion or in deciding whether to grant an extraordinary request for summary reversal.

At any rate, there is again no reason to think the severance question would be decided any differently even if this Court vacated and remanded. For one thing, nothing in Section V.B of the opinion suggests the court would reach a different decision if instructed to reconsider severance without taking into account that the unconscionable provisions address arbitration. And regardless, petitioner does not challenge the court's independent determination in Section V.A that severance was inappropriate because "once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left." Pet. App. 30a; *see also* Pet. App. 30a (court describing subsection B as addressing "two *additional*, important considerations") (emphasis added). Indeed, petitioner does not even acknowledge the Section's existence. *See* Pet. 9-11 (Statement); *id*. 15-16 (Argument). Accordingly, any error in the court's separate analysis in subsection B had no effect on the outcome and provides no basis for reversal by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Kevin K. Russell
Counsel of Record
GOLDSTEIN, RUSSELL &
WOOFTER, LLC
1701 Pennsylvania Ave. NW
Suite 200
Washington, DC 20006
(202) 240-8433
kr@goldsteinrussell.com

John C. Hayes, IV
THE HAYES LAW FIRM, LLC
180 E. Bay St., Ste. 202
Charleston, SC 29401

Jesse Sanchez
THE LAW OFFICE OF
JESSE SANCHEZ, LLC
751 Johnnie Dodds Blvd.,
Suite 200
Mount Pleasant, SC 29464

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