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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2024-_____
Court of Appeals Case No. 2022-001587

315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives, as set forth herein, Respondents,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners LLC; John Does 1-25, Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 13, 2024.

QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals conflict with decisions of this Court and the United States Supreme Court recognizing the contractual nature of arbitration, where the Court of Appeals erroneously relied on a boilerplate arbitration notice, not the terms of the parties' contract, to find that the parties opted for the application of state arbitration law to the exclusion of the Federal Arbitration Act?
2. Does a transaction for South Carolina resort property involve interstate commerce, such that federal arbitration law applies, where the parties' dispute is focused on the ability of renters to access club facilities, and Plaintiffs market their homes as short-term rentals throughout the United States, and many of the Plaintiffs are not permanent South Carolina residents?
3. Where the parties have agreed to delegate unconscionability to the arbitrator in a transaction involving interstate commerce, did the Court of Appeals err in refusing to recognize that application of any South Carolina rule prohibiting delegation of unconscionability is preempted by the Federal Arbitration Act?
4. Did the Court of Appeals err in finding the arbitration agreements unconscionable when it is undisputed that (a) sophisticated, high-worth purchasers of vacation property in one of the many luxury developments in the Lowcountry do not face an absence of meaningful choice that could render agreements related to the purchase unconscionable; (b) a unilateral modification provision is not unconscionable *per se*; and (c) under settled principles of South Carolina law, a purportedly unconscionable remedial limitation in an arbitration agreement should be severed?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Respondents (“Plaintiffs”) are a small group of property owners in the Palmetto Bluff luxury residential/resort community.¹ (App. 292-296.) They include individuals, closely held family LLCs, and a family trust. (*Id.*) One set of related plaintiffs owns four Palmetto Bluff properties. (App. 293-294.) Publicly available information confirms that these are persons of wealth and business sophistication, including a senior vice-president of an investment management company, the former CEO of a 500-person engineering and architectural firm, and a principal of a Myrtle Beach auto dealership which itself requires arbitration of disputes with its customers.² (App. 778-937.) Many Plaintiffs are out-of-state purchasers who bought their properties for commercial investment and/or who have transferred title to their limited liability companies or other closely held entities.

It is undisputed that Plaintiffs had an abundance of choice in deciding whether to purchase homes in Palmetto Bluff. Plaintiffs do not contend that vacation homes, second homes, or luxury homes are necessities, and Palmetto Bluff is far from the only developer of luxury homes in the Lowcountry and other desirable coastal areas.

As a planned community, Palmetto Bluff is subject to covenants, restrictions, and governing documents. (App. 303.) These include the Community Charter, which is recorded in the Office of the Beaufort County Register of Deeds and which provides, among other things, for the establishment of the Palmetto Bluff Club. (App. 303; 724.) The Charter states: “By acceptance of a deed, each Owner shall automatically become a member of the Palmetto Bluff Club and shall

¹ Petitioners (“Palmetto Bluff”) are entities or individuals involved in the development and operation of Palmetto Bluff and its facilities and amenities.

² The dealership’s arbitration clause was held unconscionable in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2 663 (2007).

automatically assume and agree to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, which terms and conditions are incorporated herein by reference.” (App. 420.)

Upon becoming a member of the Palmetto Bluff Club, the owner executes a Palmetto Bluff Club Membership Agreement (“Membership Agreement”). (App. 475, 726.) The Membership Agreement contains an arbitration agreement. Additionally, the Club operates pursuant to the Membership Plan, which also contains an arbitration agreement. The core text of both arbitration agreements is identical, and provides:

[A]ny and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from this Membership Agreement [or “Membership Plan”], including, but not limited to, the breach or alleged breach of this Membership Agreement [or “Membership Plan”], shall be resolved by mandatory arbitration **in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the “Rules”) then in effect . . . applying the substantive laws of South Carolina.**

(App. 578; 730 (emphasis added).) Each Membership Agreement also states that each member acknowledges receipt of the Membership Plan and agrees to be bound by all of its respective terms and conditions, as they may be amended from time to time. (App. 577.)

Plaintiffs’ properties are all located in the designated area for short-term rentals, and many Plaintiffs market their properties nationwide as short-term rentals through websites like VRBO.com, Airbnb.com, hometogo.com, and palmettobluffluxuryrental.com, among others. This dispute arises out of Plaintiffs’ allegation that actions taken or contemplated under the Membership Plan were “intended . . . to suppress” their ability to market their properties for short-term rentals by restricting renters’ access to Club amenities. Plaintiffs’ dissatisfaction with this lack of short-term renter access drives the multiple claims asserted in their complaint. Plaintiffs’ claims thus arise directly from the documents containing the arbitration agreements that Plaintiffs are seeking to avoid.

II. PROCEDURAL HISTORY

A. Circuit Court Proceedings

Plaintiffs sued Palmetto Bluff in April 2022, asserting multiple claims. (App. 274-356 (Complaint).) Two days later, Plaintiffs filed an arbitration demand with the American Arbitration Association (“AAA”), attaching the circuit court complaint. (App. 556-564.) Palmetto Bluff filed an answer and counter-demand, and subsequently asserted a counterclaim, seeking resolution of the same issues raised in Plaintiffs’ arbitration demand. (App. 565-572.)

Plaintiffs subsequently filed a Motion to Stay Arbitration and a Motion for Summary Proceedings on the Invalidity of the Purported Arbitration Clause. (App. 549-552.) For its part, Palmetto Bluff moved to dismiss the complaint pursuant to Rule 12(b)(8), SCRCPP, or alternatively to compel arbitration and stay the circuit court action. (App. 553-555.) The circuit court conducted a hearing on these and other motions on July 20, 2022.

In September 2022, the circuit court entered an Order granting Plaintiffs’ motion to stay arbitration and denying Palmetto Bluff’s motions to dismiss and to compel arbitration. (App. 203-235.) On the arbitration issues, the circuit court held that (1) the South Carolina Arbitration Act (“SCUAA”), S.C. Code Ann. § 15-48-10, *et seq.*, applied, rather than the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.*; (2) no arbitration agreement exists as to 15 Plaintiffs or 11 Defendants; (3) the non-signatory Plaintiffs are not bound by the arbitration agreements; (4) the arbitration agreements are invalid, unlawful, and unenforceable; and (5) Plaintiffs’ claims did not “relat[e] directly or indirectly to, or aris[e] directly or indirectly from [the Palmetto Bluff Club] Membership Plan,” and thus were outside the scope of the arbitration agreements. (App. 230-232.) Thereafter, the court denied Palmetto Bluff’s motion to alter or amend, entering an Amended Order that was identical to its previous order except for the date and title. (App. 236-268; App. 269-271.)

Palmetto Bluff timely appealed.

B. Court of Appeals – Initial Opinion

The Court of Appeals issued an opinion affirming the circuit court on July 24, 2024. (App. 1-12.) In summary, the Court of Appeals ruled as follows:

- Based on questions raised for the first time during oral argument, the Court of Appeals held that the Membership Agreement's reference to "the substantive laws of South Carolina" required application of the SCUAA rather than the FAA. (App. 5.)
- Despite recognizing that "parties can delegate questions of arbitrability," including "whether an arbitration agreement is valid," the Court of Appeals ruled that arbitrability was properly decided by the circuit court, rather than by the arbitrator, because disputes about *contract formation* (such as unconscionability) are reserved for the courts." (App. 5-6 (emphasis in original).)
- The arbitration agreements are unconscionable and unenforceable because (1) the Club documents are contracts of adhesion, and thus there was "an absence of meaningful choice on the Plaintiffs' part," and (2) the terms of the contracts are oppressive and one-sided in that they give Palmetto Bluff the unilateral right to amend the contracts and preclude an award of treble damages in any action under the contracts. (App. 8.)

C. Court of Appeals – Opinion on Denial of Rehearing

Palmetto Bluff timely filed a petition for rehearing on September 20, 2024. (App. 13-29.) On November 13, 2024, the Court of Appeals denied rehearing and issued a substitute opinion, in which it attempted to address the errors identified in the petition for rehearing. (App. 32-33; App. 34-45.)

As to whether the parties' dispute is governed by state or federal arbitration law, the Court of Appeals abandoned the reasoning in its first opinion, instead concluding that the SCUAA controlled because the arbitration notice on the front page of the Membership Agreement states, "This membership agreement is subject to arbitration pursuant to South Carolina Code Section 15-48-10, *et. seq.*" (App. 38.)

With respect to delegation of the question of arbitrability, the Court of Appeals acknowledged that its ruling was contrary to the Supreme Court's decision in *Rent-A-Center, West*,

Inc. v. Jackson, 561 U.S. 63 (2010). The Court of Appeals ruled, however, that under the supremacy clause of the South Carolina Constitution, it was bound to follow this Court's decision in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2 663 (2007), even though *Simpson* was decided three years *before Rent-A-Center*.

ARGUMENT

Certiorari is appropriate here because (1) the Court of Appeals’ decision conflicts with decisions of this Court, including *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001), and *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); and (2) this matter involves a federal question (the applicability and effect of the Federal Arbitration Act) and the Court of Appeals’ decision conflicts with decisions of the United States Supreme Court, including *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). See Rule 242(b)(3), (5), SCACR. Additionally, certiorari is warranted by the importance of the issues at stake. Regrettably, both the original and substituted Court of Appeals opinions demonstrate the kind of hostility to arbitration that the FAA was meant to overcome and that South Carolina courts have long since abandoned. See, e.g., *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (recognizing that the purpose of the FAA was to “revers[e] the judicial hostility against arbitration”); *Munoz*, 343 S.C. at 540-41, 542 S.E.2d at 364 (recognizing “liberal policy favoring arbitration”).

I. The Arbitration Notice Cannot Override the Parties’ Agreement to Arbitrate Under Federal Law

In the circuit court and in the parties’ appellate briefs, the question whether the arbitration agreements are governed by the FAA or the SCUAA turned on whether this case involves a transaction occurring in interstate commerce. In its initial opinion and its substituted opinion on denial of rehearing, the Court of Appeals avoided this basic question by twice adopting theories for application of the SCUAA that were never raised by Plaintiffs and which, more importantly, conflict with decisions of the U.S. Supreme Court and this Court.

The Court of Appeals initially held that the arbitration agreements’ reference to “the substantive law of South Carolina” mandated application of the SCUAA. However, the Court of

Appeals abandoned this theory after Palmetto Bluff’s Petition for Rehearing explained that it is flatly contrary to *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1993), and *Osteen v. T.E. Cuttino Const. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993). (App. 16-20.) In its substituted opinion on denial of rehearing, the Court of Appeals adopted a another theory never asserted by Plaintiffs: that a reference to the SCUAA in the boilerplate arbitration notice on the first page of the Membership Agreement demonstrates with “no ambiguity” that the parties chose to arbitrate according to state law rather than federal law. (App. 38.) However, the Court of Appeals did not address the obvious conflict between the notice and the arbitration agreements themselves, which do not choose state arbitration law, and therefore are subject to the FAA.

The Court of Appeals’ reliance on the arbitration notice conflicts with decisions of this Court and of the United States Supreme Court. First, this Court has long recognized that “[u]nless the parties have contracted to the contrary, the FAA applies in Federal or State Court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363 (citing *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), and *Soil Remediation Co. v. Nu–Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996)). “Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA,” but such an intention must be clearly expressed in the contractual language. *Id.* at 538 n.2, 542 S.E.2d at 353 n.2; see *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019) (arbitration is a matter of contract).

Contrary to the Court of Appeals’ substituted opinion, a boilerplate arbitration notice on the front page of a document is not “a contract providing for arbitration under [state] rules.” *Munoz*, 343 S.C. at 538 n.2, 542 S.E.2d at 353 n.2, because it is not a contract at all. The only function of

an arbitration notice is to signal that an arbitration agreement is contained within the document on which the notice appears. “A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). An arbitration notice comes nowhere close to demonstrating that there has been a meeting of the minds with respect to arbitration.

Even assuming—contrary to logic and South Carolina contract law—that citing the SCUAA in a boilerplate arbitration notice has some evidentiary value in determining whether the parties have agreed to opt out of the application of the FAA, it cannot change the actual terms of the arbitration agreement. Here, the arbitration agreements provide that arbitration shall occur “in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the “Rules”) ... applying the substantive laws of South Carolina.” (App. 578.) As Palmetto Bluff explained at length in its Petition for Rehearing, incorporation of state *substantive* law does not demonstrate that the parties agreed to apply state *arbitration* law. (App. 16-20 (analyzing *Mastrobuono* and *Osteen*.) Similarly, an arbitration agreement’s incorporation of AAA arbitration rules does not clearly show that the parties intended to arbitrate under state arbitration law. *See, e.g., Metzler Contracting Co. LLC v. Stephens*, 774 F. Supp. 2d 1073, 1077 (D. Haw. 2011) (agreement to arbitrate under AAA rules “do[es] not evince a clear intent to choose state over federal arbitration rules”). *At worst*, the arbitration notice’s reference to the SCUAA might be said to create an ambiguity when viewed in conjunction with the actual terms of the arbitration agreements. Under both state and federal law, however, mere ambiguity is not sufficient to show that the parties clearly intended to arbitrate under state arbitration law. *See Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *see also Lamps*

Plus, Inc. v. Varela, 587 U.S. 176, 189 (2019) (recognizing that “the FAA provides the default rule for resolving certain ambiguities in arbitration agreements”).

Even if the reference to the SCUAA in the arbitration notice could be viewed as a contractual agreement to adopt state arbitration law, it would not change the outcome here because state-law rules that conflict with parties’ rights under the FAA—and “would undermine the goals and policies of the FAA”—are nonetheless preempted. *Volt*, 489 U.S. at 477-78. In particular, the South Carolina rule that parties cannot delegate the determination of unconscionability to the arbitrator squarely conflicts with “the goals and policies of the FAA” as identified by the U.S. Supreme Court in *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 43 (2010), and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019). The FAA limits efforts to use state law, including state contract interpretation, to curtail the powers of arbitrators under the language of the arbitration agreement, *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-64 (1993), or otherwise to materially alter the terms of arbitration, *see DIRECTV v. Imburgia*, 577 U.S. 47, 54-58 (2015); *see also Lamps Plus*, 587 U.S. at 183-189.

Arbitration is a matter of contract, and courts are bound to honor the terms to which the parties have agreed. *See Volt*, 489 U.S. at 474-75. Certiorari is warranted here because the Court of Appeals’ holding undermines this fundamental principle by ignoring the arbitration agreements and relying instead on the boilerplate arbitration notice, which is not part of the parties’ contract. There are doubtless hundreds if not thousands of contracts containing an arbitration notice that, like the notice on the Membership Agreement here, cite the SCUAA. The substituted opinion of the Court of Appeals, if it is allowed to stand, would allow courts to disregard the terms of arbitration agreements in favor of a statement that is only intended to alert parties to the existence of an arbitration agreement located elsewhere in the document. Such an outcome is antithetical to

contract law generally and to arbitration law specifically. This Court should grant certiorari to correct the serious error of the Court of Appeals.

II. The Contracts Involve Interstate Commerce

In light of its erroneous holding regarding the arbitration notice, the Court of Appeals did not reach the question of whether the contracts involved interstate commerce. This Court should grant certiorari to resolve this important question.

“[T]he FAA applies in Federal or State Court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363. Moreover, “involving commerce” is broadly construed because it covers more than “only persons or activities within the flow of interstate commerce”; rather, “the word ‘involving,’ like ‘affecting,’ signals an intent to exercise Congress’ commerce power to the full.” *Allied-Bruce Terminix*, 513 U.S. at 273-77. Indeed, “the smallest connection of an arbitration agreement with interstate commerce is sufficient to bring the agreement within the FAA.” *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 13 (Ala. 1998).

The Circuit Court held the FAA does not apply to the arbitration agreements because “[t]he development of real property does not involve interstate commerce.” (App. 208 (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012))). But the development of real estate is not the fulcrum of this case, which turns on Plaintiffs’ claims that various Palmetto Bluff governing documents are being used to restrict access to Palmetto Bluff Club amenities by short-term renters. (App. 495.) The renters include persons from outside South Carolina, as Plaintiffs market their properties to renters nationwide on numerous vacation-rental websites. (App. 725.) Plaintiffs complain, not about their real estate purchases, but about how the Club’s operation hurts their rental businesses. The eight out-of-state Plaintiffs (App. 728-729) show that the Club serves

out-of-state customers, and thus its operation involves interstate commerce.

It is clear from the Complaint that Plaintiffs’ rental businesses—including rental guests’ access to Club amenities—and the alleged effects of Club governance and policies on those businesses, are at the core of the dispute. The Complaint’s “preamble” frames the issues in terms of short-term renters’ rights. (App. 280, 288-291.) Additionally, four of Plaintiffs’ claims specifically refer to rental issues; two claims are asserted on behalf of a putative class of short-term renters; and the remaining claims all incorporate by reference the allegations regarding the effects on Plaintiffs’ rental businesses and tenants. (App. 334-354.) Plaintiffs also assert claims attacking Club ownership, operations, and policies, generally with specific reference to access limitations and fees imposed on short-term renters’ use of Club facilities. Moreover, the pre-suit claims letters put short-term rental guests’ access to Club facilities at the center of the dispute. (App. 488-497.) Finally, none of Plaintiffs’ claims concern the fact that they bought property in Palmetto Bluff. Instead, Plaintiffs seek relief to enhance their ability to commercialize their properties and their Club membership—which they advertise to a national audience on national rental platforms.

The United States Supreme Court held long ago that “[t]he rental of real estate is unquestionably ... an activity [affecting interstate commerce].” *Russell v. United States*, 471 U.S. 858, 862 (1985); *see also Groome Res. Ltd., LLC v. Jefferson Parish*, 234 F.3d 192, 209-10 (5th Cir. 2000) (“discriminatory actions in the purchase, sale, or rental of housing” affect “the interstate market for housing”); *Cho v. Casnak LLC*, 2022 WL 16894869, at *3 (N.D. Cal. Sept. 7, 2022) (enforcing arbitration agreement because “[r]eal estate rental is an activity that affects interstate commerce as a matter of law”). The Supreme Court made clear that rental activity involves interstate commerce whether or not landlord and tenant come from different states. The Court did

“not rely on the connection between the market for residential units and ‘the interstate movement of people,’” but instead “recognize[d] that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties.” *Russell*, 471 U.S. at 862; *see also United States v. Medeiros*, 897 F.2d 13, 16 (1st Cir. 1990) (“*Russell* ... holds that rental property is *per se* property used in an activity affecting interstate commerce.”).

Even if the Circuit Court were correct that this case involves the development of real property, the FAA would still apply because the development of Palmetto Bluff involves interstate commerce, as the eight out-of-State Plaintiff property owners attest. (App. 728.) Just as their purchases were specific, concrete interstate transactions, the creation of the Palmetto Bluff community, and the sale of property in it, are activities involving interstate commerce even though “a piece of real estate being sold in interstate commerce does not itself pass across state lines.” *United States v. Romer*, 148 F.3d 359, 367 (4th Cir. 1998)

The Circuit Court relied on *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), for the proposition that real estate development does not involve interstate commerce. (App. 208.) *Bradley*, however, is inconsistent with the U.S. Supreme Court’s decision in *Russell*. If the *rental* of residential real estate to an *in-state* tenant involves interstate commerce, the *sale* of property to *out-of-state* buyers—actual interstate commercial transactions—must do so as well. “[I]f renting real estate is an activity which unquestionably affects interstate commerce, one need not make a leap of faith to conclude that a business engaged in real estate markets also has, at least, a minimal effect on interstate commerce.” *United States v. Leslie*, 103 F.3d 1093, 1102 (2d Cir. 1997). Contrary to the suggestion in *Bradley*—which is supported only by a pair of federal district court decisions from other circuits, *see* 398 S.C. at 456-58, 730 S.E.2d at 316-18—interstate sales of real estate are not categorically exempted from the scope of Congress’s Commerce Power. On

the contrary, “transactions related to real estate do ‘affect’ interstate commerce.” *United States v. Nerone*, 563 F.2d 836, 850-51 (7th Cir. 1977). And “transactions occurring across state lines” are “interstate commerce.” *Edgar v. MITE Corp.*, 457 U.S. 624, 641–42 (1982).

Were the law otherwise, the Fair Housing Act would be invalid; in that statute, Congress exercised its Commerce Power precisely to address residential housing transactions regardless of their financing or additional links to interstate commerce. Court after court has sustained the reach of the Commerce Clause to residential housing sales. Thus, the Eleventh Circuit rejected the “argument that, because the real estate market involves private intrastate transactions, no interstate commerce is involved in residential sales and rentals.” *Seniors C.L. Ass’n, Inc. v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992); *see also Morgan v. Secy of Hous. & Urb. Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993).

This Court should grant certiorari so it can reconcile its decision in *Bradley* with the U.S. Supreme Court’s *Russell* decision. This can be done by limiting *Bradley* to its facts: a transaction “strictly for the purchase of a completed residential dwelling.” 398 S.C. at 457, 730 S.E.2d at 317; *see U.S. Home Corp. v. Michael Ballesteros Trust*, 415 P.3d 32, 39 (Nev. 2018) (distinguishing *Bradley* as involving only the purchase of a single residence). In contrast, the transaction at issue here encompassed the Club documents and a Community Charter that were designed “to facilitate the creation and governance” of a community comprising hundreds of homes and including the Trust and the Club, which provides “amenities that protect the purchasers’ investments and expectations.” Transactions in the interstate market for homes in luxury resort communities, like Plaintiffs’ purchases here, clearly “involv[e] interstate commerce” within the meaning of the FAA, 9 U.S.C. § 2.

III. The Arbitration Agreements' Delegation Clause Precluded the Circuit Court from Ruling on Arbitrability

In its original opinion, the Court of Appeals correctly recognized that “parties can delegate questions of arbitrability,” including “whether an arbitration agreement is valid,” and that the AAA Commercial Arbitration Rules explicitly provide for this. (App. 5-6.) Nevertheless, the Court refused to honor the delegation clause in the arbitration agreements here, reasoning that “the question of the arbitration agreement’s existence was properly before the circuit court because disputes about *contract formation* (such as unconscionability) are reserved for the courts.” (App. 5 (emphasis in original).)

Palmetto Bluff’s petition for rehearing explained that this reasoning was contrary to United States Supreme Court precedent holding that when the parties agree to delegate unconscionability to the arbitrator, a court “must enforce” that agreement unless the party claiming unconscionability “challenged the delegation provision specifically.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010). In its substituted opinion on denial of rehearing, the Court of Appeals “acknowledge[d]” the holding of *Rent-A-Center* but refused to apply it, asserting that:

Pursuant to S.C. Const. art. V, § 9, this Court is bound by *Simpson [v. MSA of Myrtle Beach, Inc.]*, 373 S.C. 14, 644 S.E.2 663 (2007)], which states that, under the SCUAA, specifically, section 15-48-20(a), the question of enforceability is for the court to decide when an arbitration agreement is challenged as unconscionable.

(App. 39-40 n.3.) The Court of Appeals did not address whether its reliance on *Simpson* was appropriate in light of the fact that *Rent-A-Center* was decided in 2010, three years *after* this Court decided *Simpson*.

The U.S. Supreme Court has repeatedly recognized that the FAA allows parties to agree to have an arbitrator decide “whether the parties have agreed to arbitrate,” *e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67–68 (2019), including by use of a “delegation clause” that refers threshold or gateway issues to the arbitrator. Here, the arbitration agreements require

disputes to be resolved “in accordance with the Commercial Arbitration Rules of the American Arbitration Association.” Rule R-7(a) provides that the arbitrator, not the court, is to decide “his or her jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” Under AAA Rule R-7(b), “[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part.” Under *Rent-A-Center* and *Schein*, incorporation of the AAA arbitration rules “constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.” *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190, 1199 n.2 (9th Cir. 2024) (internal quotation marks omitted); *see also In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879 (6th Cir. 2021) (“This court, and each of the ten other circuits to address the issue, has held that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *Blanton v. Domino’s Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (collecting cases).” (internal quotation marks omitted)).

To the extent *Simpson* requires a different result, a grant of certiorari is necessary so that this Court can reconcile its jurisprudence with *Rent-A-Center* and *Schein*, which this Court must follow under the Supremacy Clause of the United States Constitution. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) (“Lower court judges are certainly free to note their disagreement with a decision of this Court. But the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” (internal quotation marks omitted)). At the very least, the arbitration agreements’ incorporation of the AAA Commercial Arbitration rules, which specifically allow for delegation of arbitrability questions to the arbitrator, is a contractual term

that must be enforced like any other. *See Volt*, 489 U.S. at 478-79. Application of the South Carolina rule against delegation would “require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,” thereby thwarting “the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.” *Id.* (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

IV. The Arbitration Agreements Are Not Unconscionable

A grant of certiorari is warranted for the additional reason that the Court of Appeals erred in holding the arbitration agreements unconscionable on the grounds that (1) Plaintiffs lacked meaningful choice in accepting the arbitration agreements; and (2) the terms of the arbitration agreements are oppressive and one-sided. (App. 7-11.) As to lack of meaningful choice, the Court of Appeals failed to account for the facts of this case, which are that Plaintiffs are sophisticated purchasers of optional luxury homes (not primary residences), some of which are used as investments in the short-term rental business. As to the purported oppressiveness and one-sidedness of the arbitration terms, the Court failed to recognize both that the terms at issue are not unconscionable, and that any improper term in the arbitration agreements can simply be severed, thereby preserving the parties’ contractual agreement to arbitrate their disputes.

A. Plaintiffs Had a Meaningful Choice

Determining whether an arbitration agreement is tainted by an absence of meaningful choice is fact- and context-specific. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611, 879 S.E.2d 746, 755 (2022) (“A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.”) In deciding whether an absence of meaningful choice taints a contract term, courts must consider *all* of the facts and circumstances, including “the parties’ relative sophistication.” *Id.* at 613, 879 S.E.2d at 775.

Contrary to the case-by-case determination required by *Damico*, the Court of Appeals

simply and uncritically applied the *general* proposition that a buyer of new residential construction “is *normally* in an unequal bargaining position as against the seller.” *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (emphasis added). The Court failed to give effect to the undisputable and uncontested reality that Plaintiffs are not typical purchasers of a primary residence. They are, as the Court of Appeals acknowledged, “wealthy purchasers of secondary homes.” (App. 8.) Indeed, Plaintiffs do not dispute their own sophistication or the supporting evidence in the record. Moreover, the properties at issue in *Damico* were primary homes, lived in by the plaintiffs, who were all individuals. *See* First Am. Compl., *Damico v. Lennar Carolinas, LLC*, No. 2014-CP-08-02424, 2015 WL 13780350 (S.C. Com. Pl. Nov. 23, 2015). In contrast, the homes at issue here are luxury second homes, often for out-of-state purchasers, often held by limited liability companies, and often purchased as investments for rental business. Indeed, some Plaintiffs had previously bought property in Palmetto Bluff. These buyers were not seeking necessary shelter from a local developer, but were making a discretionary purchase from one among many competing luxury developments in South Carolina and throughout the world.

In deciding *Damico*, this Court could have adopted a blanket rule that purchasers of new residential construction are *always* in an inferior bargaining position *vis-à-vis* the seller, but it did not. It merely recognized that the typical home buyer is “normally” in an unequal bargaining position. By not adopting a blanket rule, this Court necessarily recognized that not all home buyers are “typical.” Some, like Plaintiffs here, operate with a high level of sophistication and choice. *Damico* required the Court of Appeals to consider and give effect to these differences. Certiorari is warranted so that this Court can remedy the Court of Appeals’ error.

B. The Arbitration Agreements Are Neither Oppressive Nor One-Sided

The Court of Appeals further erred in ruling that the terms of the arbitration agreements are oppressive and one-sided due to the provision allowing for unilateral modification of the

contract and by the provision precluding an award of treble damages.³ (App. 8-10.) As to unilateral modification, the Court misapprehended the applicable law. Multiple courts have held that a provision allowing one party the unilateral right to amend a contract does not invalidate an arbitration provision where the right to amend is not contained within, or specific to, the arbitration provision itself. *See Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 (4th Cir. 2005); *Hicks v. Brookdale Senior Living Communities, Inc.*, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018).

The Court of Appeals recognized this principle, including by citing *Peoplesoft*, but then disregarded it, holding that “although the language permitting unilateral modification to the contract is located outside the arbitration clause itself, it is not located in a *separate policy*.” (App. 9 (emphasis added).) The Court also tried to tie the modification provision to the arbitration agreements by noting that the clause regarding modification states that it applies to “the documents in which the arbitration agreement is located.” (*Id.*)

The Court’s reasoning on this point is contrary to established law. “Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause.” David Horton, *The Shadow Terms: Contract Procedure And Unilateral Amendments*, 57 UCLA L. Rev. 605, 649 (2010). Among these is the North Carolina Supreme Court, which recently held that “traditional modification analysis which requires mutual assent and consideration does not apply to changes stemming from a valid unilateral change-of-terms provision in an existing contract”; rather, actual unilateral changes are valid so long as they “reasonably relate back to the universe of terms discussed and anticipated in the original contract”

³ If the Court determines that Plaintiffs had the ability to exercise meaningful choice, it would be unnecessary to reconsider the question of whether the terms are oppressive and one-sided. By the same token, if the Court agrees that the terms are not oppressive and one-sided, it need not reconsider whether Plaintiffs had a meaningful choice.

and thus comply with the obligation of good faith and fair dealing. *Canteen v. Charlotte Metro. Credit Union*, 386 N.C. 18, 23, 28, 900 S.E.2d 890, 894 898 (2024). *Canteen* specifically rejected the argument, adopted by the Court of Appeals here, that the mere presence of a unilateral modification provision renders a contract illusory. *Id.* at 26–27, 900 S.E.2d at 897; *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) (noting that “the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable”).

Even assuming—contrary to the weight of authority—that the mere presence of a unilateral amendment provision can invalidate an arbitration agreement, it cannot do so unless the unilateral modification clause is within the arbitration agreement itself, or at the very least is specific to the arbitration clause. For example, in *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288 (4th Cir. 2022), the court found the requisite specificity where the modification provision appeared in an acknowledgement form, and the arbitration agreement explicitly referenced the acknowledgement form. *See id.* at 290, 292. Here, unlike in *Coady* or the other cases cited by the Court of Appeals, the provision allowing for unilateral amendment does not reference the arbitration agreements, nor do the arbitration agreements reference the provision allowing for unilateral amendment. Thus, the circumstances that would tie the two provisions together are simply absent, and it was error for the Court to determine that the unilateral modification provision rendered the arbitration agreements unconscionable.

As to limitation of remedies, the Court of Appeals erroneously failed to apply case law recognizing that until the arbitrator is called to interpret and apply remedy limitations in an arbitration agreement, the outcome is uncertain and “the proper course is to compel arbitration.” *Rowe v. AT&T, Inc.*, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014). *Rowe* considered *and*

rejected the same argument Plaintiffs made here and that the Court of Appeals erroneously accepted. The proper course was for the arbitrator to address, in the first instance, the scope of the available remedies.

Apart from this, the Court of Appeals failed to consider whether the limitation on remedies, to the extent it might render the arbitration agreements unconscionable, could be severed and the remainder of the agreements enforced. It is well settled that a court may sever an unconscionable provision from an arbitration clause, even if the arbitration clause does not contain a severability provision. *See* S.C. Code Ann. § 36-2-302(1); *see also, e.g., Larsen v. Citibank FSB*, 871 F.3d 1295, 1320 (11th Cir. 2017) (recognizing that severance is “the usual remedy for substantively unconscionable terms” and that severance should be granted unless the “unconscionable terms pervade an arbitration agreement such that severance would significantly alter the tone and nature of arbitration” (internal quotation marks omitted)). The strong federal policy favoring arbitration suggests that where severance is possible, it should be employed to preserve the parties’ agreement to arbitrate. Too, as noted, the Community Charter itself contemplates severance when necessary to comport with South Carolina law.

V. The Court of Appeals’ Decision Undermines the Federal Policy Favoring Enforcement of Arbitration Agreements and Denigrates the Parties’ Right to Contract as They See Fit

Last, but by no means least, granting certiorari is necessary because the Court of Appeals’ reasoning and decision evince precisely the kind of hostility to, and suspicion of, arbitration that the FAA was meant to overcome and that South Carolina courts have long since abandoned. *See, e.g., Doe*, 430 S.C. at 616, 846 S.E.2d at 881 (recognizing that the purpose of the FAA was to “revers[e] the judicial hostility against arbitration”).

Plaintiffs purchased their Palmetto Bluff properties with their eyes wide open and of their own free choice. None of the Plaintiffs *had* to purchase a home (or, in the case of some Plaintiffs,

more than one home) in Palmetto Bluff—they could have chosen not to purchase a luxury residence, or to purchase from another developer, in another community in South Carolina or elsewhere. Those Plaintiffs who purchased their properties as investments for short-term rentals had every incentive to review and understand the terms of Club membership and dispute resolution. And, it is undisputed that Plaintiffs are wealthy individuals with much greater sophistication than the typical buyer of a primary residence.

CONCLUSION

A core principle of both state and federal arbitration law is that parties who enter into an agreement to arbitrate disputes are entitled to have the agreement enforced according to its terms. It is emphatically not the role of the courts to undermine the parties' agreement by disregarding or misconstruing its terms. Regrettably, however, that is precisely what the Court of Appeals did here. Rather than enforce the arbitration agreements as written and according to the FAA, the Court of Appeals flouted these bedrock principles. Its decision, if allowed to stand, will make South Carolina an outlier and will put this State's jurisprudence in opposition not only to the FAA and U.S. Supreme Court precedent, but also with this Court's decisions. The Court should grant certiorari to correct the Court of Appeals' errors and to ensure that South Carolina continues to respect parties' rights to contract as they see fit, including by agreeing to arbitrate their disputes.

Respectfully submitted,

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