THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2025-001658

Linda Plaag and Robert Plaag, ... Respondents,

v.

Charles Oliver, Leanna Oliver, Davis Oliver, Devin Patel, Foundations Investment Advisors, LLC, Strategic Equity Energy a Series of V360 Holdings LLC, Strategic Equity Path, LP, Strategic Equity Path, GP, Strategic Equity Technology a Series of V360 Holdings LLC, Strategic Equity Technology LLC, Strategic Equity Technology Management LLC, Hidden Wealth Management LLC, Alternative Wealth Solutions, LLC, The Institute of Financial Enrichment, LLC, Strategic Retirement Solutions, LLC, American Equity Investment Advisors, LLC, Innovative Medical Enterprises, LLC, CDO Enterprises, Inc., Event Labels LLC, Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners, LLC, Moving Future, LLC, Incredible Concepts, LLC, Upside Solutions, LLC, Oliver Avery and Bryant LLC, ERP LLC, GITW, LLC, Legacy of Faith LP, Legacy of Faith Trust, and John Doe Corporate Entities, ...Defendants,

Of which Charles Oliver, Leanna Oliver, Davis Oliver, Strategic Equity Energy a Series of V360 Holdings LLC, Strategic Equity Path, LP, Strategic Equity Path, GP, Strategic Equity Technology a Series of V360 Holdings LLC, Strategic Equity Technology LLC, Strategic Equity Technology Management LLC, Hidden Wealth Management LLC, Alternative Wealth Solutions, LLC, The Institute of Financial Enrichment, LLC, Strategic Retirement Solutions, LLC, American Equity Investment Advisors, LLC, Innovative Medical Enterprises, LLC, CDO Enterprises, Inc., Event Labels LLC, Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners, LLC, Moving Future, LLC, Incredible Concepts, LLC, Upside Solutions, LLC, Oliver Avery and Bryant LLC, ERP LLC, GITW, LLC, Legacy of Faith LP, and Legacy of Faith Trust are, ...Appellants.

INITIAL BRIEF OF RESPONDENTS

R. Walker Humphrey, II
James T. Johnson
WILLOUGHBY HUMPHREY & D'ANTONI, P.A.
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
(843) 619–4426

Attorneys for Respondents

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1. Relying on a policy in favor of arbitration, the General Assembly allows for interlocutory appeals from orders denying arbitration but not from orders compelling arbitration. Our Supreme Court has rejected that policy. Does the statute allowing for appeals like this one now violate equal protection because it treats arbitration orders differently without a rational basis?
2. A party seeking to compel arbitration must first prove by admissible evidence that it can enforce the agreement. But here, Appellants denied all allegations that they fall within the relevant agreement, refused targeted discovery on that subject, and offered no other proof filling that gap. Did the circuit court correctly deny their motion to compel arbitration?
3. The Plaags argued Appellants waived arbitration by first answering the complaint and moving to dismiss. The circuit court did not reach the waiver argument because it otherwise found for the Plaags. But Appellants seek reversal of the circuit court's non-finding of waiver. Should this Court decline to address waiver because it is not a basis for reversal, or should it alternatively affirm on that basis?

Counterstatement of the Case

This action arises from substantial investments losses which Appellants caused the Plaags to suffer. Compl. ¶¶ 1–3, 52–82. Linda Plaag and Robert Plaag commenced this action on November 27, 2024, in the Richland County Court of Common Pleas. The complaint names Foundations Investment Advisors, LLC, Devin Patel, the Oliver Family,[1] The Hidden Wealth Solution,[2] the Fund Defendants,[3] and the Oliver Family Asset Defendants.[4] *Id.* ¶¶ 15, 23, 26, 44; *see also* Appellants' Br. at 3–5. Defendants provided mixed responses. On February 14, 2025, Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment, LLC answered. Answer ¶ 1. In their answer, Chuck, Patel, and the Institute of Financial Enrichment denied being employees, representatives, officers, or agents of Foundations. *Id.* ¶¶ 15, 45, 161. That same day, Leanna Oliver, Davis Oliver, the Fund Defendants, the Oliver Family Asset Defendants, and Hidden Wealth Management moved to dismiss both under Rule 12(b)(6) and for lack of personal jurisdiction under Rule 12(b)(2). Mot. to Dismiss at 1, 3; Order at 3. The Plaags moved to strike the affidavits submitted in support of the personal jurisdiction motion as untimely on February 19, 2025. Pls.' Mot. to Strike. Foundations moved to compel arbitration on February 26, 2025. Foundations Mot. to Compel Arb.

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[1] Charles Oliver, Leanna Oliver, and Davis Oliver.

[2] Hidden Wealth Management and The Institute of Financial Enrichment.

[3] Alternative Wealth Solutions, Strategic Equity Energy, Strategic Equity Technology Management, Strategic Equity Technology, Strategic Equity Technology a Series of 360 Holdings, Strategic Equity Path, and Strategic Equity Path GP.

[4] American Equity Advisory Group, Oliver Avery and Bryant LLC, ERP LLC, Strategic Retirement Solutions LLC, Moving Future LLC, Incredible Concepts LLC, Upside Solutions LLC, GITW LLC, American Equity Investment Advisors LLC, CDO Enterprises, Inc., Oliver Heritage, LLC, KTF, LLC, Strategic Equity Partners LLC, Legacy of Faith L.P., and the Legacy of Faith Trust.

Nearly six weeks after Foundations moved for arbitration, and about eight weeks after they answered and moved to dismiss, Appellants here (the Oliver Family, The Hidden Wealth Solution, the Fund Defendants, and the Oliver Family Asset Defendants) moved for arbitration under Foundations' agreement. *See* Appellants' Br. at 5–6. Appellants argued they can enforce the agreement because the Plaags alleged that Appellants are Foundations' agents and representatives, even though three Appellants denied those allegations and all Appellants argued that alleging they are alter egos of Chuck and The Institute of Financial Enrichment violates Rule 11 and the Frivolous Claims and Proceedings Sanctions Act. Appellants' Mem. in Supp. of Mot. to Compel Arb. at 3–18; Answer ¶¶ 15, 45. While Defendants' motions were pending, the Plaags served discovery which included requests relevant to Appellants' arbitration and jurisdiction arguments. Foundations and Appellants objected to producing records and information. June 4, 2025 Osborne Letter at 1–2; Foundation Objs. to Pls.' First RFAs at 1–2.

The circuit court held an in-person hearing on July 8, 2025. At the hearing, Leanna, Davis, the Fund Defendants, the Oliver Family Asset Defendants, and Hidden Wealth Management withdrew their Rule 12(b)(6) motion to dismiss. Tr. at 44. The Plaags also agreed that, if the court compels their claims against Foundations to arbitration, then "claims against Mr. Patel would go to arbitration as well" because he was an investment advisor representative with Foundations. Tr. at 43. So the issues remaining before the circuit court were (1) whether Foundations can compel arbitration, (2) whether the Appellants can invoke Foundations' arbitration agreement, (3) whether Appellants waived arbitration by answering and moving to dismiss before seeking arbitration, (4) whether the court has personal jurisdiction over Leanna Oliver, Davis Oliver, the Fund Defendants, the Oliver Family Asset Defendants, and Hidden Wealth Management, and (5) whether to strike

the jurisdictional affidavits. The court denied the motion to strike at the hearing and took all other motions under advisement. Tr. at 49.

The circuit court issued a Form 4 order on July 14, 2025, denying the motion to dismiss; denying Appellants' motion to compel arbitration because they "provide no evidence, by affidavit or otherwise, proving their right to arbitrate under Foundations' agreement"; and granting Foundations' motion to compel arbitration. Form 4 at 2. The court directed the Plaags to submit a formal order, which the court entered on July 29, 2025. Appellants timely moved to alter or amend under Rule 59(e), SCRCP. The circuit court denied that motion by a Form 4 order entered August 13, 2025. Appellants filed their notice of appeal on August 18, 2025.

Statement of Facts

I. The Plaags lost substantial funds at Appellants' hands.

Bob and Linda Plaag are South Carolina retirees who spent a lifetime building the savings they intended to carry them through retirement. Compl. ¶¶ 53–54. Linda had accumulated a substantial nest egg after a career in dentistry, most recently with the U.S. Department of Veterans Affairs, and Bob looking forward to retiring from his career in information technology. *Id.* The Plaags did what prudent retirees are supposed to do: they carefully shopped the market for an honest advisor who would conservatively manage their assets and preserve their savings. *Id.* Their search landed them the sophisticated national marketing operation run by Chuck Oliver and The Hidden Wealth Solution. *Id.* ¶¶ 1, 50–58. Through radio shows, television appearances, YouTube content, websites, podcasts, and self-promotional materials, Chuck held himself out as a "Wealth Architect," "Wealth Protector," and "Retirement Planning Expert" with the secret to "a lifetime of tax-free income." *Id.* ¶¶ 1, 50–57.

The Plaags had no written agreement with Chuck or The Hidden Wealth Solution. Their only agreement was with Foundations Investment Advisors, a registered investment adviser. *See* Appellants' Mem. in Supp. of Mot. to Compel Arb. Ex. A. None of the Appellants was registered with Foundations. *See* Compl. ¶6–46. But Devin Patel, who worked alongside Chuck, was registered. Compl. ¶ 12. So he signed the agreement, not any of the Appellants. Appellants' Mem. in Supp. of Mot. to Compel Arb. Ex. A at 12. No one disclosed to the Plaags that Chuck and The Hidden Wealth Solution deny operating within Foundations' network. *See* Answer ¶ 15.

After snaring the Plaags, Chuck, his wife Leanna, son Davis, and colleague Devin, took the lead in investment discussions with the Plaags. Compl. ¶ 61. Chuck and his family never mentioned that they are unlicensed to work in the securities industry. *Id.*; Answer ¶ 52. The Plaags wanted safety, stability, and conservative management of their retirement funds. Compl. ¶¶ 59–60. They repeatedly made clear they were seeking secure investments that would preserve principal and generate steady retirement income. *Id.* In fact, the Plaags selected the least risky option for every question bearing on investment stability on a written risk assessment. *Id.* ¶¶ 63–65. Despite that expressly conservative profile, Apppellants steered more than $1 million of the Plaags' assets into highly risky, unprofitable, improper, and fraudulent investments. *Id.* ¶ 66.

Appellants principally funneled a substantial portion of the Plaags' money into private, illiquid, Oliver-controlled investments that bore no resemblance to the conservative strategy requested. Compl. ¶¶ 67–77. Chuck recommended three alternative investments, all controlled by the Oliver Family and infected by undisclosed conflicts of interest. *Id.* ¶¶ 67–68, 76–77. Most notably, the Olivers represented to the Plaags that they were investing in FTL Energy Assets, but the Olivers instead invested the Plaags in Strategic Equity Energy, a protected series LLC created

and managed through Oliver-affiliated entities as a special-purpose vehicle to hold a 99.8% stake in FTL. *Id.* ¶¶ 70–75. This structure generated fees for the Oliver Family, concealed the true nature of the investment, and depended on Chuck's promise to raise $20 million for FTL—a promise he failed to fulfill, causing the venture to collapse and rendering the Plaags' investment worthless. *Id.* ¶¶ 72–75. The Olivers placed an additional $157,000 into Strategic Equity Path and $150,000 into Strategic Equity Technology a Series of V360, both Oliver-controlled entities that likewise lost substantial value while enriching the Oliver enterprise through fees and control. *Id.* ¶ 76. The Olivers never disclosed their inextricable intertwining with these entities to the Plaags. *Id.* ¶ 77.

Chuck and Patel also invested over $500,000 of the Plaags' money into managed funds that were unsuitable for investors with the Plaags' conservative objectives. Compl. ¶¶ 78–80. Appellants failed to disclose the risks or unsuitability of those funds, yet they still collected substantial fees while the Plaags' investments underperformed and lost value despite a fast-rising market. *Id.*

The Plaags were victims of a coordinated scheme to solicit retirees through a sophisticated web of recruitment platforms, assured they would receive safe and conservative retirement planning, then funneled into a mix of risky private placements and unsuitable managed funds that benefitted only the Oliver Family and their related entities. *Id.* ¶¶ 1–3, 55–80. Appellants employed an interlocking maze of affiliated entities used to facilitate investments, collect fees, obscure roles, and shield assets from recovery. Compl. ¶¶ 16–46, 81–82, 160–63. These Oliver-affiliated entities, which here are the Fund Defendants and the Oliver Family Asset Defendants, operate indistinguishably from one another under the Oliver Family's control, with no legitimate purpose

other than advancing the scheme and frustrating recovery by victims such as the Plaags. *Id.* ¶¶ 44, 81–82.

II. Appellants deny they are Foundations' representatives or agents but still seek arbitration as Foundations' representatives or agents.

The Plaags sued Defendants on November 27, 2024, to recover their substantial losses. They brought claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, violation of the Uniform Securities Act, S.C. Code Ann. §§ 35-1-101 to -880, fraud and fraudulent concealment, negligent misrepresentation, breach of contract, and breach of contract accompanied by a fraudulent act against the Oliver Family, The Hidden Wealth Solution, Patel, Foundations, and the Fund Defendants; violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10 to -180, civil conspiracy, and unjust enrichment against all Defendants; and for joint liability between the Oliver Family, Fund Defendants, and the Oliver Family Asset Defendants under a single business enterprise/veil piercing/alter ego theory. Compl. ¶¶ 83–163.

Chuck Oliver, Patel, and The Institute of Financial Enrichment answered on February 14, 2025, without mentioning arbitration. *See generally* Answer. They also denied that the Oliver Family and The Hidden Wealth Solution are agents or representatives of Foundations and the remaining Appellants are alter egos of the family:

Complaint	Answer
15. Foundations Investment Advisors, LLC is an Arizona limited liability company and a citizen of Arizona. Foundations is a Registered Investment Adviser registered with the SEC. Foundations provides financial advisory services through a network of affiliated offices including The Hidden Wealth Solution, which is a top 25 producer for Foundations, was captained by Chuck Oliver and, at all relevant	15. Denied that Mr. Oliver "captained" anything or used Mr. Patel as a pass-through investment advisor. Defendants lack knowledge and information sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph 15 of the Complaint and, therefore, deny the same and demand strict proof thereof.

times, leveraged Devin Patel as their pass-through Investment Advisor.	
44. Upon Information and belief, [the Oliver Asset Family Defendants], along with the Fund Defendants and The Hidden Wealth Solution, operate indistinguishably from one another under the complete and absolute control of Chuck, Leanna, and Davis Oliver. Upon further information and belief, the Oliver Family Asset Defendants serve no legal purpose and exist only to shield the Oliver Family's assets from creditors, including defrauded investors like the Plaags.	44. Denied.
45. At all times relevant to this case, Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel were agents, representatives, and/or employees of The Hidden Wealth Solution and/or Foundations Investment Advisors. All their actions, inactions, omissions, and wrongdoing were performed for and on behalf of The Hidden Wealth Solution or Foundations in the course and scope of their agency and/or employment. Therefore, in addition to Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel's personal liability for their own actions, inactions, and omissions, The Hidden Wealth Solution and Foundations are individually, jointly, severally, and totally liable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Charles Oliver, Leanna Oliver, Davis Oliver, and Devin Patel under agency law and common law principles of *respondeat superior*.	45. The allegations in Paragraph 45 of the Complaint are legal conclusions, which require no response from Defendants. To the extent a response is required, Defendants deny the allegations in Paragraph 45 of the Complaint.
58. Foundations was a knowing and eager participant in the Oliver Family's schemes. The Hidden Wealth Solution is one of Foundations' top 25 producers, which incentivized Foundations to sponsor the Oliver Family's fraudulent investment strategies. Foundations was aware of the Oliver Family's	58. Denied.

activities, advertising, and investments, and it knowingly permitted, sanctioned, and enabled those actions to continue so that Foundations could collect substantial fees and revenue from the Oliver Family's defrauded clients.	
61. … Devin would maintain assets under management for Chuck's clients through Foundations. Meanwhile, Oliver hid the ruse from clients like the Plaags by blurring the lines between himself, his business, his family, and his employed investment advisors, like Devin. Indeed, many sections of the Oliver Family's website link directly to Foundations, employees share email domains with both The Hidden Wealth Solution and Foundations, and they even refer to Foundations as "our firm."	61. Admitted that Mr. Patel handled investment advisory services through Foundations at the relevant time. The remainder of the allegations in Paragraph 61 of the Complaint are denied.
63. To clients like the Plaags, The Hidden Wealth Solution seemed to be merely the platform through which Chuck and Devin provided services for Foundations. For example, on October 21, 2021, Chuck and Devin required the Plaags to complete a "Risk Tolerance and Time Horizon Assessment." This assessment is proprietary to Foundations Investment Advisors. Neither Chuck, Devin, nor Foundations drew any line between which activities were conducted under Foundations and which were under The Hidden Wealth Solution only.	63. Admitted that Mr. Patel provided Plaintiffs with a Risk Tolerance and Time Horizon Assessment. The remainder of the allegations in Paragraph 63 of the Complaint are denied.
66. Despite the Plaags' expressly stated highly conservative risk tolerance, the Oliver Family, Devin, and Foundations invested over $1 million of the Plaags' assets in investments which were either highly risky, unprofitable, improper, and/or plainly fraudulent. The Plaags lost a tremendous amount of money as a result and Bob Plaag, now 73, no longer expects to retire as a result. The Defendants, on the other hand, have profited handsomely.	66. Denied.

143. These Defendants entered into express and implied contracts with Plaintiffs in connection with soliciting, investing, and managing Plaintiffs' investments. These contracts included account agreements, subscription agreements, and others	143. Denied.
161. The Oliver Family dominates and controls the Fund Defendants, the Oliver Family Asset Defendants, and numerous other John Doe Corporate Entities, controlling their business decisions and actions to such an extent that they manifest no separate corporate interests and function solely to achieve the purposes of the Oliver Family. With regard to these entities, there has been such an amalgamation of corporate interests, entities, funds, and activities so as to blur the distinction between them and their activities.	161. Denied.

Compl. ¶¶ 15, 44–45, 58, 61, 63, 66, 143, 161; Answer ¶¶ 15, 44–45, 58, 61, 63, 66, 143, 161. The same day, the remaining Appellants moved to dismiss for lack of personal jurisdiction and failure to state a claim. Mot. to Dismiss.

On February 26, 2025, Foundations moved to compel arbitration under an Investment Advisory Agreement. That agreement defines the Plaags as the "Client," Foundations as "FIA," and both as the "Parties." Appellants' Mem. in Supp. Mot. Compel Arb. Ex. A at 7. It also provides that

> Client and FIA each agree that, except as prohibited by applicable law, all claims or controversies, and any related issues, which may arise at any time *between the Parties (including FIA's representatives, directors, officers, employees, and agents)* concerning any investment or planning advice, recommendation, or exercise of limited discretionary authority with respect to any subject matter, any transaction or order, *the conduct of FIA or its representatives, directors, officers, employees, and agents*[,] the construction, performance, or breach of this or any other agreement *between the Parties*, whether entered into prior to, on, or subsequent to the date of this Agreement the breach of any common law or statutory duty or the violation of any

> federal or state law of any nature shall be resolved by binding arbitration rather than by a lawsuit in a court of law or equity.

Id. at 9, ¶ 15 (emphasis added). Appellants are not named as parties to the agreement.[5]

Appellants and Patel moved to join Foundations' motion on April 7, 2025. Appellants submitted no evidence in support of their motion. Instead, their claim to arbitration rests exclusively on allegations—which they denied—that the Oliver Family and The Hidden Wealth Solution are agents or representatives of Foundations, and all remaining Appellants are liable under various amalgamation theories. Appellants' Mem. in Supp. of Mot. to Compel Arb. at 3-18.

Because Appellants offered no facts in support of arbitration, the Plaags tried to fill the void through discovery. The Plaags served Foundations with a single request for admission asking it to admit that Charles Oliver, Leanna Oliver, Davis Oliver, Devin Patel, and The Institute of Financial Enrichment were "representatives, directors, officers, employees, and/or agents" of Foundations in connection with the allegations in this lawsuit. Foundations objected rather than answer. FIA's Objections to First Requests for Admission at 1–4. The Plaags also served discovery on Appellants seeking information directly relevant to Appellants' arbitration and personal jurisdiction arguments. Appellants objected across the board and refused to provide substantive responses. *See* June 4, 2025 Osborne Letter (objecting to all discovery while the motions were pending).

III. The circuit court found Appellants had not proven an arbitration agreement exists between them and the Plaags.

The Plaags opposed Foundations' and Appellants' motions to compel arbitration. As to Foundations, the Plaags argued that no agreement exists because Foundations refused to arbitrate under the applicable American Arbitration Association rules. Am. Opp. to Defs.' Mots. to Dismiss

[5] The Institute of Financial Enrichment is listed as a solicitor on the signature page, but no one signed on its behalf. Appellants' Mem. in Supp. of Mot. Compel Arb. Ex. A at 12.

and Compel Arb. at 13–16. To simplify matters for the court, the Plaags volunteered that any order compelling arbitration against Foundations would include Patel. Tr. at 43. As to Appellants, the Plaags argued that they failed to meet their burden of proving by admissible evidence that they can enforce Foundations' arbitration agreement. *Id.* at 16–20. The Plaags also argued that Appellants waived the right to compel arbitration by answering the complaint and moving to dismiss before seeking arbitration. *Id.* at 20–21.

The circuit court granted Foundations' motion and denied Appellants' motion. The court first held that Foundations had offered sufficient evidence of a valid and enforceable arbitration agreement and that the Plaags agreed the agreement covers Patel. Order at 3–4. The dispute as to which rules apply is a matter for the arbitrator to decide. *Id.* at 4. But the court reached the opposite conclusion as to Appellants based on their filings:

> Here, there is no agreement between [Appellants] and the Plaags. [Appellants] instead argue that they fall within Foundations' arbitration agreement, which extends to Foundations' "representatives, directors, officers, employees, and agents." But [Appellants] offer no evidence that they are representatives, directors, officers, employees, or agents of Foundations. They simply point to allegations in the Plaags' complaint to that effect. Yet Chuck Oliver, Devin Patel, and The Institute of Financial Enrichment - the three defendants who answered the complaint - denied those allegations. Those denials render the allegations "evidence of nothing."

Id. at 5 (citing *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990), *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)). The court also rejected Appellants' argument that the Plaags' allegations estop them from disputing that the agreement covers Appellants. *Id.* at 6. Because the lack of proof disposed of the motion, the court expressly declined to reach waiver. *Id.* at 6 n.6. Appellants moved to alter or amend under Rule 59(e),

SCRCP. The circuit court denied that motion by Form 4 order on August 13, 2025. This appeal followed.

Standard of Review

Courts review de novo whether an arbitration agreement may be enforced. *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 383, 892 S.E.2d 112, 115 (2023). The same is true when the question is whether a nonsignatory may enforce an arbitration agreement. *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). But de novo review does not erase the circuit court's role as factfinder on threshold contractual issues. A circuit court's factual findings in an arbitrability dispute will not be reversed if any evidence reasonably supports them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

Summary of the Argument

Appellants denied they have any relationship with Foundations, refused targeted discovery on the subject, and did not provide an affidavit, contract, corporate record, or other admissible evidence showing they can enforce Foundations' agreement. But they now ask this Court to compel arbitration anyway. Appellants therefore raise two straightforward questions on appeal.

First, can parties who deny the facts establishing their right to enforce an arbitration agreement still compel arbitration? No, they cannot. Appellants bear the burden of proof to show an arbitration agreement exists between them and the Plaags. Given their denials and refusal to participate in discovery, the circuit court correctly held they failed to meet their burden. And every argument they raise to avoid their burden is meritless, unpreserved, or both.

Second, can parties seek reversal of an order based on a defense which the opposing party raised but the circuit court did not address? No, they cannot. Waiver was one of the Plaags'

defenses to arbitration. The circuit court declined to reach waiver because it resolved the motion on other grounds. Appellants therefore were not aggrieved by the circuit court's decision and lack standing to appeal that issue. If waiver is relevant at all, it is an alternative basis to affirm. Appellants either answered the complaint or moved to dismiss well before seeking arbitration. Their voluntary invocation of the court's powers is a common law waiver of their right to seek arbitration. So if the Court finds that Appellants did prove an agreement exists, the Court should affirm the denial of arbitration because Appellants waived that right.

But there also is an important threshold question to resolve: can Appellants even seek review of the circuit court's order? Because the circuit court's order is not final, jurisdiction falls under S.C. Code Ann. § 15-48-200. Relying only on a policy in favor of arbitration, that statute allows interlocutory appeals from orders denying arbitration but denies interlocutory appeals from orders compelling it. Our Supreme Court has dispensed with that policy. As a result, there is no longer a rational basis to give preferential treatment to orders denying arbitration over orders compelling it. Section 15-48-200 therefore is unconstitutional. The Court should dismiss this appeal even though Appellants' arguments lack any merit.

ARGUMENT

I. The order denying arbitration is not immediately appealable because the statute allowing for review is unconstitutional under the Supreme Court's rejection of the policy in favor of arbitration.

Appellants asked the circuit court to send the Plaags' claims to arbitration under a contract that they denied applies to them and on which they produced no evidence whatsoever. The circuit court's refusal was correct. *Infra* pp. 17–35. But before addressing those arguments, this Court must first determine whether it has jurisdiction over Appellants' interlocutory appeal. *Tatnall v.*

Gardner, 350 S.C. 135, 137–38, 564 S.E.2d 377, 378–79 (Ct. App. 2002). Due to a recent shift in arbitration case law, this Court no longer has jurisdiction over appeals from interlocutory orders denying arbitration.

"[N]o person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *City of Beaufort v. Holcombe*, 369 S.C. 643, 647–48, 632 S.E.2d 894, 897 (Ct. App. 2006) (citing *Harrison v. Caudle*, 141 S.C. 407, 416, 139 S.E. 842, 845 (1927)). "A classification does not violate the equal protection clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 149, 568 S.E.2d 338, 351 (2002). Because no suspect class is implicated, the Constitution bars only "irrational and unjustified classifications" and "legislative enactments … without any reasonable basis." *Holcombe*, 369 S.C. at 649, 632 S.E.2d at 897.

Under S.C. Code Ann. § 15-48-200, an order denying arbitration is immediately appealable but an order compelling arbitration is not. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). This disparity exists because of a policy in favor of arbitration. *Id.* ("The policy of the United States and this State is to favor arbitration of disputes. Consistent with this policy, statutes at both the federal and state level have been enacted which restrict the right to appeal orders which favor arbitration over litigation."); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999) ("Both federal and state policy favor arbitrating disputes. This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.") (citing *Heffner*, 321

S.C. at 537, 471 S.E.2d at 136); *see also* George F. Lieberman, *Discovery in an Arbitration Proceeding and Appealing an Award Under the Federal Arbitration Act: It's Not That Simple (and What You Do Not Know Can Hurt You)*, 56-May Fed. Law. 54, 56 (2009) ("The rules governing appeals [under the Federal Arbitration Act] may be simply stated as follows: orders favoring arbitration are not considered final for purposes of appeal and not immediately appealable; orders unfavorable to arbitrations are considered final for purposes of appeal and immediately appealable.").

But now, "[t]here is … no public policy—federal or state—'favoring' arbitration." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 649, 856 S.E.2d 150, 153 (2021). Just this past year, the Court "remind[ed] our litigants and lower courts that we dispensed with this incorrect notion [that there is a policy favoring arbitration] almost four years ago." *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025). This change in state law tracks the U.S. Supreme Court's explanation that its own historic references to a "policy favoring arbitration" actually "connote[] something different," where "[t]he policy is to make arbitration agreements as enforceable as other contracts, but not more so." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (cleaned up); *see also Palmetto Constr. Grp.*, 432 S.C. at 639, 856 S.E.2d at 153 ("Neither the Supreme Court nor this Court, however, meant to give the law of arbitration such a special status that it would supplant state procedural law."). Courts therefore cannot "elevate a contractual right of arbitration above the procedural rules of the court." *Palmetto Const. Grp.*, 432 S.C. at 636, 856 S.E.2d at 152.

With this policy gone, there no longer is a rational basis to treat orders denying arbitration differently than orders compelling it. Under existing law, a party seeking arbitration (usually a corporate defendant) may immediately appeal a denial and avoid court. That appeal ties the case up for years. *See* Rule 241(a), SCACR (providing an automatic stay of orders on appeal). During that

time, memories may fade, parties or witnesses may die, the harm complained of may worsen or become irreparable, and injured plaintiffs are left waiting for relief. And if a plaintiff dies pending a years-long appeal, certain claims may die with him. Immediate appeals of orders denying arbitration therefore impose real costs. Disallowing immediate appeals of orders compelling arbitration has real costs too. The party opposing arbitration (usually an individual plaintiff) must submit to arbitration, lose access to the courts, and only later attempt to unwind the process after years of expense and procedural prejudice. As Judge Posner observed, "[s]ince arbitration may be protracted … a plaintiff forced into arbitration against his will may be irreparably harmed, for if it later turns out that the matter should not have been submitted to arbitration he will not be able to recover his lost time and expense." *Hayes v. Allstate Ins.*, 722 F.2d 1332, 1340 (7th Cir. 1983) (Posner, J., dissenting); *see also U.S. for Use & Benefit of Cap. Elec. Const. Co. v. Pool & Canfield, Inc.*, 778 F. Supp. 1088, 1092 (W.D. Mo. 1991) ("It would be irrational to hold that there is no irreparable harm in forcing a party to be subjected to the cost and hardship of a meaningless proceeding simply because it could be later reviewed by a proper forum."). There is no basis to spare those who seek arbitration from these harms by allowing immediate appeals while denying them to those who oppose arbitration.

Section 15-48-200's one-sided appeal right violates the equal protection clause. This Court therefore should dismiss this interlocutory appeal.

II. Appellants failed to meet their burden to prove they are entitled to enforce the Foundations' agreement.

The circuit court correctly refused to extend Foundations' agreement to 28 other parties who deny they are covered by it. That ruling was correct and should be affirmed.

A. The circuit court correctly held Appellants offered no evidence they are representatives or agents of Foundations who can compel arbitration.

Before a court can order arbitration, it must "confirm [] that the parties have an agreement to arbitrate." *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 314 (2010). The burden to prove an enforceable arbitration agreement exists is on the party seeking to compel arbitration. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317–18 (2012); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (preventing a court from considering the merits of the underlying claim when ruling on a motion to compel arbitration). The moving party must meet this burden using admissible evidence. *Dillon v. BMO Harris Bank, N.A.*, 173 F. Supp. 3d 258, 264 (M.D.N.C. 2016) (holding that the party seeking to compel arbitration must "produce[] credible, admissible evidence which satisfies the Court that there was an arbitration agreement"); *see also Saro Invs. v. Ocean Holiday P'ship*, 314 S.C. 116, 122, 441 S.E.2d 835, 839 (Ct. App. 1994) (noting that only admissible evidence in affidavits should be considered in support of a motion).

A party cannot deny an agreement exists but then seek arbitration under that same agreement. *Sandvik AB v. Advent Int'l*, 220 F.3d 99, 108–09 (3d Cir. 2000) (allowing a party to seek arbitration while denying the existence of a contract alleged in a complaint would permit that party to "concede a consequence of [the plaintiff's] fundamental position in the controversy without accepting the bitter with the sweet"); *Hibbett Sporting Goods, Inc. v. Pleasanton Assocs.*, No. SA-13-CA-282-FB, 2013 WL 12129939, at *1 (W.D. Tex. Nov. 6, 2013) ("[B]ecause defendant denies the existence of the lease agreement containing the arbitration provision at issue, it has failed to carry its burden to prove the existence of a valid agreement to arbitrate."); *NAFEP Mgmt. Co. v. Binkele*, No. 2:06-cv-369 TS, 2007 WL 1726435, at *2 (D. Utah June 12, 2007) ("Defendant

appears to dispute the very existence of the Account Executive Agreement, thereby precluding any argument to enforce an arbitration provision under nonsignatory estoppel and/or agency theory."); *S.C. Maxwell Fam. P'ship. v. Kent*, 472 S.W.3d 341, 344 (Tex. Ct. App. 2015) ("This allegation challenging the formation of a valid contract is incompatible with the movant's burden to prove the existence of an agreement to arbitrate."); *Operis Grp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 489–90 (Fla. Ct. App. 2007) (holding that a party who denies an arbitration agreement exists is estopped from relying on that agreement to compel arbitration).

This means allegations in the complaint which the moving party denies are not enough to meet that party's burden to show an arbitration agreement exists. By those denials, the allegations are "evidence of nothing." *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990). Similarly, the moving party is bound by his denial of those allegations. *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("[P]arties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise."); Rule 7(a), SCRCP (including an answer as a pleading). And reaffirming that mere allegations are not enough, courts must conduct a trial to resolve any disputes as to whether an arbitration agreement exists. *See* 9 U.S.C. § 4 ("If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."); S.C. Code Ann. § 15-48-20(a) ("[I]f the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised").

Appellants therefore ask this Court to do what courts across the country refuse: compel arbitration based on a contract which they deny applies to them. They submitted no affidavits, corporate records, contracts, agency agreements, employment records, organizational documents,

or sworn testimony demonstrating that Appellants are agents or representatives of Foundations who can enforce the arbitration agreement. And when the Plaags sought this evidence through discovery, Appellants refused to produce it. *See generally* Pls.' Opp to Defs' Mots. Ex. C–D. Appellants instead rely exclusively on allegations in the complaint which Chuck and the Institute of Financial Enrichment denied.[6] Compl. ¶¶ 15, 44–45, 58, 61, 63, 66, 143, 161; Answer ¶¶ 15, 44–45, 58, 61, 63, 66, 143, 161. While the remaining Appellants did not formally answer the complaint, their motion to dismiss made plain that they also dispute any connection to Foundations. *E.g.*, Mem. in Supp. of Mot. to Dismiss at 3 (arguing there is no factual or legal basis to allege that Davis and Leanna Oliver assisted Chuck with his scheme); *id.* at 4 n.2 (arguing that including the Oliver Family Asset Defendants as alter egos violates Rule 11 and the Frivolous Claims Proceeding and Sanctions Act); *see also* Mem. in Supp. of Mot. to Compel Arb. at 4 nn.2–3 (Oliver and The Institute of Financial Enrichment arguing that these allegations are sanctionable). Appellants also are united in their refusal to produce extrinsic evidence of any such relationship. *See* Pls.' Opp to Defs' Mots. Ex. C–D.

Nor will Appellants ever concede that this evidence exists. For strategic reasons, they will always deny those allegations, even in any arbitration. So they want to compel arbitration because they are agents or representatives of Foundations but then defend the arbitration on the basis that

[6] Appellants' contention that they properly denied legal conclusions rings hollow. *See* Appellants' Br. at 18–19. Of all the allegations at issue, Appellants only objected to one as calling for legal conclusions. *Supra* pp. 7–10. It did not call for legal conclusions—it appropriately alleged facts. And Appellants denied the allegation anyway. *Id.* Further, Appellants still bore the burden of coming forward with *affirmative* admissible evidence that they are Foundations' agents or representatives. The denials simply complete the picture: they show not only that Appellants offered no proof, but that they affirmatively disclaimed the relationship.

they were *not* agents or representatives of Foundations. Appellants cannot have it both ways. Because they picked their path of denying the agreement, they cannot compel arbitration under it.

The record therefore contains no evidence of an agreement to arbitrate claims between the Plaags and Appellants. The circuit court did not err in denying Appellants' motion.

B. Appellants' arguments to avoid their burden are unpreserved and meritless.

Appellants fall back on a stack of arguments which they believe will avoid their burden. None has merit.

1. Appellants' denial that they are representatives or agents of Foundations precludes applying equitable estoppel against the Plaags.

Appellants argue there are three paths which they, as nonsignatories, can enforce Foundations' agreement: (1) agency, (2) veil piercing/alter ego, and (3) estoppel. Appellants' Br. at 17. This appeal is the first time that Appellants raise agency and veil piercing as standalone grounds to compel arbitration. Those arguments therefore are not preserved. *Doe v. Roe*, 369 S.C. 351, 375–76, 631 S.E.2d 317, 330 (Ct. App. 2006). At bottom, however, these arguments flow directly into Appellants' estoppel argument: the Plaags alleged agency and alter ego, so the court should estop them from denying it now. The circuit court correctly rejected that argument.

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.*, 388 U.S. 395,

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

To begin, this Court need not reach the specifics of estoppel because it equally applies to Appellants if it applies to the Plaags. Appellants are bound by their denials that they are not agents or representatives of Foundations. *Postal*, 308 S.C. at 87, 418 S.E.2d at 323. The crux of the arbitration estoppel rule is that a party should not be able to rely on a contract to claim its benefits but deny its burdens. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–91, 733 S.E.2d 597, 601–02 (Ct. App. 2012). That means Appellants cannot claim the benefits of Foundations' agreement (for them, arbitration) but reject its burdens (the liability which flows from it). These competing estoppel arguments neutralize each other. *Operis Grp.*, 973 So. 2d at 489–90. As a result, whether a contract exists remains a question for the court to determine. *Id.*

In any event, the Plaags are not estopped from requiring that Appellants meet their burden. 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 Appellants 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, Appellants rely on *Pearson*, which sets forth a different—and more permissive—test for estoppel when it comes to arbitration agreements. Appellants' Br. at 20–23. The *Pearson* rule was grounded, at least in part, in the now-rejected policy in favor of arbitration. *See Pearson*, 400 S.C. at 295, 733 S.E.2d at 604 ("Otherwise the arbitration proceedings between

the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.") (quotation omitted). This Court should hold that the traditional estoppel test applies and not the special formulation developed for arbitration.[7] Because Appellants did not meet the traditional test, and do not even argue that test here, the Court should affirm the circuit court's finding.

Appellants' estoppel argument still fails even if *Pearson* applies. The Plaags did not deny the existence of contract—Appellants did. Asking the court to put Appellants to their proof given their denials is not inconsistent with the Plaags' allegations. *See Sandvik*, 220 F.3d at 109 ("Sandvik's fundamental position is not similarly at war with itself. Sandvik maintains that the underlying contract is valid, but asserts that the validity of the arbitration clause must first be found by the District Court before the matter can be referred to the arbitrators. This argument does not require Sandvik to make any evidentiary proffers that are opposed to its underlying position in the controversy."). Requiring such proof instead simply carries out the FAA's mandate that courts determine whether an agreement exists. *Id.* Because Appellants refused to provide any evidence, they failed to meet their burden and the analysis ends.

Also, a nonsignatory may be estopped from avoiding arbitration only when the claim arises from the contractual relationship, the nonsignatory has exploited the contract by reaping its benefits, and the claim relies solely on the contract terms to impose liability. *Weaver*, 431 S.C. at

[7] The Supreme Court applied *Pearson* in *Wilson* and concluded that estoppel did not apply under that test. *Wilson*, 426 S.C. at 338–45, 827 S.E.2d at 174–78. The Court decided *Wilson* 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 our Supreme Court's pronouncement in *Palmetto Construction Group* that "[t]here is … no public policy—federal or state—'favoring' arbitration." Because these newer decisions forbid the use of a special estoppel test for arbitration, this Court can recognize that the arbitration-specific estoppel rule is no longer valid.

230, 847 S.E.2d at 272. The Plaags' claims against Appellants do not arise solely from the Foundations agreement. The complaint asserts claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, securities violations, SCUTPA violations, fraud, concealment, negligent misrepresentation, civil conspiracy, unjust enrichment, and veil piercing, in addition to contract claims. Compl. ¶¶ 83–163. Those claims arise from alleged common-law and statutory duties, from the private placement transactions themselves, and from Appellants' own alleged misconduct. The Plaags' complaint therefore does not meet the *Pearson* test.

The Supreme Court's decision in *S.C. Public Service Authority v. Great Western Coal (Ky.), Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993), is not to the contrary. *Great Western* prevented artful pleading from defeating an *already established* right to arbitrate. *Great W. Coal*, 312 S.C. at 563, 437 S.E.2d at 24–25. The Court held that a party should not escape arbitration simply by naming a non-party defendant alongside a signatory where the nonsignatory's connection to the agreement was not in genuine dispute. *Great Western* did not hold, and has never been read to hold, that a sprawling group of nonsignatories may compel arbitration without first proving that right exists. Nor did it say denied allegations in a complaint can support arbitration.

Nor does the record show the type of inequity which estoppel is designed to prevent. The Plaags tried to test Appellants' denials through targeted discovery. Foundations and Appellants objected rather than answer. FIA's Objections to First Requests for Admission at 1–4; June 4, 2025 Osborne Letter. If there is any inequity in the record, it lies in allowing Appellants to compel arbitration on allegations they have labeled sanctionable while keeping the supporting facts hidden from discovery. The circuit court correctly refused to let equity be used "as a sword to compel arbitration." Order at 6 (citing *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177).

2. The question is whether a contract was formed, not its scope.

Appellants also wish to convert this question from one of contract formation to one of contract scope. Appellants' Br. at 13–14, 23–24. They want to reframe this argument because (1) courts generally determine whether a claim falls within an agreement's scope by reference to the complaint's allegations, *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008), (2) parties can delegate scope questions to an arbitrator, and (3) scope questions fall under the now-outdated standard that claims fall within an arbitration agreement unless it can be said otherwise with "positive assurance," *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). But their attempt to rewrite the question fails as a matter of law.

To start, Appellants' argument is unpreserved. The circuit court found that the underlying question is whether a contract was ever formed between Appellants and the Plaags. Order at 4–5. Appellants did not argue that the question instead is one of scope in their motion to compel briefing, at the hearing, or in their Rule 59(e) motion. They just generically argued parties can delegate questions of arbitrability. *E.g.*, Appellants' Rule 59(e) Mot. at 6–8. Their argument to this Court therefore is unpreserved. *Doe*, 369 S.C. at 375–76, 631 S.E.2d at 330.

In any event, the circuit court's conclusion that the question of who can enforce an agreement is a question of existence, not scope, is correct.[8] *E.g.*, *Wilson*, 426 S.C. at 337, 827 S.E.2d

[8] Appellants string cite cases allegedly holding that whether a non-signatory can enforce an agreement is a question of arbitrability rather than contract formation. Appellants' Br. at 12–14. Missing from Appellants' list are the binding South Carolina decisions cited here which deem this question to be one of formation. And the cited decisions (like Appellants) refer to this question more broadly as one of "arbitrability." *Swiger v. Rosette*, 989 F.3d 501, 507 (6th Cir. 2021); *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014); *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 211 (2d Cir. 2005); *Apollo Comput. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989); *Fisher v. FCA US LLC,* 769 F. Supp. 3d 587, 604 (E.D. Mich. 2025); *Cunningham v. Ford Motor Co.*, No. 21-CV-10781, 2022 WL 2819115, at *6 (E.D. Mich. July 19, 2022); *DeAngelis v. Icon*

at 173 (distinguishing between questions of scope and "the identity of parties who may be bound by such an agreement") (quoting *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 496 (Tex. Ct. App. 2011)); *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 233–34, 847 S.E.2d 268, 274 (Ct. App. 2020) ("We conclude Appellants may not use equitable estoppel to bind Weaver to the arbitration provision. Because no valid arbitration agreement existed between Appellants and Weaver, we affirm the denial of the motion to compel arbitration."); *Weckesser v. Knight Enters. S.E., LLC*, 735 F. App'x 816, 821 (4th Cir. 2018) (holding that "the question 'who must arbitrate' rather than 'what must be arbitrated'" is one of contract existence and not scope); *Raymond James Fin. Servs. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013) (holding that whether the plaintiffs were "customers" who could enforce an arbitration agreement goes to existence and not scope); *see also Mey v. DIRECTV, LLC*, 971 F.3d 284, 304 (4th Cir. 2020) (Harris, J., dissenting) ("As this court has recognized on many occasions, the question of who is subject to an arbitration agreement goes to whether there is an agreement to arbitrate at all, rather than to the scope of any such agreement."). A scope question assumes a valid arbitration agreement already binds the parties. Conversely, an existence question asks whether these parties agreed to arbitrate at all.

Going further, Appellants try to bypass the determination of the contract's existence altogether. They argue the circuit court erred because it already found a valid arbitration agreement

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Ent. Grp., 364 F. Supp. 3d 787, 797 (S.D. Ohio 2019); *Rivera v. L-3 Commc'ns Corp.*, Case No. 8:09-cv-02447, 2010 WL 11629096, at *2 (M.D. Fla. May 24, 2010). Courts often use the term "arbitrability" generically without distinguishing between questions of scope and questions of formation. *Berkeley Cnty. Sch. Dist. v. HUB Int'l*, 363 F. Supp. 3d 632, 644–45 (D.S.C. 2019), *vacated and remanded on other grounds*, 944 F.3d 225 (4th Cir. 2019). And in the cases which Appellants cite, the courts did not ask whether this specific "arbitrability" question is one of formation which cannot be delegated in the first instance. Those cases therefore have no relevance here, where that is the operative question.

that "covers the exact same claims" and expressly contend that "[t]he existence or formation of an agreement to arbitrate is not at issue." Appellants' Br. at 1–2, 8–14. But the order found "*Foundations* has offered sufficient evidence that there is a valid and enforceable arbitration agreement between Foundations and the Plaags which covers this dispute." Order at 3 (emphasis added). As to Patel, the Plaags agreed that any order compelling arbitration for Foundations would extend to Patel. *Id.* at 3–4. But an agreement with Foundations is not necessarily an agreement with Appellants. Appellants therefore had to prove they were parties to, or otherwise entitled to enforce, Foundations' arbitration clause in the first place. Because Appellants must prove an agreement exists using admissible evidence, the circuit court properly required proof beyond denied allegations in the complaint.

3. Appellants' argument that the parties delegated the question presented to an arbitrator is unpreserved and wrong.

Appellants next say the arbitrator should have decided whether they can enforce Foundations' agreement because the contract delegates arbitrability questions, either by its general language or by incorporating AAA rules. Both delegation arguments fail.

1. To start, their delegation arguments are unpreserved. Appellants did not raise delegation in their motion to compel arbitration. Appellants' Mot. to Compel Arb. Their supporting memorandum filed four days later only argued that matters concerning the scope of the agreement were delegated to an arbitrator after the court "determine[es] a valid arbitration agreement exists." Appellants' Mem. in Supp. of Mot. to Compel Arb. at 11. In their reply brief, however, Appellants argued for the first time that the parties delegated *any* disputes, including whether an arbitration agreement exists, to the arbitrator. Reply Br. at 3–4. "It is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716

S.E.2d 887, 888 n.2 (2011). Appellants therefore failed to timely raise their delegation argument in the circuit court, and they cannot raise it on appeal.

2. Further, the question presented here cannot be delegated even if the parties try. 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); *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."). But determining whether a valid arbitration agreement exists 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 "[w]e are not alone in this regard" and collecting cases). Parties may delegate *other* "gateway" questions to the arbitrator, but there must be clear and unmistakable evidence of their intent to do so. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). So the circuit court—not an arbitrator—had to decide whether an agreement exists between the Plaags and Appellants. That threshold question cannot be delegated away.

3. Even if that question *can* be delegated to an arbitrator, there is no clear and unmistakable evidence that the parties *did* delegate it. The Supreme Court defines "clear and unmistakable" evidence as an express agreement to arbitrate these issues. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (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:

> 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 of Chi., 514 U.S. at 945.

Foundations' arbitration agreement says nothing about arbitrators deciding arbitrability, the existence or validity of an agreement, jurisdiction, or any specific gateway matter. It just generically says the arbitrator will decide "all claims or controversies, and related issues," concerning the underlying transactions and events, and "the construction, performance, or breach" of an agreement between the parties. Appellants' Mem. in Supp. of Mot. Compel Arb. Ex. A ¶ 15(b). This generic language is insufficient to delegate gateway questions such as those presented here to the arbitrator. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) ("[B]road arbitration clauses that generally commit all interpretive disputes 'relating to' or 'arising out of' the agreement do not satisfy the clear and unmistakable test."). As a result,

Appellants cannot meet their burden to prove the Plaags agreed to have an arbitrator, rather than a court, determine controversies related to the validity and enforceability of the agreement.[9]

4. Neither does the mere incorporation of AAA's rules 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, and governed by, the Code of Commercial Arbitration of the American Arbitration Association." Appellants' Mem. in Supp. of Mot. Compel Arb. Ex. A ¶ 15(c). It says nothing about delegation. Second, the AAA rules merely *allow* 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 Appellants the benefit of all doubt, which cannot be done, the arbitration agreement at best is ambiguous as to whether an arbitrator

[9] Foundations did not argue delegation in its motion. *See generally* Foundations Mot. to Compel Arb.

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.

Contrary to Appellants' argument, this Court did not previously hold that the mere incorporation of AAA rules is clear and unmistakable evidence of delegation of contract existence questions. Appellants' Br. at 10 (citing *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 530, 908 S.E.2d 892, 896 (Ct. App. 2024)); *id.* at 11 (citing *315 Corley CW*, 444 S.C. at 530, 908 S.E.2d at 896). In *315 Corley CW*, this Court suggested that AAA Commercial Arbitration Rule 7 "purports" to delegate arbitrability questions, but it did not decide that issue because the underlying question was whether a contract existed which cannot be delegated. 444 S.C. at 529–30, 908 S.E.2d at 896–97; *see also Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021) ("Thus the incorporation of the rules of the American Arbitration Association, which allow the arbitrator to rule on questions of arbitrability … does not obviate the need for courts to decide the threshold issue of contract formation."). The argument which Appellants raise therefore remains an open question in South Carolina.

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 Sols., 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. DynMcDermott 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). 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.").[10]

None of these courts address the argument raised here—the AAA rule at issue simply *allows* an arbitrator to hear gateway questions once 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 of 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 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

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

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.

4. Appellants' argument that Arizona law applies also is unpreserved and wrong.

Appellants next argue that Arizona law applies to this issue. Appellants' Br. at 17 n.7. They never argued the application of Arizona law below. Appellants therefore did not preserve this issue. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80; *Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695. They also abandoned this argument by raising it cursorily in a footnote. *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 677, 869 S.E.2d 819, 857 (Ct. App. 2021) (holding that a party abandons an issue by raising it only in a footnote).

The argument also fails on its merits. Whether a contract exists is determined by the law of the state where the contract was made, not the law selected in a choice of law provision. *Johnson v. Cont. Fin. Co.*, 131 F.4th 169, 178 (4th Cir. 2025). Because the Plaags accepted the contract from South Carolina, South Carolina law controls questions of contract formation. *See O'Briant v. Daniel Const. Co.*, 279 S.C. 254, 256–57, 305 S.E.2d 241, 243 (1983).

III. Appellants have no standing to argue the circuit court erred by "failing to determine" whether they waived arbitration, and if this Court reaches the issue anyway, it is an additional sustaining ground.

Appellants' second issue asks whether the circuit court erred by "failing to determine" that they did not waive arbitration. Appellants' Br. at 1. That issue is not a valid ground for reversal. Even if the Court elects to address waiver, it should not do so to reverse. It should do so, if at all, as an additional ground to affirm.

Only an aggrieved party may appeal, and a party is aggrieved when the judgment operates on its rights or bears directly on its interests. *Ralph v. McLaughlin*, 432 S.C. 640, 649, 856 S.E.2d 154, 158 (2021). Here, Appellants were not aggrieved by any ruling on waiver. After denying Appellants' motion based on their lack of proof, the court wrote:

> Because this conclusion disposes of [Appellants'] motion, the Court need not reach the Plaags' argument that Chuck Oliver and The Institute of Financial Enrichment waived arbitration by answering the complaint and the other [Appellants] waived it by moving to dismiss. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Order at 6 n.6. So there was no adverse ruling on waiver for Appellants to appeal; there is nothing for the Court to reverse.

While the Court cannot reverse based on waiver, it can affirm under it. *See* Rule 220(c), SCACR; *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419–22, 526 S.E.2d 716, 723–24 (2000). "[A] court must hold a party to its arbitration contract just as a court would to any other kind" and it "may not devise novel rules to favor arbitration over litigation." *Morgan*, 596 U.S. at 418; *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."). A party may raise any defense to the formation of an arbitration agreement that it could raise to the formation of any

contract. *Dr.'s Assocs. 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 v. Concepcion*, 563 U.S. 333, 339 (2011). A state therefore cannot erect special barriers to enforcing arbitration agreements, whether direct or covert. *Kindred Nursing Ctrs. L.P. v. Clark*, 581 U.S. 246, 252 (2017); *Dr.'s Assocs.*, 517 U.S. at 687. But just as importantly, neither can a state "elevate [arbitration agreements] over other forms of contract." *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 404 n.12 (1967).

Like any contractual right, the right to arbitrate may be waived. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). Waiver is the voluntary and intentional relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). And after *Morgan*, courts may not impose arbitration-specific waiver rules requiring prejudice where ordinary contract law would not. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417–19 (2022). Appellants' conduct in circuit court was plainly inconsistent with a right to arbitrate. Chuck and The Institute of Financial Enrichment answered the complaint without mentioning arbitration. Answer. The remaining Appellants moved to dismiss for lack of personal jurisdiction and failure to state a claim, again without invoking arbitration. Defs.' Mot. to Dismiss. At the hearing, the Plaags accurately summarized the point: Appellants had "voluntarily appeared in court" and sought relief "inconsistent with the claim that an arbitrator has to decide this case." Tr. at 40.

Appellants respond that South Carolina cases sometimes discuss prejudice and delay in the arbitration waiver context. Appellants' Br. at 24–27. But *Morgan* forecloses any arbitration-specific prejudice requirement. 596 U.S. at 417–19. The question is simply whether the conduct reflected the knowing abandonment of the claimed right. If Appellants truly believed the complaint itself gave them a right to arbitrate, then they knew about that right when they received the complaint. Yet they answered and moved to dismiss first, and only later pivoted to arbitration. On this record, waiver supports affirmance if the Court chooses to reach it.

Conclusion

The Plaags are defrauded retirees who have been waiting for their day in court. Appellants operated through a maze of entities, denied they had any relationship with the only party whose agreement contained an arbitration clause, refused to produce any evidence of such a relationship, and now ask this Court to send the case to arbitration anyway. That request is not supported by contract law, South Carolina precedent, or basic procedural principles.

The circuit court correctly enforced the Foundations arbitration agreement where it was proven and refused to extend that agreement to 28 additional parties who refused to prove they are entitled to enforce it. This Court should affirm.

[Signature page follows]

Respectfully submitted,

WILLOUGHBY HUMPHREY & D'ANTONI, P.A.

s/ *R. Walker Humphrey, II*
R. Walker Humphrey, II
James T. Johnson
133 River Landing Drive, Suite 200
Charleston, South Carolina 29492
Telephone Number: 843-619-4426
whumphrey@whdlawyers.com
jjohnson@whdlawyers.com

Attorneys for Respondents

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