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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2026-000043
Case No. 2024-CP-10-04606

Frank Perrelli, Jr.,.....Appellant,
v.

Vacation Inspirations, Destination Travel, LLC, Joseph Shirley, Randy Gardner, and Jeffrey Pumilia.....Respondents,

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PETITION FOR REHEARING

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INTRODUCTION

The Federal Arbitration Act recognizes arbitration as an alternative to in court dispute resolution, so long as it provides certain minimum guarantees of due process. Due process is guaranteed by both the United States Constitution and the South Carolina Constitution regardless of whether a dispute is resolved in court or through a different "mode of trial," such as arbitration. A core tenet of due process is adjudication before an impartial forum. When the arbitration process lacks neutrality, litigants are deprived of one of the most fundamental "substantial rights"—due process itself.

Although orders compelling arbitration are ordinarily not immediately appealable, this is an extraordinary case in which Appellant's substantial rights are directly implicated. The trial court's Orders prohibits Appellant from litigating his case in a neutral judicial forum. Moreover, Appellant is compelled to submit to an arbitration scheme that lacks an impartial decisionmaker and fails to otherwise provide even minimal due-process protections.

The dispute resolution process devised by Respondents and compelled by the trial court amounts to a "sham" process—one so "warped" and "void of due process" that it cannot serve as a legitimate substitute for adjudication in a court of law. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); *see also Doe v. TCSC, LLC*, 430 S.C. 602, 613, 846 S.E.2d 874, 879 (Ct. App. 2020) ("The *Hooters* decision struck down an arbitration clause because it incorporated rules so 'warped' and void of due process that any arbitration under them would have been a 'sham.'"). The central defect rendering this process devoid of minimum due process protections—and therefore outside the scope of the Federal Arbitration Act—is Respondents' unilateral power to select the arbitrator. The Arbitration Provision's operative language is undisputed: "The arbitrator shall be selected by [Vacation Inspirations]." A one-party arbitrator-selection mechanism of this

kind is "fundamentally unfair, substantively unconscionable, unenforceable and void" and it "undermine[s] neutrality and must fail." 1 Oehmke, Commercial Arbitration § 54:5; *see also id*. § 10:37 ("When one party exercises exclusive control over the pool from which the arbitrator is selected, the selection process is fundamentally unfair and lacks neutrality, preventing arbitration from being an effective substitute for a judicial forum."); *see also Flores v. New York Football Giants, Inc*., 150 F.4th 172, 185 (2d Cir. 2025) ("[W]e additionally find persuasive some of the reasoning of the Fourth and Sixth Circuits, respectively, which refused to enforce arbitration provisions because of the unilateral selection of arbitrators." (citing *Hooters*, 173 F.3d at 939–40 & *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493–94 (6th Cir. 2004))).

Because such an arbitral scheme necessarily deprives parties of "a fair hearing before a legally constituted impartial tribunal," it lacks "[p]rocedural due process" and therefore affects substantial rights. *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). Where, as here, an order implicates the fundamental substantial right of due process, S.C. Code Ann. § 14-3-330(2) provides that the order is immediately appealable.

Immediate appeal is not only permitted but required. Under South Carolina law, "failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (collecting cases). Courts applying the Federal Arbitration Act likewise recognize that "[t]he general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair." *Walker v. Ryan's Fam. Steak Houses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2005) (citing *McMullen*, 355 F.3d 485, 494 n. 7). In such circumstances, "'the arbitral forum is not an effective substitute for a judicial forum,' and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial

review." *Id*. (quoting *McMullen*, 355 F.3d at 494 n. 7); *see also Hooters,* 173 F.3d at 941 (same). Therefore, Appellant respectfully requests rehearing pursuant to Rule 221, and that the Appeal proceed to briefing on the merits.

BACKGROUND

A fuller discussion of the factual and procedural background is warranted where, as here, the Court of Appeals has not yet been presented with the substance of the appeal through briefing or argument. Describing the full scheme implemented by Respondents is necessary to explain why Appellant's substantial right to due process is at risk, rendering the trial court's order immediately appealable under S.C. Code Ann. § 14-3-330(2).

The Trial Court's order compelling arbitration under the Federal Arbitration Act (the "FAA") strips the Appellant-consumer of the most basic attribute of adjudication: a fair and neutral forum. The "arbitration" compelled here is "arbitration in name only." *See Flores*, 150 F.4th at 183 (where an agreement, "[a]t a structural level, [] lacks the requisite independence between parties and arbitrator that is fundamental to the FAA's conception of arbitration," it is nothing more than "arbitration in name only"). The Arbitration Provision is conspicuously embedded within a broader Purchase Agreement that Appellant alleges in his Verified Complaint is unconscionable. The Arbitration Provision empowers the business—unilaterally and without constraint—to select the arbitrator and venue, impose commercial arbitration rules on unsophisticated consumers, bypass any reputable administering body, and, after an inevitably adverse award issued by its hand-picked decision-maker, saddle the consumer with the full costs of the proceeding.[1] The result is not an alternative forum authorized by the FAA, but a private non-

[1] The arbitration provision's language is:

> Any controversy, claim or dispute arising out of or relating to this Purchase Agreement, shall be resolved and decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") (however, not under the auspices of AAA)

neutral and partial system designed to deter claims and predetermine outcomes. This structure squarely contravenes the FAA, South Carolina law, and due process rights under the U.S. Constitution.

The arbitration clause does not exist in isolation, however. It is one component of a broader, multi-state scheme that has ensnared hundreds of consumers over more than a decade. Appellant is merely one of the latest victims of practices that have drawn repeated scrutiny from state enforcement authorities across the country, including Texas and Georgia.[2] In fact, there are two other cases against Respondent-Defendants with similar allegations in South Carolina Courts. *See Skoler v. Vacation Inspirations*, No. 2024-CP-1002646 (S.C.Com.Pl.), *on appeal*, *Skoler v. Vacation Inspirations*, No. 2026-000058 (Ct. App.); *Sawyer v. Vacation Inspirations*, No. 2024-CP-1002642 (S.C.Com.Pl.). *See* Ex. A; Ex. B; Ex. C.

In 2012, Randy Gardner, Joseph Shirley, and Vacation Station settled with the Georgia Governor's Office of Consumer Protection resolving allegations they "ha[ve] used, are using, or [were] about to use unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce as declared unlawful by O.C.G.A. § 10-1-390 *et seq*." Ex. D at 2. The settlement required the payment of consumer restitution and a $100,000 civil penalty. *Id*. at 12–13.

Five years later, the Texas Attorney General reached a separate agreement with Joseph Brandon Shirley and Randy Lee Gardner following allegations that their travel-service operations

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> and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator shall be selected by [Vacation Inspiration]. Upon final award, arbitrator compensation and cost of the location shall be paid by the non-prevailing party. The arbitration shall take place in Charleston, S.C. at the Charleston County Courthouse or other location determined by Vacation Inspirations.

[2] *See* Ex. D; Ex. E. Appellant files these documents in accordance with South Carolina Rule of Appellate Procedure 240(c)(3), which provides "[w]here the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions."

violated the Texas Deceptive Trade Practices Act and other Texas statutes. Under that agreement, individuals and entities—many of whom overlap with Defendants here—were required to pay substantial consumer restitution, civil penalties, and attorneys' fees. *See* Ex. E.

South Carolina consumers have fared no better. According to the South Carolina Department of Consumer Affairs, the agency has received at least 130 complaints concerning Vacation Inspiration's allegedly deceptive practices since 2014. *See* Ex. F; Ex. G.

Vacation Inspiration's "business model" follows a familiar pattern: unsuspecting consumers visiting the Charleston area are lured with promises of "free" gifts in exchange for attending a purported travel presentation—only to discover that those promises come at a price.

This pattern has been publicly documented. In a November 2022 report by WCSC-TV in Charleston, "Customers' complaints with the South Carolina Department of Consumer Affairs accuse the business of a high-pressure sales situation where they were told how to fill out forms, including checking 'no' when asked on the forms if they were pressured into the deal. This "high-pressure sales situation" is exactly what the Appellant experienced. Ex. H.

At one of Respondents' sales presentations in October 2022, Appellant was subjected to a tightly controlled, hours-long sales presentation in which independent research was discouraged and steep expiring discounts were repeatedly framed as a "once-in-a-lifetime" opportunity. (Ex. I ¶¶ 12–33.) Based upon the representations made in the presentation and discounts available, Appellant agreed to purchase a membership. (*Id*. ¶ 26.) He was then immediately presented with paperwork and directed to sign on the spot, without time to read the documents carefully, seek advice, or meaningfully pause or walk away. (*Id*. ¶¶ 27–33.)

The paperwork consisted of a six-page pre-printed purchase agreement with no rescission period. (Ex. J (Purchase Agreement).) The only page of the agreement that did not require either a

signature or initialization was the page containing the "dispute resolution" clause. (*Id*. at 4.) This Arbitration Provision appeared among other contractual terms and was not mentioned or explained to Appellant at the time of signing. (*Id*.) The Arbitration Provision—containing numerous one-sided and oppressive terms is part of a broader structure designed to ensure that Vacation Inspiration avoids accountability in court and never faces adjudication before a fair and neutral tribunal. (*Id*.)

As recognized by courts across the country and affirmed by leading arbitration treatises, a structurally unfair arbitration scheme lacks due process protections and cannot be enforced under the FAA. Pre-arbitration judicial intervention is therefore necessary to prevent irreparable harm to consumers and to ensure that structurally biased mechanisms do not foreclose meaningful adjudication.

STANDARD OF REVIEW

Ordinarily, a petition for rehearing "shall state with particularity the points overlooked or misapprehended by the court." Rule 221, SCACR. Where, however, rehearing is sought following a *sua sponte* dismissal issued before briefing and without any opportunity to be heard, that heightened standard should not apply. In such circumstances, Appellant respectfully submits that the question of appellate jurisdiction should be reviewed *de novo*, because Appellant was denied notice and an opportunity to present any arguments—including his jurisdictional arguments—in the first instance. Moreover, when appeals, such as this one, "present a novel question of law, appellate courts decide the case de novo." *Portfolio Recovery Assocs., LLC v. Campney*, 441 S.C. 36, 46, 892 S.E.2d 321, 326 (Ct. App. 2023).

ARGUMENT

I. Pre-Briefing Dismissal Order Deprived Appellant of Notice and an Opportunity to Be Heard

The *sua sponte* dismissal of the appeal—only twelve (12) days after the Notice of Appeal was filed and without notice or an opportunity to be heard—denied Appellant due process. Rehearing is therefore warranted on this ground alone. *See* 16B Am. Jur. 2d Constitutional Law § 1017 ("Dismissal of an appeal without a prior notice warning of imminent dismissal is a denial of due process.").

A. Due Process

Procedural due process rights "inhere in the due process clause of the United States and South Carolina Constitutions." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) (citing United States Const. amend. XIV; S.C. Const. art. I, § 3.) As this Court has explained, "[t]he Due Process Clause demands notice reasonably calculated under ***all circumstances*** to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) (emphasis added). Consistent with these principles, "notice after the fact does not satisfy due process." 16B Am. Jur. 2d Constitutional Law § 982; *see also Lewis v. State of N. Y.*, 547 F.2d 4, 6 (2d Cir. 1976) ("Failure to afford plaintiffs an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal.")

B. Due Process Rights in the Context of a Rehearing

"A motion for rehearing is not a sufficient, meaningful opportunity to be heard with regard to the underlying order that is the subject of the motion, as required to satisfy due process." 16B Am. Jur. 2d Constitutional Law § 1016. Rehearing ordinarily imposes a higher burden than applies in the first instance, requiring the movant to demonstrate error in a decision already rendered rather

than permitting argument before rights are decided.[3] Requiring rehearing under these circumstances offends basic principles of fairness. Appellant was never afforded a *hearing*—in any form—or any prior opportunity to present their jurisdictional arguments. As courts have recognized, "[t]o be fair or meaningful, the opportunity to be heard must be provided ***before*** rights are decided." *Richard v. Bank of Am., N.A.*, 258 So. 3d 485, 488 (Fla. Dist. Ct. App. 2018) (emphasis added).

Rehearing is also procedurally complicated because it ordinarily follows briefing and argument—neither of which has occurred here. *See* 16 S.C. Jur. Appeal and Error § 147 ("[C]ourt will not grant a rehearing to consider points not presented in the briefs or arguments on which the case was submitted for decision" (citing *Atl. Coast Lumber Corp. v. Litchfield*, 90 S.C. 363, 73 S.E. 728, 729 (1912))); *see also Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.")The parties were never afforded an opportunity to present their arguments so the traditional rehearing framework is an imperfect fit.

C. There are Appropriate Alternatives to Address Appellate Jurisdiction

Routinely, when appellate jurisdiction is not immediately apparent, the respondent raises the issue by filing a motion to dismiss for lack of appellate jurisdiction. *E.g., Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) ("Physician filed a motion to dismiss the appeal for lack of jurisdiction."); *State v. Devore*, 416 S.C. 115, 118, 784 S.E.2d 690, 691 (Ct. App. 2016) ("On October 10, 2014, the State filed a motion to dismiss for lack of appellate

[3] As discussed *infra*, Appellant nevertheless demonstrates that the dismissal of his Appeal is erroneous and warrants rehearing.

jurisdiction."). That procedure provides notice and a meaningful opportunity to be heard before the court resolves jurisdiction or reaches the merits.

By contrast, a *sua sponte* dismissal deprives the appellant of notice, shifts the burden to the appellant, and imposes a heightened standard without prior warning, resulting in additional prejudice. Moreover, appellate jurisdiction is commonly addressed through briefing as part of the appeal itself. *E.g., Lemmons v. Macedonia Water Works, Inc.*, 431 S.C. 186, 190, 847 S.E.2d 471, 474 (Ct. App. 2020) ("Utility did not file a separate motion to dismiss this appeal, but rather raised the issue of appellate jurisdiction for the first time in its appellate brief."). Either of these alternative approaches would have afforded Appellant the notice and opportunity to be heard that due process requires.

D. The Dismissal Order must be Vacated and the Appeal Reinstated on Due Process Grounds Alone

The South Carolina Supreme Court's decision in *Bundy v. Shirley* is instructive. 412 S.C. 292, 302, 772 S.E.2d 163, 169 (2015). As described by the Supreme Court, the Court of Appeals denied a petition for rehearing prior to reviewing a timely filed reply to a return of the petition for rehearing. *Id*., 412 S.C. at 302; 772 S.E.2d at 169. This Court later "recogniz[ed] the error," "withdrew the original opinion, and filed a substituted opinion" after having "reviewed [the] reply." *Id*., 412 S.C. at 303; 772 S.E.2d at 169. The Supreme Court concluded that the corrective process—the filing of a substituted opinion after withdrawing the original opinion and consideration of the reply—was a sufficient "opportunity to be heard" such that the litigant's "right to due process was not violated." *Id*.

Notably, even in that context—which presented a far less severe violation of due process—the Supreme Court and the Court of Appeals acknowledged that deciding a rehearing petition before receipt of a reply constituted error. And critically, rehearing arose after full briefing, oral

argument, and the issuance of a reasoned appellate opinion. See *Bundy v. Shirley*, Case No. 2012-208007 (Ct. App.).

The Dismissal Order was entered only twelve (12) days after the Notice of Appeal was filed and before any briefing whatsoever; as a result, Appellant was deprived of any opportunity to present his jurisdictional arguments. Appellant had no meaningful opportunity to address appellate jurisdiction, as the sole filing in the appeal to date—the Notice of Appeal—is not the proper vehicle for presenting substantive jurisdictional argument. Accordingly, the Court should afford Appellant an opportunity to be heard on appellate jurisdiction, grant rehearing, vacate the Dismissal Order, reinstate the Appeal.

II. The Dismissal Order Overlooked Two Bases for Appellate Jurisdiction

With respect to appellate jurisdiction, Appellant has two principal bases for immediate appealability: (1) under S.C. Code Ann. § 14-3-330, because the order affects a substantial right; and (2) under *Toler's Cove*, because the issues are "capable of repetition" and "need to be addressed." These grounds are discussed below, though Appellant respectfully welcomes the opportunity to provide full briefing on appellate jurisdiction should the Court find it helpful.

A. The Trial Court's Order is Immediately Appealable Under S.C. Code Ann. § 14-3-330 Because it Affects Appellant's Substantial Right

As a threshold matter, Appellant does not contend that orders compelling arbitration are categorically or routinely appealable. Nor does Appellant dispute that arbitration *may* serve as a permissible alternative to judicial adjudication where it provides a fair and neutral forum.

This Appeal instead concerns a narrow and exceptional circumstance: an order compelling participation in a dispute-resolution scheme that lacks fundamental due process protections because neutrality is absent at its core. Therefore, it cannot qualify as arbitration within the meaning of the Federal Arbitration Act or South Carolina law. Where the process compelled is

nothing but a "sham process," immediate appellate review is required because the order affects a substantial right that cannot be vindicated later.

1. *S.C. Code Ann. § 14-3-330(2)*

The order compelling arbitration is immediately appealable under S.C. Code Ann. § 14-3-330 because it affects a substantial right. *See Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 425, 887 S.E.2d 153, 156 (Ct. App. 2023) ("'An interlocutory order is not immediately appealable ***unless*** it involves the merits of the case or ***affects a substantial right***.'" (citation omitted) (emphasis added)). Section 14-3-330(2) of the South Carolina Code provides that an order is immediately appealable where it "affects a substantial right." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005).

A substantial right is affected where immediate appellate review is required "to preserve a party's constitutional rights that would otherwise be lost." *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004). Interlocutory appeals are also "allowed in situations where the substantial right could not be vindicated on appeal after the case." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). As Black's Law Dictionary explains, a "substantial right" as "[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right." RIGHT, Black's Law Dictionary (12th ed. 2024). The critical substantial right here is Appellant's right to due process. Specifically, the right to adjudication before a fair and impartial tribunal. An adjudicative process that is so "infected with [] unfairness as to . . . [amounts to] a denial of due process." *State v. Rudd*, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003). "'[P]rocedural due process requires . . . proper standards for adjudication,'" *Whitehurst v. Town of Sullivan's Island*, 446 S.C. 137, 149, 919 S.E.2d 402, 409 (2025) (quoting *State v. Michau*, 355 S.C. 73, 76-77, 583 S.E.2d 756, 758 (2003)), and "a fair hearing before a legally constituted

impartial tribunal," *Legg*, 416 S.C. at 13, 785 S.E.2d at 371. "Due process, in arbitration, means satisfying 'minimal requirements of fairness' . . . [achieved] when parties have had adequate notice and opportunity to be ***heard by unbiased decision makers***." *McMahan & Co. v. Dunn Newfund I, Ltd.*, 230 A.D.2d 1, 4 (N.Y. Sup. Ct. 1st Dep't 1997).

South Carolina courts have repeatedly held that where an order changes the manner in which a dispute will be adjudicated—and where delayed review would foreclose meaningful relief—the order affects a substantial right and must be reviewed immediately. *See, e.g, Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) ("[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14–3–330(2) (1977) and must, therefore, be appealed immediately."). Where, as here, an order "affect[s] the mode of trial[,]" it "affect[s] substantial rights under S.C. Code Ann. § 14–3–330(2) and must, therefore, be appealed immediately." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). "Failure to immediately appeal such an order forever bars appellate review." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Immediate appealability under S.C. Code Ann. § 14-3-330(2) is justified because the "substantial right[s] could not be vindicated on appeal after the case." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000).

2. *The Order Compels a Structurally Biased Process That Eliminates Neutral Adjudication and Alters the Mode of Trial*

The Arbitration Provision at issue contains facial and structural defects that go to the heart of adjudicative fairness. The Arbitration Provision's language is undisputed:

> Any controversy, claim or dispute arising out of or relating to this Purchase Agreement, shall be resolved and decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") (however, not under the auspices of AAA) and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator shall be selected by [Vacation Inspiration]. Upon final award, arbitrator compensation and cost of the location shall be paid by the non-prevailing party.

> The arbitration shall take place in Charleston, S.C. at the Charleston County Courthouse or other location determined by Vacation Inspirations.

By its express terms, the provision disclaims administration by any reputable arbitral organization, imposes commercial arbitration rules on unsophisticated consumers, and shifts the full costs of the proceeding onto the consumer if they lose under such a scheme. Most critically, it eliminates neutrality altogether by granting the drafting party unilateral authority to select the arbitrator: "The arbitrator shall be selected by [Vacation Inspirations]."

The arbitral scheme imposed by Respondents is fundamentally unfair and "'unworthy even of the name of arbitration' and thus falls outside of the FAA's protection." *Flores*, 150 F.4th at 183 (quoting *Hooters*, 173 F.3d at 940). Such a scheme cannot plausibly function as a fair substitute for judicial adjudication. "The Supreme Court has recognized that arbitration must be a fair forum." *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 618 (D.S.C. 1998), *aff'd*, 173 F.3d. As courts have long recognized, "'[a]ny tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias.'" *Flores*, 150 F.4th at 183 (quoting *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 148 (1968)). Neutrality and an impartial decisionmaker are the minimum prerequisites of any adjudicative forum, whether judicial or arbitral. "In the context of arbitration agreements, courts should 'focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.'" *Bennett v. ACS Primary Care Physicians-Se. P.C.*, 444 S.C. 458, 486, 908 S.E.2d 110, 125 (Ct. App. 2024) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668). Where the process vests one party with exclusive control over the selection of the decisionmaker and strips away institutional safeguards designed to ensure independence and fairness, the resulting forum lacks even the baseline procedural protections required by due process. *E.g., Hooters*, 173 F.3d at 940 (noting that arbitration is "a system whereby disputes are

fairly resolved by an impartial third party" and that a "scheme whereby one party to the proceeding so controls the arbitral panel" is not arbitration, but rather "a sham system").

The defects here are apparent on the face of the Arbitration Provision. The structure itself predetermines the absence of neutrality and creates an inherent risk of bias that no post hoc review can cure. Because the trial court's order compels Appellant to submit to this structurally biased process, it deprives him of his substantial right to a fair and neutral adjudicative forum. That deprivation affects a fundamental constitutional right—procedural due process. This cannot be meaningfully remedied after arbitration proceeds. Accordingly, the order affects Appellant's substantial rights and is immediately appealable under S.C. Code Ann. § 14-3-330(2).

3. *Structural Unfairness Pervades the Arbitration Provision and Fails as a Legitimate Arbitral Mechanism*

The lack of fairness does not end with the unilateral arbitrator-selection provision; it pervades the Arbitration Provision in its entirety. Compounding that defect, the scheme empowers the same unilaterally selected arbitrator to decide whether his own appointment mechanism, and the remainder of the Arbitration Provision, is valid or unconscionable. Respondents have constructed a deliberately one-sided dispute-resolution scheme designed to evade scrutiny of their unfair and deceptive practices. These practices have previously resulted in enforcement actions, settlements, monetary penalties, and victim restitution imposed by the Texas Attorney General and the Georgia Attorney General. *See* Ex. D; Ex. E.

In addition to the unilateral arbitrator selection provision, Respondents have provided that the dispute "shall be resolved and decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the 'AAA') (however, not under the auspices of AAA)." (Arbitration Provision.)

First, Respondents drafted the Arbitration Provision to include the AAA Commercial rules. This is an apparent attempt to have their unilaterally-selected arbitrator decide whether the Arbitration Provision is invalid or unconscionable. That includes deciding whether the very appointment mechanism that put the unilaterally-selected arbitrator in place is valid. Such a result is untenable.

Second, Respondents themselves drafted the Arbitration Provision to avoid administration by a reputable arbitral provider by expressly providing that arbitration would proceed "not under the auspices of AAA." That drafting choice is significant. Under AAA Consumer Arbitration Rule R-1(a), "parties shall be deemed to have made the Consumer Arbitration Rules a part of their arbitration agreement when they have provided for arbitration by the American Arbitration Association ("AAA") and the arbitration agreement is within a consumer agreement. If no rules are specified, or there is a different set of AAA rules named in the arbitration agreement, these Rules and any amendment of them shall apply . . ." Consumer Arbitration Rules of the American Arbitration Act (the "AAA Consumer Rules"), R-1(a).[4] In short, the AAA rules are clear: consumer arbitration agreements invoking the AAA are governed by the Consumer Rules.

Third, the Arbitration Provision is structured to avoid the application of the AAA Consumer Arbitration Rules, which impose core consumer-protection requirements incompatible with Respondents' scheme. Those Rules provide that the consumer pays only the filing fee while the business bears the remaining arbitration costs, *see* AAA Consumer Arbitration Rules R-1(c), R-12; AAA Consumer Arbitration Rules Administrative Fee Schedule, and further require that the

[4] This reflects the reality that most consumer contracts are contracts of adhesion and if the more sophisticated party were allowed to draft a consumer arbitration agreement to avoid consumer rules, this would effectively nullify the consumer rules. This cannot be what the law wants and the AAA rules reflect that.

arbitration "substantially and materially complies with the due process standards of the Consumer Due Process Protocol." AAA Consumer Arbitration Rules R-1(c).

The Consumer Due Process Protocol, in turn, requires that "[t]he Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute." "[T]he proceedings should be conducted at a location which is reasonably convenient to both parties." AAA Consumer Due Process Protocol. By excluding AAA administration, the Arbitration Provision eliminates these fundamental safeguards. Accordingly, the process compelled here lacks the minimum fairness and neutrality required of a legitimate arbitral forum.

Fourth, the AAA will administer consumer arbitrations only where the process is fundamentally fair and complies with its Consumer Due Process Protocol. The Arbitration Provision here fails that threshold. It requires that "arbitrator compensation and cost of the location shall be paid by the non-prevailing party" and mandates that arbitration occur "at the Charleston County Courthouse or other location determined by Vacation Inspirations." Those terms conflict with the AAA's consumer arbitration requirements, including cost-allocation limits and forum-convenience standards designed to ensure neutrality and accessibility. As drafted, the Arbitration Provision therefore could not be administered by the AAA, further underscoring that Respondents deliberately structured the process to operate outside the safeguards of a reputable arbitral institution.

Taken together, these features reveal an arbitration scheme that is structurally incapable of providing a fair and neutral forum. By combining unilateral arbitrator selection, avoidance of reputable administration, cost-shifting designed to deter claims, and venue control favoring Respondents, the Arbitration Provision abandons the basic attributes of adjudication. That

structure is antithetical to due process and fundamentally incompatible with the FAA's conception of arbitration. The provision therefore fails as a matter of law and cannot be enforced.

4. *This is the Appropriate Posture for this Appeal*

Ordinarily, interlocutory appeals are disfavored so as to avoid piecemeal litigation and promote judicial efficiency. *Breland v. Love Chevrolet Olds, Inc.,* 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). ("The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.") Here, however, immediate appellate review promotes—not undermines—efficiency by preventing the parties from proceeding through an arbitration process that is structurally biased and incapable of providing a neutral adjudication, and likely to result in an award subject to vacatur.

Judicial efficiency supports addressing the structural defect now before arbitration because the "system of warped rules" promulgated by Respondents is "so skewed in its favor that [Appellants] ha[ve] been denied arbitration in any meaningful sense of the word." *Hooters,* 173 F.3d at 941. "To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution." *Id*.

Numerous federal courts applying the Federal Arbitration Act have likewise recognized that structural defects apparent at the outset—such as a unilateral arbitrator-selection provision—should be addressed before arbitration is compelled. In *Walker*, the Sixth Circuit Court of Appeals explained that "the general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair." 400 F.3d at 385 (citing *McMullen,* 355 F.3d at 494 n.7.) In such a case, 'the arbitral forum is not an effective substitute for a judicial forum,' and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial review." *Id.* (quoting *McMullen,*

355 F.3d at 494 n. 7.) Indeed, the Fourth and Sixth Circuit Courts of Appeal both recognized that procedural unfairness inherent in an arbitration agreement may be challenged before the arbitration." *McMullen*, 355 F.3d 485, 494 n.7 (6th Cir. 2004) (first citing *Hooters,* 173 F.3d; then citing *Floss v. Ryan's Fam. Steak Houses, Inc.,* 211 F.3d 306 (6th Cir. 2000)). Requiring parties to proceed through a structurally unfair arbitration only to challenge its validity later would defeat both efficiency and the fundamental purpose of arbitration as a fair alternative to judicial adjudication. As in *Flores*, the Arbitration Provision here "contractually provides no independent arbitral forum" and "[i]t would make little sense if the [FAA] nonetheless required the courts to compel parties to arbitrate their claims in a forum that is indisputably partial." 150 F.4th at 184.

B. The Trial Court's Order is Immediately Appealable Under Toler's Cove Because the Issues are "Capable of Repetition" and "Need to be Addressed"

Second, South Carolina's "capable of repetition" doctrine provides an independent basis for appellate jurisdiction. Although *Toler's Cove* (the case cited in the Court's Dismissal Order) observed that an order compelling arbitration is ordinarily not appealable, the Supreme Court of South Carolina nevertheless reached the merits "because appellant's issues are capable of repetition and need to be addressed." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 585 (2003).

Appellant submits that the issues presented here are likewise capable of repetition warranting immediate appellate review. The challenged Arbitration Provision is not unique to this case: it has already been invoked in multiple actions against Defendants pending in South Carolina courts, each arising under the same form contract and identical dispute-resolution language. *See Skoler v. Vacation Inspirations*, No. 2024-CP-1002646 (S.C.Com.Pl.), *on appeal*, *Skoler v. Vacation Inspirations*, No. 2026-000058 (Ct. App.); *Sawyer v. Vacation Inspirations*, No. 2024-CP-1002642 (S.C.Com.Pl.). *See* Ex. A; Ex. B; Ex. C. In addition, numerous consumer complaints

filed with the South Carolina Department of Consumer Affairs allege the same high-pressure sales practices and involve the same one-sided arbitration scheme reflected in the Verified Complaints here. *See* Ex. F; Ex. G.

Absent appellate guidance, the same issues will continue to recur while evading meaningful review. Consumers will be compelled into arbitration under the same structurally biased provision before courts have the opportunity to address its validity. Immediate review is therefore warranted to ensure that the application of the Federal Arbitration Act in South Carolina courts conforms with controlling law and does not permit enforcement of arbitration schemes that federal appellate courts have repeatedly found unenforceable due to structural unfairness.

Apart from the merits of the underlying allegations—which Appellant submits are themselves recurring—this appeal presents additional issues that are likewise "capable of repetition and need to be addressed." These include: (i) the validity of unilateral arbitrator-selection provisions, particularly in consumer arbitration agreements; (ii) the legal standard governing motions to compel arbitration under the Federal Arbitration Act; (iii) whether a consumer arbitration provision that invokes the "Commercial Arbitration Rules of the American Arbitration Association," while simultaneously providing that arbitration will proceed "not under the auspices of the AAA," constitutes "clear and unmistakable" evidence of delegation of arbitrability to the arbitrator; and (iv) the proper application of binding Supreme Court of South Carolina precedent—*Damico* and *Simpson*—by trial courts. Although Appellant briefly addresses these issues here, he respectfully submits that each warrants fuller treatment in appellate briefing, as they are closely intertwined with the facts of this case and the arguments on appeal.

First, as discussed above and as will be addressed more fully in Appellant's Initial Brief, it is well settled that "[w]hen it comes to arbitrator appointment, the rule is clearly that a party may

not reserve unto itself the power to name the sole arbitrator, a majority of a panel of arbitrators, or all of the panel members. Such an arbitration scheme is fundamentally unfair and void." 97 Am. Jur. Trials 319 (Originally published in 2005) (emphasis added). Numerous federal courts have reached the same conclusion and have refused to enforce arbitration provisions that permit unilateral arbitrator selection. *See, e.g., Flores*, 150 F.4th at 185 ("[W]e additionally find persuasive some of the reasoning of the Fourth and Sixth Circuits, respectively, which refused to enforce arbitration provisions because of the unilateral selection of arbitrators." (citing *Hooters*, 173 F.3d at 939–40 (4th Cir. 1999) & *McMullen*, 355 F.3d at 493–94).[5] Despite this authority, the trial court compelled arbitration without addressing—let alone analyzing—the unilateral arbitrator-selection provision in either of its orders, constituting reversible legal error.

Second, "[i]t is well settled that a motion to compel arbitration is analogous to a motion for summary judgment." *Ex parte Greenstreet, Inc.*, 806 So. 2d 1203, 1208 (Ala. 2001); *see also Air-Con, Inc. v. Daikin Applied Latin Am., LLC*, 21 F.4th 168, 174 (1st Cir. 2021) (collecting Federal Court of Appeals cases indicating that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. all apply the summary-judgment standard to motions to compel arbitration); *see also Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021) (recognizing in "resolv[ing] the parties' dispute over whether they agreed to arbitrate . . . the district court must employ the summary judgment standard").[6] Here, the trial court

[5] Binding South Carolina case law directly addresses validity of arbitrator selections. In *Lackey v. Green Tree Financial Corp.*, the Court of Appeals held that a party's "veto" power over an arbitrator selection constituted "enough control over the selection process to assure the appointment of a neutral arbitrator." 330 S.C. 388, 400 (Ct. App. 1998). As the court explained, "[w]ithout their agreement, no arbitrator can be selected by [defendants]." Id. This juxtaposes the arbitration provision in this suit involving no such veto or consent requirement. The trial court therefore erred by failing to apply and distinguish *Lackey* as binding precedent and by enforcing an arbitrator-selection clause that lacks the neutrality protections *Lackey* deemed essential.

[6] The FAA's summary-judgment framework applies with equal force in state and federal court. As the Supreme Court has made clear, "[t]he Federal Arbitration Act is a law of the United States," and "[c]onsequently, the judges of every State must follow it." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015). Because state courts are "most frequently called upon to apply the Federal Arbitration Act," it is therefore "a matter of great importance . . . that state supreme

erred by failing to apply a summary-judgment-like standard or any identifiable standard when ruling on the motion to compel arbitration.

Third, the trial court disregarded two binding South Carolina decisions holding that there can be no "clear and unmistakable" delegation of arbitrability where an Arbitration Provision is challenged as unconscionable. In *Simpson*, the Supreme Court of South Carolina held that where a consumer "has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no 'clear and unmistakable' evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (emphasis added).

More recently—and even more directly—the South Carolina Court of Appeals reaffirmed that "in South Carolina, if an arbitration provision is challenged on grounds of unconscionability, the question of the clause's validity is for courts to decide, even if the clause delegates issues of validity by incorporating the AAA's Commercial Arbitration Rules." *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 530, 908 S.E.2d 892, 896 (Ct. App. 2024). The trial court's conclusion that arbitrability was delegated cannot be reconciled with those two binding decisions.

Fourth, the trial court's Arbitration and Reconsideration Orders are devoid of any reference to *Damico* or *Simpson* and in fact contain no analysis of unconscionability. In fact, South Carolina law requires courts to engage in a fact-specific, case-by-case analysis of unconscionability before

courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012). The South Carolina Supreme Court has expressly echoed that command, emphasizing *Nitro-Lift*'s instruction "that state supreme courts must adhere to United States Supreme Court's interpretations of the FAA." *Parsons v. John Wieland Homes & Neighborhoods, Inc.*, 418 S.C. 1, 10, 791 S.E.2d 128, 133 (2016); *see also Dewan v. Walia*, 544 F. App'x 240, 244 (4th Cir. 2013) ("The FAA 'supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration.'" (quoting *Preston v. Ferrer,* 552 U.S. 346, 349 (2008))).

enforcing an arbitration clause. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755 ("A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case."); *Simpson*, 373 S.C. at 19, 644 S.E.2d at 666 (describing the doctrine as requiring "case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.") The threshold requirement, therefore, is that the court actually examine the specific circumstances of the challenged arbitration clause as alleged in a complaint—something the orders below do not do.

In sum, this appeal fits within South Carolina's "capable of repetition and need to be addressed" doctrine. The same Arbitration Provision has already been invoked in multiple cases, presents recurring legal errors of great importance, and will continue to evade review absent immediate appellate intervention. Because the issues presented recur in consumer arbitration disputes, implicate the proper application of controlling South Carolina and the Federal Arbitration Act, and require appellate guidance to prevent continued enforcement of structurally unfair arbitration schemes, the trial court's order is immediately appealable under *Toler's Cove*.

CONCLUSION

In sum, this Court has appellate jurisdiction under S.C. Code Ann. § 14-3-330 because the trial court's orders deny Appellant his substantial right to due process, and independently under *Toler's Cove* because the issues presented are capable of repetition and warrant appellate resolution. A contrary determination would leave Appellant without any meaningful opportunity for a fair hearing before a neutral decisionmaker and, consequently, without any meaningful avenue for redress. Accordingly, Appellant respectfully requests that rehearing be granted, the Dismissal Order be vacated, and the Appeal be reinstated.