THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454

Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly situated, ...Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Petitioners.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
Hedrick Gardner Kincheloe & Garofalo LLP
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's Counsel certifies the Petition for Rehearing in this case was finally ruled on by the Court of Appeals ("COA") by Order dated November 21, 2024.

INTRODUCTION AND SUMMARY OF GROUNDS FOR CERTIORARI

The Petitioner asks this Court to correct errors of law in the COA's decision affirming the denial of Petitioner's Motion to Compel Arbitration under Rule 242(b)(3), SCACR. The COA's decision conflicts with South Carolina and United States Supreme Court precedent and longstanding principles of contract interpretation. Compounding this error, the COA did not address South Carolina precedent that enforced arbitration provision language similar to the language at issue here. Left unreversed, the COA's decision creates an ambiguity in the law and places arbitration provisions on an unequal plane with other contracts.

This Court should grant certiorari to: (1) correct legal errors relating to the interpretation and enforceability of arbitration provisions under South Carolina law; and (2) ensure that South Carolina and United States Supreme Court precedent is applied consistently.

QUESTIONS PRESENTED

1. Did the Court of Appeals commit legal error when it ignored South Carolina precedent enforcing similarly drafted arbitration provisions?

2. Did the Court of Appeals commit legal error when it failed to analyze Pacifica's arbitration provision on an equal plane with other contracts?

STATEMENT OF THE CASE

This appeal arises from a putative class action, filed on February 8, 2022, related to alleged deficiencies with the independent senior living accommodations at Pacifica Senior Living Skylyn ("Pacifica" or "the Facility"). (App. 58). Respondent Ed Medford ("Respondent") was a resident of an independent living apartment on Pacifica's campus and had lived on Pacifica's campus for

five years at the time this suit was filed. (App. 58). Respondent brought this action individually and on behalf of a putative class of other residents, alleging breach of contract, negligence, and related causes of action against: Pacifica; allegedly related entities R Cucamonga, LLC and Pac R Cucamonga, LP; former director Matthew Arledge; management consultant ETROS, LLC; and individual Deepak Israni as an alleged "manager" of Pacifica. (App. 58-69). The allegations relate to the operation and maintenance of the facility and non-medical services provided by Pacifica during Respondent's residence in independent living at Pacifica, though Respondent purports to represent a class of residents living in both the independent living apartment building and a separate assisted living facility on the campus. (*Id.*).

Plaintiff signed a Residence and Care Agreement ("the Agreement") that governed the terms of his residency at Pacifica. (App. 99-112). Section H of the Agreement contains numerous "Miscellaneous" provisions, including an arbitration provision. (App. 110-111). The arbitration provision is contained in subparagraph 11, titled "**ARBITRATION**," and requires arbitration of any and all disputes arising from the Agreement. (*Id.*). The scope of the arbitration provision is broad—the parties agreed to binding arbitration of "any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity. . . ." (*Id.*). The arbitration provision includes an exception for "any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court" unless both parties agree to arbitrate such a claim." (*Id.*). Additionally, the arbitration provision includes an agreement concerning certain parameters for arbitration—the parties must mutually agree upon an arbitrator in accordance with the Federal Arbitration Act, and each party must bear its own costs for arbitration. (*Id.*).

Respondent personally signed the arbitration clause on November 7, 2018, the same date on which the Agreement was executed by Respondent and the executive director of Pacifica. (*Id.*).

On April 11, 2022, Pacifica moved to Dismiss under Rule 12(b)(1) and Rule 12(b)(6), SCRCP, or in the alternative, to Stay and Compel Arbitration. (App. 24-25). Respondent opposed Petitioner's motion and argued that the arbitration provision was unenforceable because it was not supported by consideration. Respondent's argument focused on the first sentence of the arbitration provision and the use of the word "you" to identify Respondent. According to Respondent, this word choice indicated only he agreed to arbitrate claims and therefore the arbitration provision did not contain mutual promises. Petitioner asserted the arbitration provision was supported by consideration in the form of mutual promises to arbitrate claims arising from the Agreement.

After a hearing, the circuit court denied the Motion to Compel Arbitration on July 28, 2022. (App. 47-56). The Circuit Court accepted Respondent's argument and concluded that the arbitration provision was unenforceable for lack of consideration. The Circuit Court held that the arbitration provision did not evince a mutual intent to be bound because Petitioner used the word "you" to identify Respondent in the arbitration provision. (App. 8).

Petitioner noticed a timely appeal to the Court of Appeals. Petitioner argued that the Circuit Court erred in disregarding South Carolina precedent that enforced similarly drafted arbitration provisions and failed to consider the entire scope and effect of the language used in the arbitration provision. (App. 6-9). Respondent reiterated its argument that the use of the word "you" rendered the arbitration provision unenforceable because Petitioner did not also promise to submit claims to arbitration. The Court of Appeals affirmed by unpublished opinion pursuant to Rule 220(b), SCACR. Petitioner timely filed a Petition for Rehearing, which was denied on November 21, 2024.

(App. 211). Petitioner asks this Court to grant Certiorari to review and ultimately reverse the Court of Appeals' decision.

ARGUMENT

1. This Court should grant Certiorari and hold that the arbitration provision is supported by sufficient consideration in the form of mutual promises.

South Carolina law has long held that mutual promises constitute sufficient consideration to support a valid, enforceable contract. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996); *Evatt v. Campbell*, 234 S.C. 1, 106 S.E.2d 447 (1959). Yet the Circuit Court denied Petitioner's Motion to Compel Arbitration because it concluded the arbitration provision was not supported by adequate consideration. In so doing, the Circuit Court disregarded South Carolina precedent and ignored the language in the arbitration provision as a whole. The COA endorsed these errors of law when it affirmed the Circuit Court's decision, notwithstanding precedent enforcing similarly drafted arbitration provisions. This Court must grant certiorari to correct this error of law.

A. The Court of Appeals erred and departed from South Carolina precedent holding that mutual promises amount to consideration sufficient to enforce a contract.

The Circuit Court concluded that Petitioner's use of the word "you" in the arbitration provision to identify the offeree rendered the entire provision unenforceable for lack of sufficient consideration. The Circuit Court's analysis quotes the following language in the arbitration provision:

> By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be

> brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

(App. 51.).[1] But the Circuit Court's analysis ends after the first five words: "[b]y signing below, you agree." (App. 51-53). The Court of Appeals erred in affirming because the Circuit Court's conclusion failed to apply South Carolina precedent that enforced similarly drafted arbitration provisions. Equally problematic, the cases cited in the Court of Appeals' decision do not support the conclusion that this arbitration provision lacks mutual promises.

For example, the arbitration provision in *York v. Dodgeland of Columbia, Inc.* provided as follows:

> PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT . . . .

406 S.C. 67, 81-82, 749 S.E.2d 139, 146 (Ct. App. 2013). By comparison, the arbitration provision at issue here states as follows:

> By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community. . . shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act . . . .

Like the arbitration provision here, the arbitration provision in *York* used a single term to identify the offeree – "Purchaser" – who had the power to either accept or reject the contract's terms. *Cf. Carolina Amusement Co. v. Connecticut Nat. Life Ins.,* 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) ("The offer identifies the bargained for exchange and creates a power of acceptance in the offeree.") (citing *Restatement (Second) of Contract* § 24 (1981)). Petitioner also used a single term—"you"—to identify the offeree, and the words following "you agree"

[1] The Court of Appeals' decision does not quote the arbitration provision.

demonstrate that Petitioner, as the offeror, also promised to submit "**any and all claims and disputes** arising from or **related to this Agreement** or your residency, care, or services at the Community" to arbitration. (emphasis added) (App. 110-111.).

The Fourth Circuit addressed a similar argument to the one Respondent advances in this litigation in *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997). In *O'Neil*, the arbitration provision at issue used the pronoun "I," and the plaintiff argued that the agreement was invalid because it was not binding on the defendant hospital. The Fourth Circuit applied South Carolina law and rejected the plaintiff's argument: "Here the agreement to be bound by was a mutual one. The contract to arbitrate was proffered by the employer. Such a proffer clearly implies that both the employer and the employee would be bound by the arbitration process." *O'Neil*, 115 F.3d at 274. The Court continued,

> [Plaintiff's] argument is especially misplaced in the circumstances of this case. Not only has the [defendant] consistently argued that it is bound by the arbitration agreement, it has, by virtue of this suit, shown its commitment to the arbitration process. Indeed, the only party to this case who has shown a desire to avoid binding arbitration is [plaintiff] herself.

Id. at 275. Like the plaintiff in *O'Neil*, Respondent has conveniently ignored that Petitioner itself performed its obligations under the arbitration provision when it moved to compel his claims to arbitration. Petitioner proffered the contract to arbitrate, implying that Petitioner would be bound by the arbitration process. As in *O'Neil*, the only party seeking to avoid the arbitration forum in this case is Respondent. This Court should grant Certiorari to correct the errors of law in the decisions below and hold the arbitration provision contains mutual promises to arbitrate.

B. The Court of Appeals erroneously departed from South Carolina law when it affirmed a decision that did not consider the arbitration provision as a whole.

South Carolina precedent requires our courts to consider the "whole scope and effect" of the language used in a contract. *See Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the *whole scope and effect of the language used*.") (emphasis added). Even so, the Court of Appeals affirmed an Order that effectively ignored the majority of the arbitration provision.

While the arbitration provision does include the term "you" to identify the offeree with power to accept or reject the offer, the provision also includes other agreed upon parameters for arbitration that reflect the mutual intent to submit claims to arbitration. The Circuit Court erred in limiting its analysis to a single word in the arbitration clause without reference to the "whole scope" of the clause. For example, the parties agreed that arbitration "shall be conducted in Spartanburg, South Carolina by a *mutually agreed upon* single neutral arbitrator." (App. 110-111) (emphasis added). Additionally, "[t]he parties" agreed to treat the results of arbitration as confidential unless "the parties" provide written consent to disclose the results. (*Id.*). Concerning the cost of arbitration, "[e]ach party" agreed to bear its own costs and fees. (*Id.*). In the event any portion of the arbitration agreement is found unenforceable, the agreement provides that "the remaining portions of the clause shall remain valid and shall be enforceable by *the parties*." (*Id.*). This Court should grant Certiorari to enforce the whole language of the arbitration provision.

2. The Court of Appeals erred and diverged from Supreme Court precedent when it placed the arbitration provision on an unequal plane with other contracts.

General contract principles of state law apply to arbitration clauses governed by the Federal Arbitration Act ("FAA"). *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). Respondent has not challenged the applicability of the FAA to the parties' dispute at any point, and the Circuit Court's order assumes the application of the FAA. (App. 47-49.). While

a party opposing arbitration may present a generally applicable contract defense to the arbitration provision, the United States Supreme Court has consistently held that such provisions are subject to an equal treatment principle. *AT & T Mobility LLC v. Concepcion,* 563 U.S. 333, 339, 131 S.Ct. 1740 (2011). Importantly, this principle applies to both validity and enforcement of an arbitration provision and requires state courts to view arbitration provisions on an equal plane with other contracts. *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017).

This Court recently reiterated its commitment to this equal treatment principle in *Palmetto Constr. Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021). This Court explained, "[w]hen considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions." *Id.* at 639, 856 S.E.2d at 153.

The Court of Appeals failed to apply the equal treatment principle to the arbitration provision in this case when it affirmed the Circuit Court's conclusion that the provision did not contain mutual promises, thereby disregarding South Carolina precedent concluding that similarly drafted provisions did contain mutual promises. *See, e.g., York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 81-82, 749 S.E.2d 139, 146 (Ct. App. 2013). Compounding this error, the Court of Appeals did not distinguish the language in *York*, leaving one to speculate where the difference lies between the two provisions. This is particularly problematic because the only apparent difference between the provisions is the subject matter of the underlying contract—one addresses the purchase of a vehicle, while the other involves admission to an independent living facility. This Court should grant Certiorari to ensure the arbitration provision is respected and enforced just like any other contractual provision, without regard to the subject matter of the underlying contract.

CONCLUSION

Petitioner requests that this Court grant Certiorari to correct the errors of law addressed herein, reverse the Court of Appeals, and remand the case to circuit court with instructions to stay the case and compel the Respondent's claims to arbitration.

Respectfully submitted,

HEDRICK GARDNER KINCHELOE & GAROFALO LLP

s/ Paul E. Allen, Jr.
Jonathan G. Roquemore (SC Bar No. 68274)
Joshua D. Shaw (SC Bar No. 77835)
Paul E. Allen, Jr. (SC Bar No.: 104062)
1230 Main Street, Suite 325
Columbia, SC 29201

Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210

Ed Medford, in his individual capacity, and on behalf of those similarly situated, ... Respondents,

v.

Deepak Israni, R Cucamonga, LLC, PAC R Cucamonga LP, Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge, ... Appellants.

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petition for Writ of Certiorari in the above-captioned case has been served on the following parties via email, on December 23, 2024:

Patrick E. Knie
Knie & Shealy Attorneys at Law
250 Magnolia Street
Spartanburg, SC 29306
pat@knieshealy.com

Mitch Slade
Mitch Slade Law Office, P.A.
PO Box 1007
Spartanburg, SC 29304
mitch@mitchsladelaw.com
Attorneys for Plaintiffs/Respondents

s/Paul E. Allen Jr.
Paul E. Allen, Jr.