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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

R. Ferrell Cothran, Jr. Circuit Court Judge

Appellate Case No. 2024-002098

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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 representative ....Respondents,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PLBH, 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; and John Does 1-25 .... Petitioners.

BRIEF OF AMICUS CURIAE
PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

R. Walker Humphrey, II
WILLOUGHBY HUMPHREY & D'ANTONI, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
(843) 619-4426

Attorney for Public Investors Advocate Bar Association

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Interest of Amicus Curiae

PIABA is a bar association comprised primarily of attorneys who represent members of the investing public. Its mission is to promote the interests of, and to help protect the investing public. PIABA also advocates for public education regarding investment fraud and industry misconduct. PIABA often issues comment letters regarding FINRA rule changes, provides testimony to government agencies and Congress, and files amicus briefs on a variety of issues relating to the protection of the investing public—the very people and businesses who provide corporations with the capital needed to drive economic activity in the United States. Particularly relevant here, PIABA members often represent people who oppose arbitration of their disputes.

No party's counsel has authored this brief in whole or in part, or contributed money which was intended to fund preparing or submitting this brief. This brief was funded solely by PIABA.

Introduction

Courts—not arbitrators—guard the threshold question of whether an arbitration agreement was ever formed, and that inquiry carries particular weight in consumer and financial-services disputes where contracts of adhesion, incoherent dispute-resolution schemes, and unilateral modification clauses routinely obscure the existence of mutual assent. The Public Investors Advocate Bar Association (PIABA) submits this brief because its members routinely represent investors with no bargaining power who are pushed into unconscionable arbitration clauses. The investors' only meaningful line of defense is the court system which has a duty to determine whether an enforceable arbitration agreement exists. Petitioners seek to undo these protections and open the floodgates for arbitrators to decide that threshold inquiry despite clear precedent to the contrary. So while the facts of this case do not concern investors and financial services contracts, the arbitration principles addressed in it do.

The Federal Arbitration Act requires courts to evaluate arbitration agreements on an equal footing with other contracts, which means applying ordinary state-law doctrines of offer, acceptance, consideration, and formation defenses such as unconscionability before any party can be forced into arbitration. That gatekeeping function is indispensable here: before an arbitrator wields any authority, the Court must determine that a valid agreement exists. PIABA urges this Court to find that the Court of Appeals properly held the existence of an arbitration agreement is always for the courts to decide, and that granting drafters of arbitration agreements a unilateral right to amend them is unconscionable. If it is necessary to answer additional questions beyond these two, PIABA further urges the Court to find that the mere incorporation of AAA rules into an arbitration agree-

ment does not delegate gateway questions to an arbitrator, and that the traditional equitable estoppel test applies to whether non-signatories are bound by or can enforce arbitration agreements, not an arbitration-specific test.

ARGUMENT

I. Only a court can decide whether a valid arbitration agreement exists, including whether the agreement is unconscionable.

The FAA commands courts to invalidate arbitration agreements on the same legal grounds as any contract, such as fraud, duress, unconscionability, and violation of public policy. *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 339 (2011); *United Paperworkers Intl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987). A party may therefore raise any defense to the formation of an arbitration agreement that it could raise to the formation of any contract. *Dr. 's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996); *see also Hengle v. Treppa*, 19 F.4th 324, 334 (4th Cir. 2021) ("Courts [] must enforce arbitration agreements on an equal footing with other contracts, . . . and may invalidate an arbitration agreement based on generally applicable contract defenses.") (internal citations and quotations omitted). The only limitation is that defenses which "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" are invalid. *AT&T Mobility*, 563 U.S. at 339. So just as with any other contract dispute, on a motion to compel arbitration, a court must first "confirm (1) that the parties have an agreement to arbitrate and (2) that the agreement covers their dispute" before it can order arbitration. *Granite Rock*, 561 U.S. at 314.

It is presumed courts will decide "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Parties may delegate

certain gateway questions to the arbitrator if they clearly and unmistakably intend to do so. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). But they cannot delegate all gateway questions. Determining whether a valid arbitration agreement was formed is *always* for the Court, even if an arbitration agreement purports to delegate that question to the arbitrator. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879 (6th Cir. 2021) ("[E]ven where a delegation provision purports to require arbitration of formation issues, the severability principle does not apply and courts must decide challenges to the formation or existence of an agreement in the first instance ('whether it was in fact agreed to' or 'was ever concluded').") (quotations omitted); *see also id.* & n.3 (stating that "[w]e are not alone in this regard" and collecting cases).

On top of being the law, reserving questions about the existence of an agreement to the courts makes logical sense. If one party alleges an arbitration agreement does not exist, referring that question to arbitration puts the cart before the horse. Compelling arbitration requires finding that an enforceable agreement exists. So if the agreement's existence is disputed, a court must resolve that dispute. Without an agreement, the court is powerless to compel arbitration. *See Rowland v. Sandy Morris Fin. & Estate Planning Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021) ("Section 4 of the FAA has made clear that it is up to courts to determine whether a contract has been formed, and the district court properly heeded that call. This respects party autonomy and the general principles of contract law."). A court cannot presume an agreement exists in order to delegate that question to the arbitrator.

Because an agreement's unconscionability goes to whether the agreement was validly formed, courts must answer that question. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007) (holding that as a matter of state contract law, which controls, unconscionability goes to "whether an arbitration agreement even existed in the first place"); *see also Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC,* 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties."). So the Court of Appeals was right: "courts must determine the enforceability of arbitration agreements challenged as unconscionable."[1] App. 38.

In arguing otherwise, Petitioners mistakenly believe that the only gateway question which cannot be delegated is whether the delegation clause itself is unconscionable. Pet. Br. 26–27. In their view, the U.S. Supreme Court in *Rent-A-Center* overruled *Simpson* to the extent it holds courts must determine an arbitration agreement's unconscionability. *Id.* But the Supreme Court did no such thing. *Rent-A-Center* simply held that a challenge to the entire contract as unconscionable does not extend to the delegation clause because delegation clauses are severable. 561 U.S. at 72. In reaching this decision, the Court recognized that the *existence* of an arbitration agreement (which must always be heard in court) is different than whether the agreement is *valid* (which can be delegated to an arbitrator). 561 U.S. at 70 n.2. And whether an arbitration agreement exists is a question of state law. *First Options*, 514 U.S. at 944. Under South Carolina law, unconscionability goes to the agreement's existence.[2] *Simpson*, 373 S.C. at 23, 644 S.E.2d at 668.

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[1] The Court of Appeals' original opinion, which the court withdrew and substituted on rehearing, contained an even more complete and accurate analysis of this question. *See* App. 5–7.

[2] Other states agree. *E.g.*, *Raper v. Oliver House*, LLC, 180 N.C. App. 414, 420, 637 S.E.2d 551, 555 (2006) ("Procedural unconscionability involves 'bargaining naughtiness' in the formation of the contract, i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure.");

Rent-A-Center did not create a new federal rule that unconscionability is a question of contract validity, not existence. That would require overruling decades of precedent holding that state law determines the existence of a contract. *Accord Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'") (quoting 9 U.S.C. § 2). While the Court suggested in a footnote that unconscionability is a question of a validity, *Rent-A-Ctr.*, 561 U.S. at 69 n.1, that casual reference was dicta because the party opposing arbitration agreed unconscionability goes to validity. Brief for Respondent at 21, *Rent-A-Ctr.*, 561 U.S. 63 (No. 09-497), 2010 WL 1186482, at *21. There is no evidence that the Court intended this brief unopposed comment in a footnote to create a new substantive rule which preempts ordinary principles of state contract law across the country in contravention of existing precedent. Petitioners simply put more weight on *Rent-A-Center* than it can bear. *See Cent. Va. Comm. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e

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OTO, L.L.C. v. Kho, 8 Cal. 5th 111, 124, 447 P.3d 680, 689 (2019) ("Under this standard, the unconscionability doctrine has both a procedural and a substantive element. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.") (cleaned up); *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. 2015) ("Therefore, this Court will analyze the issues in this appeal to determine if, under the factual record presented, Mr. Eaton has established an unconscionability defense to the formation of the agreement's arbitration clause.") (cleaned up); *Hunt v. Rio at Rust Ctr., LLC*, 495 P.3d 634, 642 (N.M. Ct. App. 2020) ("Accordingly, when we evaluate whether an arbitration agreement is procedurally unconscionable, we look beyond the four corners of the contract and examine the particular factual circumstances surrounding the formation of the contract[.]") (internal quotation omitted); *B & S Ltd., Inc. v. Elephant & Castle Int'l, Inc.*, 388 N.J. Super. 160, 176, 906 A.2d 511, 521 (Ch. Div. 2006) ("Procedural unconscionability can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contact formation process.") (internal quotation omitted).

are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

Simpson therefore remains good law, and only a court can determine whether an arbitration agreement is unconscionable.

II. Even if an arbitrator can determine whether an arbitration agreement is unconscionable, the mere incorporation of AAA rules into the agreement is not a clear and unmistakable delegation of that question to the arbitrator.

By holding that unconscionability cannot be delegated, the Court can avoid determining whether the mere incorporation of AAA rules into a contract is a sufficient delegation. But if the Court reaches this issue, it should find that mere incorporation is not enough.

Parties must clearly and unmistakably intend to delegate gateway questions to the arbitrator. *First Options*, 514 U.S. at 944. The Supreme Court defines "clear and unmistakable" evidence as an express agreement to arbitrate gateway issues. *See Rent-A-Ctr.*, 561 U.S. at 68–69 (holding that arbitrators can resolve issues of arbitrability only when the parties expressly agreed to delegate the issue in the arbitration agreement). The Court explained the rationale for this heightened burden as follows:

> [T]he former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

First Options, 514 U.S. at 945.

Contrary to Petitioners' arguments, the mere incorporation of AAA's rules does not amount to clear and unmistakable evidence of intent to delegate all gateway issues to the arbitrator. First, the arbitration agreement itself has no evidence of this intent. It merely says that arbitration proceeds "in accordance with the Commercial Arbitration Rules of the" AAA. App. 578. It says nothing about delegation. Second, AAA Commercial Rule 7 merely *allows* an arbitrator to decide gateway matters; it does not say the arbitrator *must* decide them:

> (a) The arbitrator shall *have the power* to rule on his or her own 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, without any need to refer such matters first to a court.
>
> (b) The arbitrator shall *have the power* to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

AAA Commercial Arb. Rule 7 (emphasis added). This generic, non-specific language is a far cry from the Supreme Court's clear and unmistakable language requirement. *See Rent-A-Ctr.,* 561 U.S. at 66 (defining a delegation provision as clear and unmistakable when it specifically provided "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have *exclusive authority* to resolve" the gateway issue) (emphasis added). And even giving Petitioners the benefit of all doubt, which cannot be done, the arbitration agreement at best is ambiguous as to whether an arbitrator must decide this question. Under the most basic canons of contract construction, the Court must construe that ambiguity against the drafter of the arbitration agreement. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010). Here, that means no delegation.

Several jurisdictions agree that this language is insufficient to delegate gateway questions to the arbitrator. One district court explained:

> It is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to "clear and unmistakable" evidence that the contracting parties agreed to delegate those issues to the arbitrator and preclude a court from answering them. To the contrary, that seems anything but "clear." And the AAA rule itself does not make the purported delegation of authority any more "clear" or "unmistakable." The AAA rule simply says that the arbitrator has the authority to decide these questions. It does not say that the arbitrator has the sole authority, the exclusive authority, or anything like that. The language of the rule does not suggest a *delegation* of authority; at most it indicates that the arbitrator possesses authority, which is not the same as an agreement by the parties to give him sole authority to decide those issues.

Taylor v. Samsung Elect. Am., Inc., No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. Mar. 16, 2020); *see also Gilbert St. Devs., LLC v. La Quinta Homes, LLC*, 174 Cal. App. 4th 1185, 1195 (2009) (holding that the majority rule finding the incorporation of NASD arbitration rules allowing arbitrators to decide their own jurisdiction is not clear and unmistakable evidence of intent to delegate "is the more persuasive rule, because the opinions so holding pay more attention to the basic analysis laid down in *First Options*"); *Glob. Client Solutions, LLC* v. *Ossello*, 382 Mont. 345, 354–55, 367 P.3d 361, 369 (2016) (holding that the incorporation of AAA rules "declares nothing concerning delegation" and does not impose "a clearly-defined and unmistakable agreement to supplant the general rule that courts determine arbitrability"); *Little Aquanauts, LLC v. Makovich & Pusti Architects, Inc.*, No. 109594, 2021 WL 1147753, at *4 (Ohio Ct. App. Mar. 25, 2021) ("Endless Pools argues that Aquanauts agreed to have the arbitrator determine the issue of arbitrability because the arbitration clause provides that dispute will be submitted to a JAMS arbitrator, and JAMS' rules state that such questions shall be determined by the arbitrator, but this is insufficient. Any agreement for arbitrability to be decided by the arbitrator rather than the court must be spelled out in the arbitration clause itself. The arbitration clause in the Terms and Conditions is silent as to jurisdiction; accordingly, the parties did not unmistakably provide that the issue of arbitrability was

to be determined by the arbitrator. The issue was therefore properly determined by the court."); *Flandreau Pub. Sch. Dist. No. 50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 437 n.6 (S.D. 2005) (refusing to adopt a "per se finding of intent to arbitrate arbitrability based solely upon the incorporation" of AAA rules). Indeed, "[t]here are many reasons for stating that the arbitration will proceed by particular rules, and doing so does not indicate that the parties' motivation was to announce who would decide threshold issues of enforceability." *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 790 (2012).

To be sure, many courts have reached the opposite result. *E.g.*, *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Petrofac, Inc. v. Dyn-McDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). But these nonbinding decisions are identically flawed because each conflates a rule that an arbitrator *may* decide these questions with an agreement that an arbitrator *must* decide them. *See Blanton*, 962 F.3d at 845 (justifying its holding by claiming that "the AAA Rules clearly empower an arbitrator to decide questions of 'arbitrability'—for instance, questions about the 'scope' of the agreement."); *Brennan*, 796 F.3d at 1130 (claiming a delegation was valid because it "expressly incorporate[ed] the AAA arbitration rules, one of which provides that the 'arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the ... validity of the arbitration agreement.'"); *Fallo*, 559 F.3d at 878 (holding that rule incorporation was clear and convincing evidence "because Rule 7(a) expressly gives the arbitrator 'the power to rule on his or her own jurisdiction.'"); *Petrofac,*

Inc, 687 F.3d at 675 (finding that "the parties expressly incorporated into their arbitration agreement the AAA Rules," and that "these rules state that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.'"); *Terminix Int'l Co.*, 432 F.3d at 1332 (holding the same, because the AAA rules were incorporated and that "Rule 8(a), in turn, provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.").[3]

But none of these courts address the argument raised here—the AAA rule at issue simply *allows* an arbitrator to hear gateway questions once they have been properly submitted through a clear and unmistakable agreement, and does not require that the arbitrator decide them. Just as this court's jurisdiction over a case never exists if a case is never filed, an arbitrator's power to exercise jurisdiction over arbitrability never exists if the matter is not properly submitted to him. *See Ajamian*, 203 Cal. App. 4th at 790 (holding that AAA rules saying the arbitrator has the "power" to decide arbitrability "tells the reader almost nothing, since a court *also* has the power to decide arbitrability" and the rules do not say the arbitrator has exclusive authority). Holding that the mere incorporation of permissive AAA rules is sufficient stands the clear and unmistakable evidence standard on its head.

What's more, allowing mere incorporation to suffice for delegation has significant downstream effects. For example, arbitrators have a personal financial incentive to rule in favor or arbitrability because they will get paid more if the case proceeds on its merits. Imre S. Szalai, *Fixing a Power Struggle in America's Civil Justice System*, 27 Harv. Negot. L. Rev. 209, 233–38 (2022). Easy

[3] Rule 8(a) in *Terminix* is identical to the modern rule 7(a) at issue here.

delegation too readily compromises a party's right to a jury trial on whether an arbitration agreement exists. *Id.* at 239–41. Parties also may not know about the alleged delegation if they must sort through layers of documents to find the operative language. *Id.* at 241–44. And the incorporated rules can change without notice after an agreement is signed, making what the parties agreed to delegate difficult to determine. *Id.* at 244–47. Finally, the role of courts in supervising the arbitration system under § 4 of the FAA would be diminished if these questions are delegated too readily. *Id.* at 247–49. The heightened "clear and unmistakable" evidence standard guards against these dangers. Lowering the bar to allow mere incorporation to suffice will, at a minimum, create uncertainty and, at worst, harm the parties and the broader civil justice system.

So the answer here is simple. Equipping arbitrators with the power to hear a question does not clearly and unmistakably evidence an intention that they must decide it. As a result, merely incorporating AAA rules falls well short of the threshold for delegating gateway questions.

III. Allowing unilateral modification of an arbitration agreement is unconscionable.

On the merits, the agreement here is unconscionable because it reserves to Petitioners a right of unilateral amendment.

"[U]nder South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022). "[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668; *see also Damico*, 437 S.C. at 611, 879 S.E.2d

at 754 (characterizing "these two prongs as procedural and substantive unconscionability, respectively") (citing 17A Am. Jur. 2d *Contracts* § 272). [A]dhesive contracts are not unconscionable in and of themselves **so long as the terms are even-handed**." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756. Unconscionability therefore "requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms." *Id.* at 614, 879 S.E.2d at 756.

A determination of whether a contract is unconscionable depends on all the circumstances of the case. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755 (citing *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012)). This Court has recognized a sliding scale between these two elements of unconscionability—the greater the procedural unconscionability, the less evidence of substantive unconscionability is required. *Id.* at 612, 879 S.E.2d at 755; *see also Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1159 (Fla. 2014) (recognizing a "balancing, or sliding scale, approach" where "both elements must be present, [but] they need not be present to the same degree"); 17A Am. Jur. 2d *Contracts* § 272 ("[T]he agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.").

PIABA addresses each element in turn.

A. Respondents lacked a meaningful choice to enter the arbitration agreement because there is no evidence that those terms were negotiable.

"Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Fundamental unfairness in the bargaining process often arises in contracts of adhesion or "standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542

S.E.2d 360, 365 (2001). "While adhesion contracts are not unconscionable per se, courts tend to look upon them with 'considerable skepticism' because they give rise to 'considerable doubt that any true agreement ever existed to submit disputes to arbitration.'" *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Munoz*, 343 S.C. at 26–27, 644 S.E.2d at 669–70). "

"In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, inter alia, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether 'the plaintiff is a substantial business concern.'" *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). One-sided contract terms also indicate a lack of meaningful choice. *Damico*, 437 S.C. at 611, 879 S.E.2d at 754 (citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 43, 472 S.E.2d 242, 245 (1996)). In *Smith*, the court held that a client lacked a meaningful choice to negotiate an arbitration agreement in a contract of adhesion. *Id.* at 50, 790 S.E.2d at 5. The Court reasoned that a single client of a corporation which does business in 27 states did not represent a substantial enough business concern to give the client any meaningful power to negotiate. *Id*. Consistent with that opinion, six years later *Damico* held that homebuyers lacked meaningful choice to negotiate against a sophisticated homebuilder and contractor which had sold "thousands of homes in the Carolinas." 437 S.C. at 614, 879 S.E.2d at 756. *Damico* lamented the "specious" "common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue." *Id.*

Respondents adeptly address this issue in their brief. But it also bears noting that absent from Petitioners' argument is any suggestion or evidence that they would have agreed to strike or

modify the arbitration clause had any Respondent asked. Recanting that Respondents are purchasers of "luxury second homes" does not mean they enjoyed any bargaining power on these terms. *See* Pet. Br. 20. As one Texas homebuilder admitted, "[t]hose with the gold get to make the rules; if you want to participate, [arbitration agreements] are the rules." Tex. H. Comm. on Civil Practices, Interim Report, 77th Leg., at 8 (2002). This quote encapsulates how arbitration requirements are imposed on buyers as the price of doing business on terms advantageous to the developer. The same is true for the clients which PIABA's members represent: they have no opportunity to negotiate arbitration terms if they wish to open an account with any given firm, so the agreements are quintessential adhesive contracts—"take it or leave it."

Petitioners simply engage in the "specious" practice of "argu[ing] that a particular contract is not one of adhesion when that is plainly untrue." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756. This Court should reinforce what it said in *Damico* and find that the agreements here are procedurally unconscionable.

B. Petitioners' right to unilaterally modify the agreement is one-sided and unreasonably oppressive.

The second prong of unconscionability is a determination of whether the arbitration agreement contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 667. The Court of Appeals correctly held that Petitioners' right to unilaterally modify the agreement "speaks to the one-sidedness of the arbitration agreement." App. 43. And the Fourth Circuit recently agreed that the right to unilaterally modify a contract is substantively unconscionable too, because it renders an arbitration agreement illusory. *See Johnson v. Cont'l Fin. Co., LLC*, 131 F.4th 169, 178 (4th Cir. 2025).

In *Johnson*, the court held language which allowed a defendant to "change *any* term of the Agreement in its *sole discretion*, upon such notice to [Plaintiffs] as is required by law" "rendered the defendant's promises entirely illusory because the unambiguous language permitted it to avoid all of its contractual obligations." *Id.* at 179. Therefore—just as here—there was "insufficient consideration to support an enforceable agreement to arbitrate." *Id.* It does not matter whether the unilateral modification provision is found within the arbitration agreement itself. The mere ability to unilaterally change the arbitration agreement's terms without consideration from both parties, renders the agreement illusory. *Id.* at 179.

IV. If the Court reaches Petitioners' estoppel arguments, the Court must apply traditional estoppel principles rather than special rules developed for arbitration.

Finding the arbitration agreement to be unconscionable would eliminate the need to address the parties' remaining arguments. If the Court does reach them, one argument Petitioners advance is that non-signatories are bound by and can enforce the arbitration agreements under equitable estoppel. Pet. Br. 31–34. PIABA takes no position on whether equitable estoppel applies under these facts. But PIABA does want to ensure the Court applies the correct framework to this issue.

Whether estoppel applies to an arbitration agreement is a question of state law. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019). A state cannot have special estoppel rules for arbitration agreements that do not apply to other contracts. *Morgan*, 596 U.S. at 418 ("[A] court must hold a party to its arbitration contract just as court would to any other kind" and it "may not devise novel rules to favor arbitration over litigation."); *see also id.* ("If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S.

395, 404 n.12 (1967) (holding that a state cannot "elevate [arbitration agreements] over other forms of contracts").

Under South Carolina law, equitable estoppel is a theory designed to prevent injustice which should be used sparingly. *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 180, 71 A.3d 849, 852 (2013)). It should not be used as "a sword to compel arbitration." *Id.* (citing *Hirsch*, 215 N.J. at 180, 71 A.3d at 852). Equitable estoppel has a familiar series of elements which Petitioners do not address in their brief. *See Strickland v. Strickland*, 375 S.C. 76, 84–85, 650 S.E.2d 465, 470 (2007) (stating the elements of equitable estoppel). Instead, Petitioners rely on *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), which sets forth a different—and more permissive—test for estoppel when it comes to arbitration agreements. Pet. Br. 31–34. If the Court reaches Petitioner's equitable estoppel arguments, it should hold that the traditional test applies and not the special formulation developed for arbitration.[4]

Conclusion

The FAA does not permit arbitration to proceed when propped up by ambiguity, unilateral modification, or adhesive terms that undermine meaningful assent. Ensuring that only valid, mutually binding agreements are enforced protects both consumers and the integrity of the arbitral forum. PIABA urges the Court to reaffirm that gateway questions of contract formation belong

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[4] This Court applied *Pearson* in *Wilson* and concluded that estoppel did not apply under it. *Wilson*, 426 S.C. at 338–45, 827 S.E.2d at 174–78. But *Wilson* was decided before the U.S. Supreme Court's decision in *Morgan* underscoring that courts "may not devise novel rules to favor arbitration over litigation" and before this Court's pronouncement in *Palmetto Const. Grp., LLC v. Restoration Specialists, LLC*, 432, S.C. 633, 649, 856 S.E.2d 150, 153 (2021), that "[t]here is . . . no public policy—federal or state—'favoring' arbitration." Because these newer decisions undermine *Pearson*'s use of a special estoppel test for arbitration, this Court is now positioned to recognize that the arbitration-specific estoppel rule is no longer valid.

squarely with the judiciary, the mere incorporation of AAA rules does not wrest that question from the courts, unilateral modification rights render an agreement unconscionable, and standard equitable estoppel principles apply.

Respectfully submitted,

WILLOUGHBY HUMPHREY & D'ANTONI, P.A.

s/R. Walker Humphrey, II
R. Walker Humphrey, II
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
(843) 619-4426

Attorney for Public Investors Advocate Bar Association

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