THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001048
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Plaintiffs.

Of whom Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins are
Petitioners,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Respondent,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

LENNAR CAROLINAS, LLC'S
PETITION FOR REHEARING

James Lynn Werner; SC Bar No. 6029
Jenna K. McGee; SC Bar No. 76891
Katon E. Dawson Jr.; SC Bar No. 101167
PARKER POE ADAMS & BERNSTEIN LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Respondent Lennar Carolinas, LLC

Respondent Lennar Carolinas, LLC ("Lennar"), respectfully submits the following Petition for Rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules.

INTRODUCTION

In this case, Lennar moved in the Circuit Court for an order compelling the Owners' claims against it to arbitration. The Circuit Court denied that motion finding that Lennar's purchase and sale agreements, warranty documents, individual deeds, and master deed, taken as a whole and construed together, were unconscionable and unenforceable.

On appeal, the Court of Appeals reversed the Circuit Court and ordered the Owners' claims against Lennar to arbitration. The Court of Appeals found that the arbitration agreement in the purchase and sale agreements were subject to and governed by the Federal Arbitration Act ("FAA") and that the Circuit Court violated the *Prima Paint* doctrine by failing and refusing to limit its review of the arbitration issue to the specific and limited terms of the arbitration agreement itself, and by instead opining on the conscionability of terms plainly not within the arbitration agreement itself. The Court of Appeals also correctly observed and held that under the terms of the Purchase and Sale Agreement arbitration agreement, and controlling law, all other issues bearing upon arbitrability are for the arbitrator—not the court—to decide.

The Owners petitioned the Supreme Court for a Writ of Certiorari pursuant to Rule 242, SCACR. According to that Rule, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis added). In the Rule 242 process of petitioning for review, however, the Owners sought to raise the issue, never raised timely to the Court of Appeals, that Section 16.4 should be considered in the review of the unconscionability analysis of the Purchase and Sale Agreement arbitration agreement—and in its Return to the Owners' Petition for Writ of Certiorari Lennar specifically and expressly asserted and argued that such matters had not been

preserved for appeal and were not proper considerations in the petition for certiorari pursuant to Rule 242(d)(2). (Lennar's Return to the Petition for Writ of Certiorari p. 12-13). Indeed; in this case, the Owners never identified and presented to the Court of Appeals that Sections 16.4 and 16.5 constituted the unconscionable provisions of the Purchase and Sale Agreement arbitration agreement. Moreover, during oral argument to the Court of Appeals the Owners' counsel admitted that he did not believe the Circuit Court "looked at the individual provisions because [the court] took the *D.R. Horton* analysis and said look there are cross references so I'm going to read these provisions as a whole." (Court of Appeals Audio Recoding 32:35 – 32:49). Thus, the issue of whether those provisions of the Purchase and Sale Agreement arbitration agreement may form the basis of an unconscionability review and determination in this case was not preserved.

Rule 242(i), SCACR further provides that, "[i]f the petition [for a writ of certiorari] is granted, the Clerk shall notify each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question[s]." In this case, when the petition was granted, the notice from the Clerk said only that "the petition for a writ of certiorari is granted to review the court of appeals' decision in *Damico v. Lennar Carolinas, L.L.C.*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020)." And, of course, the Court of Appeals decision makes no reference to any unconscionable provisions in Section 16, and no reference to Sections 16.4 and 16.5 because those provisions were never raised to the Court of Appeals prior to the issuance of its opinion.

Because the Supreme Court never identified or specified those issues for consideration in the case, Lennar had no proper notice that such questions were to be considered by the Supreme Court.

ARGUMENTS

I. Rehearing in this case is proper because the Court based its Opinion on arguments and issues that were not preserved for appellate review and not identified for consideration and briefing in the notice granting the review.

The Supreme Court's Opinion finding the arbitration provision in the Purchase and Sale Agreement to be unconscionable and unenforceable is based upon reliance on issues and arguments that were not preserved for appellate review and were not briefed before this Court.

Lennar appealed the Circuit Court's denial of its Motion to Compel Arbitration on the grounds that the Circuit Court's order was based upon an improper application of the *Prima Paint* doctrine. The Court of Appeals reversed the Circuit Court on the grounds that the Circuit Court violated the *Prima Paint* doctrine and looked outside of the Purchase and Sale Agreement arbitration provision (Section 16) to find its basis for declaring unconscionability.

In the Owners' Petition for Rehearing to the Court of Appeals, filed June 25, 2020, the Owners raised for the first time the argument that Section 16.4 of the Lennar Purchase and Sale Agreement rendered the arbitration provision unconscionable. Such issue and argument had never been raised in this case prior to that Petition for Rehearing and Owners had never cited to or argued that Section 16.4 of the Purchase and Sale Agreement formed the basis for a finding of unconscionability. Furthermore, at no point in the proceeding in the Circuit Court or the appeal to the Court of Appeals (including the petition for rehearing) did they raise any argument related to the unconscionability of Section 16.5.

A party may not raise new issues or arguments for the first time in a Petition for Rehearing to the Court of Appeals as Owners attempt here. *See Rogers v. Rogers*, 221 S.C. 360, 374, 70 S.E.2d 637, 644 (1952) ("The question now brought to the attention of the Court, having not been presented to or passed upon by the Court below and having not been made as a sustaining ground by respondents, cannot be raised for the first time on a petition for a rehearing."); *Kennedy v. S.C.*

Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended . . . ." (citation omitted)).

In this case, the attendant circumstances related to Owners having failed to properly and timely raise and preserve these issues and arguments is even more prejudicial to Lennar. Rule 221(a), SCACR, states that no return to a petition for rehearing may be filed unless requested by the appellate court. In this case, the Court of Appeals did not request a Return to the Owners' Petition for Rehearing from Lennar. Furthermore, none was submitted because six days after the Owners filed their Petition for Rehearing, the Court of Appeals issued an order denying that Petition for Rehearing. Thus, Lennar was never given the opportunity to respond to the new—and unpreserved—arguments raised by the Owners about Section 16.4 in their Petition for Rehearing.

On July 31, 2020, the Owners filed a Petition for Writ of Certiorari again seeking to raise the unpreserved arguments related to Section 16.4 of the Lennar Purchase and Sale Agreement. However, to be considered by this Court, an issue must have been properly raised in the Court of Appeals and in the petition for rehearing. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). Thus, an issue that is not properly raised both in the Court of Appeals and in the Petition for Rehearing is not available for review by the Supreme Court because it is not an issue that may be included in a petition for writ of certiorari.

This Court issued an order granting the Owners' Petition for Certiorari on May 28, 2021; however, contrary to this Court's stated rule (Rule 242(i), SCACR), that order did not identify any specific question or questions that would be considered by the Court. *See* Rule 242(i), SCACR ("If the petition is granted, the Clerk shall notify each party or his attorney, specifying the question

or questions to be considered, and the parties shall prepare briefs addressing the question(s)."); *see also In re Grants or Denials of Petitions for Writs of Certiorari Under Rules 242, 243 & 247 of the S.C. App. Ct. Rules*, 415 S.C. 438, 438, 783 S.E.2d 50 (2016) ("If the petition is granted in whole or part, the order shall indicate the questions that will be considered."). Rather, the Supreme Court's order granting the petition for writ of certiorari merely stated that "the petition for a writ of certiorari is granted to review the court of appeals' decision in *Damico v. Lennar Carolinas, L.L.C.*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020)." Of course, the Court of Appeals' opinion makes no reference to Section 16.4 or Section 16.5 of the Purchase and Sale Agreement—because arguments related to those provisions were not raised or presented to the Court of Appeals prior to the issuance of its opinion. Thus, Lennar was given no notice, or other indication, that the Court would consider the Owners' new and unpreserved arguments, and thus had no real opportunity to brief or argue that issue in advance.

Since the Owners' new arguments about the alleged effect of Section 16.4 were not properly or timely raised to the Court of Appeals and, therefore, were not properly raised in their Petition for Rehearing to the Court of Appeals, in their Petition for Writ of Certiorari, or in their Petitioner's Brief to the Supreme Court, Lennar was not afforded proper and reasonable opportunity to brief and argue those issues. In its Opinion, the Supreme Court stated in footnote 8 that Lennar "made no attempt in its brief to defend paragraph 4 from Petitioners' unconscionability challenge." *Damico*, 2022 WL 4231032, at *8, n.8. In fact, Lennar did directly and conclusively state that such challenge had not been preserved for review. (Lennar's Return to Petitioners' Brief p. 19-20). Furthermore, Lennar did not directly respond to any unconscionability argument related to Section 16.5 because Owners did not raise any argument related to that section in their submissions to the Circuit Court, the Court of Appeals, or the Supreme Court.

This Court's Opinion was, therefore, improperly based upon unpreserved issues and arguments that Lennar was given no notice would be considered by the Court. Accordingly, the Court erred in considering these new and improper arguments and using them as a substantial basis of its Opinion. The Court should grant Lennar's Petition for Rehearing to—at a minimum—permit Lennar an opportunity to respond to the unpreserved issues that were not properly before the Court and to consider the issues fully and fairly.

II. Section 16.4 is not Unconscionable.

If Lennar had been given proper notice that the unconscionability of Section 16.4 was an issue properly before this Court, Lennar's briefing would have demonstrated why this routine, ancillary provision of the arbitration agreement is not unconscionable. Because this Court did not have the benefit of adversarial briefing on the issue, it misconstrued the provision and reached erroneous conclusions about its operation and effect. In relevant part, Section 16.4 of the Purchase and Sale Agreement states:

> The waiver or invalidity of any portion of this section shall not affect the validity or enforceability of the remaining portions of this Section. Buyer and Seller further agree . . .; (2) that Seller may, at its sole election, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and (3) that the mediation and arbitration will be limited to the parties specified herein.

The Court's unconscionability ruling focused mainly on subpart (2), which is a simple joinder provision typical of many arbitration agreements. The provision merely recognizes Lennar's right effectively to assert the equivalent of its own third-party claims—just like in a civil action in the circuit court—against other persons or entities (*e.g.* the trades and subcontractors who performed work on the Owners' homes) with whom Lennar also has an agreement to arbitrate.

The Court misconstrued the joinder provision in two ways. The Court first asserted that the provision allows Lennar to force Owners to arbitrate *their* claims against subcontractors and

thus "overturns [the] firmly entrenched legal principle" that "plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries." *Damico*, 2022 WL 4231032, at *8. Section 16.4 does no such thing. It does not in any way provide that Owners can be forced to arbitrate claims they may have against subcontractors with whom they have no agreement to arbitrate. Nor could it: absent an agreement to arbitrate *with each other*, there would be no basis for compelling subcontractors and Owners to arbitrate their own disputes. The provision instead merely allows Lennar to join subcontractors with whom *Lennar* has an arbitration agreement, so that Lennar can pursue its *own claims* against those subcontractors as they relate to Owners' claims. That joinder does not prejudice Owners: If the Owners wish, they may seek an agreement with those subcontractors to arbitrate their direct claims at the same time, or the Owners may proceed in civil court with the direct claims against the third parties with whom they did not agree to arbitrate. Section 16.4 simply allows Lennar's claims against others arising from or related to the Owners' claims against Lennar to be joined in the arbitration in the same way the civil rules allow Lennar to join its third-party claims and cross-claims against others in the civil case.

In asserting that this routine joinder provision prejudices Owners, the Court misconstrued Section 16.4 in a second way. According to the Court, the provision could force Owners to litigate their claims in two separate proceedings: an arbitration against Lennar, and a civil case against subcontractors. *Id.* Such bifurcation, the Court warned, could result in inconsistent findings with no recovery for Owners, where the arbitrator rules that the subcontractors were at fault, and the civil court rules that Lennar was at fault. *Id.* But that outcome has *nothing to do with Section 16.4*. It is an inherent feature of *any* dispute where the plaintiff has a bilateral arbitration agreement with only one of multiple defendants. In any such dispute, the plaintiff or defendant subject to the agreement may compel arbitration of the plaintiff's claims against that one defendant, but neither party can compel arbitration of the plaintiff's claims against the *other* defendants who never agreed

to arbitrate the claims. Every such case creates the same possibility of inconsistent results that exists here, even absent Section 16.4.

The United States Supreme Court has expressly acknowledged the possibility that bilateral arbitration agreements can result in bifurcated proceedings—and hence potentially inconsistent results—in matters involving multiple defendants. As the United States Supreme Court observed in *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022), "the FAA licenses contracting parties to depart from standard rules [regarding joinder] 'in favor of individualized arbitration procedures of their own design,' so parties to an arbitration agreement are not required to follow the same approach. And that is true even if bifurcated proceedings are an inevitable result." *Id.* at 1923 (citations omitted). The United States Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), further recognized that bifurcation may result in "possibly inefficient maintenance of separate proceedings in different forums," but the United States Supreme Court nevertheless held that the FAA "requires … courts to compel arbitration of pendent arbitrable claims when one party files a motion to compel." *Id*. at 217. In sum, the possibility that Owners litigate in two fora (unless subcontractors agree to arbitrate with them) is an inherent feature of bilateral arbitration itself, not an unconscionable product of Section 16.4's routine joinder mechanism.

III. Section 16.5 is not Unconscionable.

Section 16.5 of the Purchase and Sale Agreement, although not legitimately in issue before this Court, cannot reasonably be interpreted to be unconscionable. Section 16.5 states:

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

> effect in any other arbitration, judicial, or similar proceeding unless there is mutuality of parties.

Of course, issues of *res judicata* and collateral estoppel (issue preclusion) are controlled by the law. This point is acknowledged in the opening clause of Section 16.5 which premises the application of the subsection with the caveat and limitation that it is only to be applied,"[t]o the fullest extent permitted by applicable law." If the applicable law does not permit the application of the terms otherwise set forth in Section 16.5, then they are of no moment. They cannot be unconscionable.

Section 16.5 simply states that the arbitration between Lennar and each of the Owners will not have a preclusive or collateral estoppel effect in any other arbitration or judicial proceeding unless there is a mutuality of the parties. This agreement is merely a restatement of the concept of *res judicata* and collateral estoppel—both doctrines require the parties to the action to be the same. *See Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (the doctrine of res judicata "bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties"); *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994) (the doctrine of collateral estoppel or claim preclusion "is shown if (1) the identities of the parties [are] the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction").

Section 16.5 does not even purport to alter the application of the law of *res judicata* or collateral estoppel as they would apply to the Owners in this situation. The Owners' claims against other parties, in arbitration or civil litigation, will not be determined by the outcome of the arbitration of the Owners' claims against Lennar.

Furthermore, as stated by the United States Supreme Court in *Dean Witter*, "[t]he collateral-estoppel effect of an arbitration proceeding is at issue only after arbitration is completed,

of course, and we therefore have no need to consider now whether the analysis in *McDonald* [which addressed the res judicata or collateral-estoppel effect to an unappealed arbitration award in a case brought under 42 U.S.C. § 1983] encompasses this case." *Dean Witter*, 470 U.S. at 222–23. The United States Supreme Court's decision not to address the preclusive effect of an arbitration award in *Dean Witter* is relevant to this case because the issue of whether the arbitration will or will not have a preclusive effect is only an issue *after* the arbitration is completed. *Id.* Accordingly, whether or not the arbitration of the Owners' claims against Lennar does or does not have a preclusive effect should not be relevant to whether the arbitration agreement, is in and of itself, unconscionable.

IV. The Court erred in refusing to sever provisions of the arbitration agreement found to be unconscionable.

The Court also erred in its severability analysis. As the Court correctly recognized, the *Prima Paint* doctrine requires the Court to focus *only* on the arbitration agreement within Section 16 of the Purchase and Sale Agreement. In accordance with *Prima Paint*, the Court cannot consider other terms and provisions outside of Section 16 to identify other ostensibly "unconscionable" provisions in determining whether Sections 16.4 and 16.5 are *themselves* severable from the bilateral arbitration agreement. Viewed solely within Section 16 itself, those provisions plainly are ancillary to the main agreement and hence unquestionably severable.

The law is well settled that when a court finds a contract clause to be unconscionable, the court may sever the unconscionable clause and enforce the remainder of the contract. S.C. CODE ANN. § 36-2-302; *see also Packard & Field v. Byrd*, 73 S.C. 1, 51 S.E. 678 (1905); *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980).

Section 16.4(2) merely addresses whether Lennar may resolve in the same arbitration its claims against third-parties. If that provision is severed (removed) from Section 16 there is no impact on the basic arbitration provision in Section 16.1. The basic bilateral agreement is not

"fragmented" at all—severing Section 16.4(2) means nothing more than eliminating Lennar's contractual right to join other parties with whom it has an arbitration agreement. The arbitration would otherwise proceed just like any other arbitration. Indeed, even after severing 16.4(2), *both* parties would have the opportunity to join appropriate third parties under Rule R-7 of the AAA Construction Industry Rules, which expressly provides for consolidation and joinder of parties to an ongoing arbitration. Therefore, if Section 16.4(2) is stricken from the agreement, the AAA's joinder provision would fill that gap.

Similarly, severing Section 16.5 of the Purchase and Sale Agreement does not create a disintegrated fragmentation of the arbitration agreement. Nor, does severing Section 16.5 alter any other material term or the essence of the agreement to arbitrate. Section 16.5 addresses issues that are controlled by the law—not the Purchase and Sale Agreement. After the completion of the arbitration between Lennar and the Owners, the court in a subsequent proceeding—should the need even arise—would decide whether the findings of fact and conclusions of law have a preclusive effect on other arbitrations or civil cases. Severing Section 16.5 would have no impact on that analysis.

Furthermore, as recognized by the Court of Appeals, Section 16.3 of the Purchase and Sale Agreement expressly delegates all arbitrability questions to the arbitrator. Such delegation provisions are proper and enforceable. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (enforcing a contract provision delegating arbitrability issues to the arbitrator). Thus, the analysis of whether to sever portions of the Purchase and Sale Agreement arbitration provision must be limited to review of only Section 16 and any efforts to examine the arbitrability of the Owners' claims or other issues related to the fundamental enforcement of terms of Purchase and Sale Agreement that are outside of Section 16 is improper.

Accordingly, the Court may readily sever Section 16.4 and Section 16.5 from the agreement to arbitrate. Severing those provisions will not result in the loss of any material term and will not render the agreement to arbitrate unintelligible or unenforceable. Therefore, Sections 16.4 and 16.5 do not make the arbitration agreement unconscionable or unenforceable and they do not justify refusal to enforce Section 16.1 or to deny the motion to compel arbitration.

V. The Court erred by treating the arbitration provision in the Purchase and Sale Agreement different from other contracts.

In its Opinion, the Court adopted a policy and approach which treats the Purchase and Sale Agreement's arbitration provision different from arbitration provisions in other contracts. Although the Court sought to justify this policy and differential consideration of arbitration agreements in contracts involving the sales of houses, the fact is that the Opinion places arbitration provisions in such contracts on a different footing than other contracts. Specifically, the Court emphasized its policy of protecting new home buyers and stated that this policy was relevant to the Court's analysis, *Damico,* 2022 WL 4231032, at *11. Such policy considerations improperly impacted the Court's decision to refuse to enforce the arbitration provision in the Purchase and Sale Agreement.

The FAA and the prior decisions of the United States Supreme Court prohibit such policies and practices. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453–54, 730 S.E.2d 312, 315 (2012) (stating that when interstate commerce is involved the FAA preempts the application of state law to the extent it invalidates an arbitration agreement). The United States Supreme Court has repeatedly stated that contracts that are subject to the FAA—like the Purchase and Sale Agreement—are to be placed "upon the same footing as other contracts." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (quoting *Granite Rock Co. v. Teamsters,* 561 U.S. 287, 302 (2010)); *see also Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *Prima*

Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts."). This rule is also known as the "equal-treatment principle." *Kindred Nursing Centers Ltd. P'ship*, 137 S. Ct. at 1426.

The Court's opinion violates this equal-treatment principle because it acknowledges that the Court treated its analysis of the Purchase and Sale Agreement, and the arbitration provision therein, differently than other contracts. The Court's articulated basis for such differential treatment was that the Purchase and Sale Agreement involves a consumer's purchase of a home in South Carolina; but that justification is not availing. *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534, 132 S. Ct. 1201, 1204, 182 L. Ed. 2d 42 (2012) (per curiam) (unanimously invalidating a state's public policy to not refer wrongful death claims against a nursing home to arbitration); *see also Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 639 (4th Cir. 2002) ("[W]e reject as meritless [the plaintiff's] unsupported argument that forcing consumers like her to arbitrate consumer protection claims against companies like [the defendant] is against public policy relating to consumer protection."). While the Court may endorse in other contexts the proposition that South Carolina intends to be in the vanguard of protecting home buyers, *Reynolds v. Ryland Grp., Inc.*, 340 S.C. 331, 338, 531 S.E.2d 917, 921 (2000), it may not extend that policy as justification for treating agreements to arbitrate differently. Thus, South Carolina's policy of special protection for home buyers provides no basis for applying different rules or standards to arbitration agreements in home buyer contracts.

CONCLUSION

Based on the foregoing, Lennar respectfully requests the Court grant this Petition for Rehearing and issue an opinion affirming the Court of Appeals.

s/James Lynn Werner
James Lynn Werner; SC Bar No. 6029
Jenna K. McGee; SC Bar No. 76891
Katon E. Dawson Jr.; SC Bar No. 101167
PARKER POE ADAMS & BERNSTEIN LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Respondent Lennar Carolinas, LLC

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Columbia, South Carolina