In the Supreme Court of South Carolina

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S.C. 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, et al.

Respondents,

v.

Palmetto Bluff Development, LLC, et al.

Petitioners.

BRIEF OF SOUTH CAROLINA RESTAURANT AND LODING ASSOCIATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The South Carolina Restaurant and Lodging Association ("SCRLA") is a statewide non-profit organization representing more than 2,400 restaurant, lodging, and hospitality-related businesses. Its members collectively position the hospitality industry as South Carolina's second-largest employer. They serve millions of guests each year, from across the globe, and generate billions of dollars in economic activity.

SCRLA is dedicated to advancing the growth and success of South Carolina's hospitality industry through advocacy, education, and innovation. SCRLA and its members participate regularly in legislative and regulatory processes affecting the industry and have a strong institutional interest in preserving predictability, uniformity, and enforceability in commercial contracting within South Carolina.

This case directly implicates those interests. Arbitration provisions are standard agreements upon which SCRLA's members rely, and predictable enforcement is integral to risk allocation and business planning. The rule adopted by the Court of Appeals, if affirmed, will therefore extend well beyond the parties to this case. SCRLA submits this brief to underscore the broader commercial consequences of that ruling.

No party's counsel has authored this brief in whole or in part or contributed money intended to fund its preparation or submission.

INTRODUCTION

In South Carolina, the phrase "Southern hospitality" has a concrete economic meaning: welcoming and serving millions of travelers who arrive from other states

and countries. The hospitality industry is South Carolina's second-largest employer, and it runs on contracts—membership agreements, guest agreements, vendor arrangements, and service contracts—that allocate risk, define obligations, and provide a predictable framework for relationships that span state lines and international borders. Arbitration clauses are standard features of those contracts. They were drafted on a reasonable expectation, grounded in decades of settled law, that they would be enforced.

SCRLA seeks leave to file this brief because that expectation is now uncertain. This Court has carefully confined its decisions declining to enforce arbitration agreements to circumstances in which challenged provisions were either void by statute or so pervasive that the arbitration mechanism itself could not survive if the challenged provisions were served. SCRLA submits that the Court of Appeals extended this Court's precedents in ways that will unsettle arbitration agreements across South Carolina's hospitality economy if left undisturbed.

ARGUMENT

SCRLA writes separately to add its perspective on three issues. First, the Court of Appeals never reached whether the FAA governs these transactions, holding instead that a front-page statutory notice displaced the more specific choice-of-law terms in the arbitration clause. This reading is foreclosed by basic rules of contract construction. When properly resolved, the FAA applies because these transactions are interstate in nature, as SCRLA's members' daily experience in the hospitality industry confirms. Second, the Court of Appeals held the arbitration agreement

unconscionable on the basis of a general modification clause located outside the arbitration provision itself, a result that controlling authority forecloses. And third, the Court of Appeals declined entirely to analyze severability, though this Court's decisions in *Smith*, *Damico*, and *Huskins* require that inquiry, and they point toward severance here because the challenged provisions do not go to the core of the arbitration mechanism and can be severed without fundamentally altering the bargain struck by the parties.

I. Federal Law Governs.

Before reaching the unconscionability questions, this Court must first resolve which law governs. The Court of Appeals applied the SCUAA on the ground that the membership agreement's front-page notice cited South Carolina Code Section 15-48-10, treating that reference as a contractual selection of state arbitration law. That holding misreads both the notice and the agreement for the reasons Petitioners explain, *see* Pet. Br. 9–15, and for the additional reasons set out below.

A. The Arbitration Clause's Specific Terms Control Over the Front-Page Notice, and Those Terms Reflect a Deliberate Choice of Federal Arbitration Procedure.

The Court of Appeals elevated a boilerplate statutory notice on the front page of the membership agreement over the arbitration clause at issue here. That inversion of interpretive priorities cannot be squared with the foundational contract-construction rule that specific provisions govern over general ones. *See Crenshaw v. Erskine Coll.*, 432 S.C. 1, 28, 850 S.E.2d 1, 15 (2020) ("A proper construction of a contract requires the court to give effect to specific terms over any general

language."). The front-page notice is exactly what it purports to be: a standardized statutory notice alerting parties to the existence of an arbitration clause. It is not itself a contract, and it is not itself the arbitration clause.

The specific terms of the arbitration clause confirm that the parties intended federal arbitration law to govern the procedural question of the forum in which disputes would be heard. The clause limits the choice of law to the "*substantive* laws of South Carolina" (emphasis added), and that word selection is dispositive. The canon of construction *inclusio unius est exclusio alterius*—"to express or include one thing implies the exclusion of another"—means that the parties' deliberate choice to invoke only South Carolina's substantive law necessarily excludes its procedural arbitration law from the agreement's reach. *Hodges v. Rainey*, 341 S.C. 79, 86–87, 533 S.E.2d 578, 582 (2000). That reading is further confirmed by the parties' incorporation of the AAA Commercial Arbitration Rules, which itself constitutes clear and unmistakable evidence of an intent to arbitrate within a federal framework. *See* Pet. Br. 10–12. The parties' explicit limitation to state substantive law, combined with its adoption of AAA procedure, reflects a deliberate choice: South Carolina law governs the merits; the FAA governs the procedural questions.

B. The Transaction Involves Interstate Commerce, and the FAA Therefore Applies by Its Own Terms.

If this Court concludes that the parties did not unambiguously select state arbitration law, then the interstate commerce question the Court of Appeals twice declined to reach becomes squarely presented. The answer to that question, under controlling federal and South Carolina authority, is that the FAA applies.

South Carolina's economy is built on hospitality, and hospitality is built on interstate commerce. South Carolina's hospitality industry serves the world. SCRLA's more than 2,400 member businesses—hotels, resorts, clubs, and lodging operators—exist almost entirely to attract, accommodate, and profit from guests who travel here from other states and other countries. The lodging industry at issue in this case is an extension of the same commerce in which SCRLA's members have always operated. A property listed on a national rental platform, marketed to out-of-state travelers, booked through an interstate transaction, and governed by a membership agreement that controls what amenities those travelers may access is not a local real estate transaction with some incidental interstate features; it is an interstate commercial arrangement from the moment of listing to the moment of checkout.

The commercial structure at issue in this case is replicated across the full breadth of South Carolina's hospitality economy which is interstate in every meaningful sense. The guests checking into a Charleston hotel booked through a national reservation platform, the family from Ohio seated at a Myrtle Beach restaurant on a July Saturday, the corporate group from Atlanta holding a conference at a Hilton Head resort, the wedding party from New York filling an inn on the South Carolina coast for a long weekend—none of these are local transactions in any meaningful commercial sense.

The membership agreements, guest agreements, vendor contracts, and service arrangements that govern these relationships are the instruments through which

South Carolina's second-largest industry conducts its business. Many of them contain arbitration clauses. All of them were drafted against the backdrop of the settled expectation that those clauses would be evaluated under a uniform federal standard.

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The Pennsylvania Supreme Court has recognized the Act's "overarching purpose" is "to ensure the enforcement of arbitration [agreements] according to their terms," and when competing considerations arise, "enforcement trumps." *Taylor v. Extendicare Health Facilities, Inc.,* 147 A.3d 490, 506 (Pa. 2016). The Nevada Supreme Court has emphasized that state courts, in turn, "must abide by the FAA, which is 'the supreme law of the land.'" *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 121 (Nev. 2015) (quoting *Nitro-Lift Techs., LLC v. Howard*).

Furthermore, courts across the country have recognized that this mandate leaves little room for states to recalibrate policies underlying arbitration. After *Concepcion*, the Missouri Supreme Court has held that courts "may not apply state public policy concerns to invalidate an arbitration agreement." *Robinson v. Title Lenders, Inc.,* 364 S.W.3d 505, 515 (Mo. 2012). The Delaware Supreme Court has explained that its state "benefits from adopting a widely held interpretation" of arbitration principles in order to remain aligned with the prevailing national view. *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006).

Arbitration, after all, advances legitimate systemic and contractual interests. The Arkansas Supreme Court aptly noted that arbitration is "a less expensive and

more expeditious means of settling litigation and relieving docket congestion," and "[a]ny doubts and ambiguities of coverage will be resolved in favor of arbitration." *BHC Pinnacle Point Hosp., LLC v. Nelson,* 594 S.W.3d 62, 70 (Ark. 2020). Arbitration agreements allocate dispute-resolution costs in advance, promote efficiency, and provide procedural certainty between contracting parties. For businesses and individuals alike, the ability to rely on those allocations promotes efficiency and stabilizes expectations.

II. The Court of Appeals' Unconscionability Analysis Rests on Legal Distinctions That Are Commercially Untenable, and Its Severability Holding Compounds The Error.

The Court of Appeals held the Palmetto Bluff arbitration agreement unconscionable on two grounds: (1) the Club's reservation of the right to modify its governing documents rendered the arbitration commitment illusory, and (2) the clause's explicit prohibition on treble damages deprived respondents of a statutory remedy guaranteed by SCUTPA. The Court of Appeals' analysis rests on formalistic distinctions that, if affirmed, will unsettle arbitration agreements across South Carolina's hospitality industry.

The Court of Appeals acknowledged the governing principle articulated in *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005), and applied by the federal district court in *Hicks v. Brookdale Senior Living Communities*, that a unilateral modification right does not infect an arbitration clause unless that right is found within or specifically directed at the arbitration agreement itself. Having acknowledged the rule, the court declined to follow it because the arbitration clause

appeared in the same integrated document rather than in a "separate policy." That is a distinction without a commercially meaningful difference.

The court's reliance on *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), is particularly difficult to reconcile with its conclusion. *New Hope* holds that, even where the overall contract is unenforceable, the arbitration provision survives unless the ground of unenforceability "specifically relates to the arbitration provision." The modification clause here—which reserves to the Club the right to adjust membership terms, amenity policies, and operational procedures—does not specifically relate to the mechanism of dispute resolution. The Court of Appeals never grappled with this tension.

The commercial consequences of this holding fall with particular force on SCRLA's members. Hotels, clubs, resorts, and lodging operators do not maintain separate "policies" for every operational term and append arbitration clauses in standalone documents. They use comprehensive membership agreements that address dues, access, modification authority, and dispute resolution together, because that is how ongoing commercial relationships are structured.

III. This Court's Decisions in *Smith*, *Damico*, and *Huskins* Require Severance of Any Problematic Provisions Rather Than Invalidation of the Entire Agreement.

"For centuries, the law has stricken illegal parts from contracts and upheld the legal parts, as long as the central purpose of the parties' agreement did not depend upon the illegal part." *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 595, 910 S.E.2d

474, 476 (2024), *reh'g denied* (Jan. 16, 2025), *cert. denied,* 146 S. Ct. 91, 223 L. Ed. 2d 8 (2025). The absence of a severability clause *may* prevent a court from severing a contract when it signals the parties' intent that the agreement stand or fall as written. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016). Likewise, where unconscionable provisions are so pervasive that only a disintegrated fragment would remain after severance, or where a provision is so material that excising it would rewrite rather than preserve the bargain, courts decline to sever problematic provisions. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 618, 879 S.E.2d 746, 758 (2022); *Huskins*, 444 S.C. at 597, 910 S.E.2d at 477. In *Huskins*, the clause purported to shorten the statutory limitations period to ninety day making that provision void by express command of S.C. Code Ann. § 15-3-140. Because removing that provision would have expanded the limitations period by several orders of magnitude, the Court held it went to the core of the agreement and could not be severed. *Id.*

The provisions at issue here bear none of those characteristics. Even assuming any term was found unenforceable, neither a damages limitation applied within arbitration nor a general modification clause reserving operational flexibility operates as a gatekeeping device that forecloses claims or circumvents the arbitration mechanism itself. The severability question turns on whether the challenged provision goes to the core of the arbitration mechanism and whether anything functional survives its removal. Here, the answer to both questions points toward severance. The public policy concerns that animated *Damico* and *Huskins*—

protecting inexperienced homebuyers from provisions designed to defeat their claims before arbitration could begin—are not implicated by remedial and operational terms in a commercial agreement among sophisticated parties. Construing the doctrine to require severance in these circumstances is faithful to this Court's precedents, avoids the needless forfeiture of an otherwise functional arbitration agreement, and keeps South Carolina law in harmony with the federal policy of enforcing arbitration agreements according to their terms.

CONCLUSION

SCRLA's members entered into arbitration agreements in reliance on the settled expectation that those agreements will be enforced. That expectation is a foundation on which commercial relationships in South Carolina's hospitality industry are built. The Court of Appeals' decision, if affirmed, would unsettle that foundation in ways that extend far beyond the parties to this dispute. SCRLA respectfully urges this Court to reverse.

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