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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

Thomas J. Rode, Circuit Court Judge

Appellate Case No. 2026-000910
Case No. 2024-CP-10-02642

Christopher Sawyer and Terese Sawyer, ... Appellants,

v.

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

APPELLANTS' RETURN TO RESPONDENTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Appellants respectfully submit this Return in opposition to Respondents' Motion to Dismiss. Summary dismissal of this matter is inappropriate at this time and briefing on the merits would allow this Honorable Court to appropriately address the parties' positions. In a related appeal involving substantially the same allegations, the same Respondents, and the same counsel on both sides, the Court of Appeals directed the parties to address Respondents' appellate-jurisdiction arguments in their merits briefs. *See Frank Perrelli, Jr. v. Vacation Inspirations*, Case No. 2026-000043, Order dated April 1, 2026. The Court could have required motion practice on appellate jurisdiction, but it did not. Instead, it directed the parties to address the issue in the ordinary course of briefing. This Court's instruction to the parties in the *Perrelli* and *Skoler* matters to address appellate jurisdiction in their respective briefs was issued on April 1, 2026. Appellants'

Notice of Appeal was filed on April 13, 2026. If Respondents believed dismissal was warranted, they had ample opportunity to seek that relief earlier. Instead, they waited until June 24, 2026 to raise the issue in this motion. Respondents' Motion disregards these directions and seeks to litigate the same threshold issue the Court has already directed the parties in the similarly situated matters to address in their appellate briefs and unnecessarily prejudices Appellants. Appellants have already devoted more than ten pages of their Initial Brief to appellate jurisdiction. The unnecessary nature of Respondents' filing is underscored by the fact that Respondents' Motion substantially duplicates pages 3 through 12 of their Initial Brief. *Compare* Mot. at 1–12, *with* Resp. Br. at 3–12.

Requiring Appellants to respond separately to a motion that largely repeats a substantial portion of Respondents' appellate brief serves no practical purpose and only further delays litigating the merits. For these reasons, the Motion is procedurally wasteful.

I. BACKGROUND

This appeal arises from Appellants' challenge to a vacation-club agreement that they allege was procured through a high-pressure sales process and contains a fundamentally unfair one-sided dispute-resolution scheme. The Verified Complaint alleges that Respondents discouraged outside research, rushed Appellants through execution of a noncancellable agreement, and imposed an arbitration provision granting Vacation Inspirations unilateral authority to select the arbitrator while exposing consumers to severe procedural disadvantages. The circuit court nevertheless compelled arbitration and stayed the action. The appeal therefore presents more than the ordinary question whether an order compelling arbitration and staying proceedings is immediately appealable. Appellants contend the order affects substantial rights because it removes them from a neutral judicial forum and compels them into a dispute-resolution process in which Respondents select the sole arbitrator.

Appellants also contend the issue is capable of repetition because related appeals involving the same Respondents, overlapping allegations, and materially similar arbitration language have raised the same threshold issue: whether consumers may be compelled into arbitration under a clause that excludes any neutral protections while giving Respondents unilateral authority to select the arbitrator. *See Perrelli v. Vacation Inspirations*, No. 2024-CP-1004606 (S.C.Com.Pl.), *on appeal*, *Perrelli v. Vacation Inspirations*, No. 2026-000043 (Ct. App.); *Skoler v. Vacation Inspirations*, No. 2024-CP-1002646 (S.C.Com.Pl.), *on appeal* No. 2026-0000058 (Ct. App.).

II. ARGUMENT

Appellants set forth two independent bases for immediate appellate review. *First*, under S.C. Code Ann. § 14-3-330, the order is immediately appealable because it compels Appellants to submit to "arbitration in name only," a scheme without minimum due process and any reasonable likelihood of a fundamentally fair process, thereby affecting a substantial right. *See Flores v. New York Football Giants, Inc.*, 150 F.4th 172, 187 (2nd Cir. 2025) (an agreement for arbitration that "lacks the requisite independence between parties and arbitrator that is fundamental to the FAA's conception of arbitration" is "arbitration in name only").

Second, under *Toler's Cove*, appellate review is warranted because the issues presented are "capable of repetition" and "need to be addressed." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 585 (2003) (recognizing that appellate review is appropriate where issues are "capable of repetition and need to be addressed," even if the order is not otherwise immediately appealable). That is true not only of the merits issues—which are now before this Court in three separate appeals involving materially similar arbitration provisions—but also of recurring threshold issues, including the legal standard governing motions to compel arbitration under the Federal Arbitration Act.

A. The Order Denies Appellants Their Due Process Right to a Decision Before a Neutral Decisionmaker rendering the Order Immediately Appealable Under S.C. Code Ann. § 14-3-330

As a threshold matter, Appellants do not contend that orders compelling arbitration are categorically or even routinely appealable. Nor do Appellants dispute that arbitration frequently serves as an acceptable alternative to judicial adjudication where it provides a fair and neutral forum.

This case is different. The order below compels Appellants into a process that lacks neutrality at its core and therefore fails to provide even minimal due-process protections required by law. That process is not arbitration at all—it is a "sham." And where a litigant is forced into such a forum, immediate appellate review is required because a substantial right is irretrievably lost. The proposition is straightforward: few rights are more substantial than the right not to have one's dispute decided through a fundamentally unfair and illegitimate process.

1. § 15-48-200 Does Not Control

Appellants' position does not disturb the ordinary operation of S.C. Code Ann. § 15-48-200 but recognizes that the circuit court's order here affects an antecedent and independent right: the right not to be compelled before a structurally nonneutral decisionmaker or into a process lacking basic due process. Treating this order as a routine order compelling arbitration would allow the label "arbitration" to insulate any private adjudicative scheme, no matter how one-sided.

As an initial matter, Respondents' principal authority on this issue, *Heffner v. Destiny, Inc.*, has been overruled by the United States Supreme Court and only provides a procedural rule for appealability in South Carolina. 321 S.C. 536, 471 S.E.2d 135 (1995). At most, *Heffner* holds that the general appealability statute could not make ordinary orders compelling arbitration categorically appealable when the more specific arbitration statute omitted those orders. 321 S.C. at 538, 471 S.E.2d at 136. But *Heffner* did not involve unilateral selection of the sole arbitrator, exclusion of the arbitral institution, a claim that the compelled process lacked the defining feature of neutral arbitration, or any comparable structural due-process defect. Nor does *Heffner*'s one-page analysis reveal the nature of the appellant's § 14-3-330 argument. That matters because Appellants do not argue that every order compelling arbitration is appealable under § 14-3-330. They argue only that this order is appealable because it compels them into a structurally nonneutral tribunal and thereby affects an independently protected substantial right and mode of adjudication.[1]

2. Forcing Consumers to Arbitrate Before Respondents' Hand-Picked Arbitrator "In Effect" Determines the Action

Respondents' argument depends on selectively quoting § 14-3-330 while omitting its critical functional language. The statute authorizes appeal from "[a]n order affecting a substantial right made in an action when such order (a) ***in effect*** determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." S.C. Code Ann. § 14-3-330(2) (emphasis added); see also Mot. at 5 (language in emphasis omitted). "In effect" does not mean "only if dismissed." It requires a practical inquiry into what the order does—not exclusively a mechanical inquiry into whether the circuit court used the word "stay" rather than "dismissal."

Widener does not hold otherwise. *See* Mot. at 5. Dismissal may be sufficient to make an arbitration order immediately appealable, but Respondents identify no authority holding that dismissal is *necessary* where the order's practical effect is to remove the dispute from the judicial system and prevent meaningful appellate review. Here, the order sends Appellants' claims out of court and into a structurally defective adjudicative process that lacks the minimum attributes of

[1] Nor does the specific-over-general canon resolve every question concerning the appealability of an arbitration order—particularly where, as here, the asserted substantial right rests on fundamental due-process guarantees. Section 15-48-200 identifies the ordinary arbitration orders from which an appeal may be taken. Section 14-3-330 separately authorizes immediate review of extraordinary interlocutory orders affecting substantial rights. Applying § 14-3-330 to an order that facially deprives litigants of a neutral decisionmaker does not rewrite or circumvent § 15-48-200. It recognizes that this order does more than choose arbitration as the forum: it compels Appellants to submit to a process whose prescribed method of selecting the adjudicator denies the essential safeguard of impartial adjudication.

neutrality. Once Appellants are forced to present their claims to an arbitrator selected by Respondents, the deprivation has occurred. A later motion to vacate cannot restore the lost right to a neutral decisionmaker at the outset, nor can it cure the coercive effect of forcing consumers to proceed in a forum designed and controlled by the opposing party.

Nor does the stay guarantee a later judgment capable of meaningful review. Given the facial defects in the compelled process—including Respondents' unilateral control over arbitrator selection—the proceeding may never generate a valid award capable of confirmation, vacatur, or appellate review. And if the practical effect of the order is to force abandonment or settlement under a structurally unfair mechanism, then the order has, "in effect," prevented any judgment from which an appeal might be taken.

Respondents' position would create an easy roadmap for insulating facially defective arbitration schemes from appellate review: request a stay rather than dismissal, compel the consumer into the one-sided forum, and then argue that no appeal lies until after the challenged process has run its course. Section 14-3-330(2)(a)'s "in effect" language exists to protect against precisely that kind of formalism.

3. Orders Affecting a Substantial Right Are Immediately Appealable Under 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 Appellants' rights to have their dispute adjudicated by a neutral decisionmaker—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).

One basis for immediate appeal is "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).

a. <u>The Order is Appealable under § 14-3-330 Because it Affects Appellants' Substantial Right of Due Process</u>

Respondents also suggest that, because § 14-3-330 does not expressly list "due process" or "adjudication before a neutral decisionmaker," those rights cannot qualify as "substantial rights." See Mot. at 6-10. That argument misunderstands the statute. Section 14-3-330 does not catalogue every substantial right protected from irreparable loss before final judgment. It uses broad language—"an order affecting a substantial right"—because the inquiry turns on the nature of the right affected.

The critical substantial right here is Appellants' right to due process—specifically, the right to adjudication before a fair and impartial decisionmaker. *In re Murchison*, 349 U.S. 133, 135–36 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process" and is "required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States"). Indeed, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Mallett v.*

Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (S.C. Ct. App. 1996) ("It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution.")[2] The Supreme Court has confirmed that the "elementary requirements of impartiality taken for granted in every judicial proceeding" apply equally to arbitration. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 145, 150 (1968). In fact, the Supreme Court went a step further and stated that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id*. at 149.

An adjudicative process that is so "infected [] with [] unfairness" 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," *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). "Due process, in arbitration, means satisfying 'minimal requirements of fairness' . . . [which is met] 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) (emphasis added). Critically for the subject dispute, arbitration can satisfy "constitutional minimums . . . so long as the arbitrator's selection did not represent [one party's] unrestricted choice." *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 308 n. 21 (1986).

[2] For the avoidance of doubt, "South Carolina courts interpret the state constitutional guarantees of due process and equal protection as coextensive with their federal counterparts." *MBSC Prop. S., LLC v. City of Myrtle Beach, S.C.*, 25-CV-1475, 2025 WL 2484183, at *10 n.4 (D.S.C. Aug. 28, 2025) (citing *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002)).

The order here strips Appellants of adjudication before a South Carolina jury and compels them into a structurally fraught arbitral scheme. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) ("The loss of the right to a jury trial is an obvious result of arbitration."). The South Carolina Supreme Court has recognized that even far less consequential changes—such as referral to a master—are immediately appealable. *Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) (holding a referral to a master-in-equity "should have been appealed immediately because it affected the mode of trial, a substantial right").

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. "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 appeal of the arbitration order here under S.C. Code Ann. § 14-3-330(2) is not only justified but required.

The right at issue here is unquestionably substantial. *E.g., United States v. Peoples*, 698 F.3d 185, 193 (4th Cir. 2012) (holding error affected litigant's "substantial rights" where a proceeding denied "the fundamental requirement of due process"). Appellants' Initial Brief explained that due process includes, at minimum, the right to adjudication before a fair and impartial decisionmaker. *See* App. Initial Br. at 9–12. A compelled proceeding before an arbitrator selected by Respondents strikes at that core guarantee. That deprivation is not a technical or procedural inconvenience; it goes to the legitimacy of the adjudicative process itself. Once Appellants are forced to submit their claims to a decisionmaker chosen by their adversary, the substantial right to neutral adjudication has already been lost.

4. The Circuit Court's Order Subjects Appellants to a Structurally Biased Process That Eliminates Neutral Adjudication

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 Inspirations]. 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 (rather than rules made for consumer disputes) 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.'" *Id.* (quoting *Commonwealth Coatings,* 393 U.S. at 148).

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).[3] 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 are evident on the face of the Arbitration Provision. Its structure guarantees a lack of neutrality and creates an inherent risk of bias. By compelling Appellants into this process, the circuit court's order deprives them of their substantial right to a fair and impartial forum. Immediate appeal is therefore required under S.C. Code Ann. § 14-3-330(2).

5. The Order Changes the Mode of Trial and Must be Challenged Now

Respondents attempt to confine "mode of trial" to the narrow question of jury versus nonjury trial. *See* Mot. at 6. That narrow reading is belied by overwhelming authority. An order compelling arbitration does far more than alter case management. An arbitration order removes every factual and legal issue from the judicial branch, eliminates a jury, and assigns final decision making to a private actor. *Simpson* recognizes that "[t]he loss of the right to a jury trial is an obvious result of arbitration." 373 S.C. at 27, 644 S.E.2d at 670. The change here is even more consequential because the private decisionmaker is selected solely by Respondents.

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[3] The Respondents' priorities in seeking to compel arbitration are telling, as illustrated on two occasions in their Initial Brief, when expressing the purpose of arbitration as "to provide a prompt and efficient alternative to resolve disputes" and ignoring the mandated prerequisite of being geared towards achieving an unbiased decision by a neutral decision-maker.

Courts have long described arbitration as a mode or substitute form of trial. *E.g., Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 480 (1989) ("[A]rbitration is merely a form of trial to be used in lieu of a trial at law."); *Cost Bros. v. Travelers Indem. Co.*, 760 F.2d 58, 62 n.4 (3d Cir. 1985) ("[V]alid arbitration clause modifies procedure only by substituting arbitration as mode of trial.").[4]

Thus, once the dispute is sent from court to a private adjudicator selected by Respondents, the mode of trial has been changed. That change must be challenged now, because post-award review cannot restore the lost right to the mode of adjudication Appellants contend the law requires.

6. § 15-48-200(a) Does Not Control When Due Process is at Issue

While Appellants contend that § 14-3-330 provides statutory authority for its immediate appeal, they need not have even explicit "statutory authority" because "[t]he U.S. and State Constitutions require due process; no statute is needed here to insure due process." *Newberry Coll. v. S.C. Emp. Sec. Comm'n*, 286 S.C. 136, 140, 333 S.E.2d 58, 60 (Ct. App. 1985); *see also State v. Beaty*, 423 S.C. 26, 43, 813 S.E.2d 502, 511 (2018) (South Carolina appellate court "authority to rectify a specific due process violation falls within [its] constitutional power to correct errors of law and trumps our inability to adopt a clearly stated practice or procedural rule"). It is clear: "procedural due process contemplates a fair trial," *Beaty*, 423 S.C. at 43, 813 S.E.2d at 511, and that is an issue that can and should be remedied now.

[4] *L. H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977) ("Early cases recognized arbitration as an approved and effective mode of trial."); *Springfield Fire & Marine Ins. Co. v. Payne*, 46 P. 315, 318 (Kan. 1896) ("[Arbitration] is a popular, cheap, convenient, and domestic mode of trial."); *Stathatos v. Arnold Bernstein S.S. Corp.*, 202 F.2d 525, 526 (2d Cir. 1953) (quoting Judge Learned Hand in stating that "arbitration is merely a form of trial" (internal quotation marks and citation omitted)); 21 Williston on Contracts § 57:51 (4th ed.) ("[A]rbitration is generally regarded as a mode of trial adopted in the suit.").

7. 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 entire Arbitration Provision. 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—practices that have previously resulted in enforcement actions, settlements, monetary penalties, and victim restitution imposed by the Texas Attorney General and the Georgia Attorney General.

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)." (Compl. ¶ 41(d).)

First, Respondents drafted the Arbitration Provision to incorporate the AAA Commercial Rules, which purport to allow a unilaterally selected arbitrator to decide the validity of the arbitration provision—including the very unilateral-selection mechanism by which that arbitrator was appointed. Such a result is untenable.

Second, Respondents deliberately drafted the Arbitration Provision to evade administration by a neutral arbitral forum, specifying that arbitration would proceed "not under the auspices of AAA." That drafting choice must be understood in light of AAA Consumer Rule R-1(a), which provides that consumer arbitration agreements invoking the AAA are governed by the Consumer Rules, regardless of whether other AAA rules are referenced. Without the administration of the arbitration by the AAA, Respondents knew there was no body ensuring the arbitrator uses the proper arbitral rules (or that the arbitrator was in fact neutral and fair).

Chavarria v. Ralphs Grocery Co. explained that the "preclusion of institutional arbitration administrators, namely AAA or JAMS, which have established rules and procedures to select a neutral arbitrator" contributes to a policy "that 'lacks any semblance of fairness and eviscerates the right to seek civil redress.'" 733 F.3d 916, 923 (9th Cir. 2013) (quoting *Chavarria v. Ralphs Grocery Co.*, 812 F. Supp. 2d 1079, 1089 (C.D. Cal. 2011)). The Ninth Circuit echoed the reasoning of the district court: "'To condone such a policy would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our justice system.'" *Id*. (citation omitted).

Third, Respondents' deliberate avoidance of the AAA Consumer Rules is unsurprising in light of the consumer protections those rules impose—protections that are facially incompatible with their scheme. The Consumer Rules limit a consumer's financial exposure by requiring that the consumer pay only a filing fee while the business bears the remaining arbitration costs. *See* AAA Consumer Arbitration Rules R-1(c), R-12; Administrative Fee Schedule. They also require that the arbitration "substantially and materially complies with the due process standards of the Consumer Due Process Protocol." AAA Consumer Arbitration Rules R-1(c). By structuring the agreement to avoid these requirements, Respondents seek to eliminate the very safeguards that render consumer arbitration fair.[5]

The Consumer Due Process Protocol, among other things, requires that consumers have "an equal voice in the selection of Neutrals" and that proceedings occur in a "reasonably convenient" location. AAA Consumer Due Process Protocol. By excluding AAA administration,

[5] This reflects the reality that most consumer contracts are contracts of adhesion. If the more sophisticated party could draft an arbitration provision to evade the AAA Consumer Rules, those protections would be rendered meaningless. That cannot be the law, and the AAA's framework reflects precisely that principle.

Respondents stripped away these core protections. The result is a process that lacks even the minimum fairness and neutrality required of a legitimate arbitral forum.

Fourth, Respondents needed to avoid the "auspices" of the AAA because the AAA will administer consumer arbitrations only where the process is fundamentally fair and complies with its Consumer Due Process Protocol. The Arbitration Provision does neither. Beyond the fact that Appellants have no say in the selection of an arbitrator, the Arbitration Provision shifts all costs to the losing party and allows Respondents to dictate the location—terms that directly conflict with the AAA's consumer protections. As drafted, the provision would almost certainly be rejected by the AAA. That is no accident: Respondents structured the process to avoid neutral administration and its attendant safeguards.

Collectively, these features expose a system that is not arbitration at all, one that is structurally incapable of providing a fair and neutral forum. Each component—unilateral arbitrator selection, evasion of institutional oversight, asymmetric cost allocation, and unilateral venue control—undermines core procedural safeguards. They strip the process of the essential characteristics of arbitration recognized under the FAA. Accordingly, these provisions further confirm the invalidity of an arbitration scheme that fails to provide even minimal due process protections.

8. Pre-Arbitration Appeal is Necessary Here

Respondents dismiss Appellants' authorities because they did not all arise in the identical procedural posture or on identical facts. But factual distinctions do not defeat their central principle. The federal cases applying the same federal statute—the Federal Arbitration Act—confirm that "procedural unfairness inherent in an arbitration agreement may be challenged before the arbitration." *McMullen*, 355 F.3d at 494 n.7.

While interlocutory appeals are generally disfavored to avoid piecemeal litigation, that principle presumes the underlying proceeding is capable of resolving the dispute. *Breland,* 339 S.C. at 94, 529 S.E.2d at 13 ("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."). That assumption does not hold here. Forcing the parties to proceed through a structurally defective arbitration risks producing an unenforceable award, necessitating further proceedings and undermining, rather than promoting, efficiency. Immediate appellate review prevents that result.

Judicial efficiency favors addressing the structural defect now, *before* arbitration proceeds. 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 [an] aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution." *Id*. Immediate review avoids forcing the parties through a process that cannot produce a valid or enforceable result.

As *McMullen* explained, "[t]he *Hooters* court and the *Floss* court both recognized that procedural unfairness inherent in an arbitration agreement may be challenged before the arbitration." *Id*. *Walker v. Ryan's Family Steak Houses, Inc.* confirms the same point. 400 F.3d 370 (6th Cir. 2005). There, the Sixth Circuit specifically explains that the rule postponing challenges to a particular arbitrator's later bias does not apply when the selection process itself is fundamentally unfair. *Id*. at 385. Thus, "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." *Id*. *Walker* explained that where an "'arbitral forum is not an effective substitute for a judicial forum,'" "'the ***party need not arbitrate first and then allege bias through post-arbitration judicial review***.'" *Id*.

The Supreme Court of Hawaii's decision in *Nishimura v. Gentry Homes, Ltd.* confirms that these same FAA principles apply in state courts. 134 Haw. 143 (2014). *Nishimura* stated: "*McMullen, Walker*, and *Geiger* all hold that courts may entertain pre-arbitration challenges to the arbitrator-selection process, because such claims are the exception to the general rule that challenges to arbitrator bias must await the completion of arbitration." *Id*. at 151. It "adopt[ed] the 'fundamental fairness' standard under *McMullen* to review pre-arbitration challenges to the arbitrator-selection process." *Id*. at 152.

That is exactly this case. Appellants do not speculate that some future arbitrator may later act with bias. They challenge the contractual mechanism that gives Respondents unilateral control over who the arbitrator will be. Under *McMullen*, *Hooters*, *Walker*, and *Nishimura*, that structural unfairness is properly challenged before arbitration begins.

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

"[A] state court, while generally denying the appealability of an interlocutory order compelling arbitration, may still hear the appeal on the basis that the issues are capable of repetition and need to be addressed." 6 C.J.S. Arbitration § 74.

Respondents invoke *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.* for its statement of ordinary nonappealability but disregard what the Court actually did. After identifying that rule, the Supreme Court reached the merits "because appellant's issues are capable of repetition and need to be addressed." 355 S.C. 605, 611, 586 S.E.2d 581, 585 (2003). Whatever label Respondents prefer, that language showcases the Court's authority to decide recurring arbitration issues despite the usual interlocutory rule.[6]

1. The Three Nearly Identical Appeals Demonstrate That This Dispute Is Capable of Repetition and Warrants Review

The case for review is strong here. The same form provision has been invoked in multiple South Carolina actions. It repeatedly presents the same questions: whether a business may select the sole arbitrator; whether invocation of Commercial Rules delegates validity in a consumer contract; whether the Consumer Rules apply[7]; whether a nonadministered proceeding can claim AAA safeguards; and whether FAA § 4 and SC Code § 15-48-20 require a summary-judgment framework. Those are Appellants' issues, they have already recurred, and they will continue to evade meaningful review if consumers must first complete an arbitration controlled by Respondents.

Respondents object to materials documenting recurrence. But the existence of related proceedings and the use of the same clause are judicially noticeable facts, not extra-record proof of liability. More fundamentally, the recurrence of the legal issue is already established by the consolidated appeals themselves. The Court need not rely on any disputed allegation to see that Respondents have invoked the same clause against multiple consumers.

[6] *Toler's Cove* is not the only South Carolina appellate decision recognizing that an appellate court may reach the merits under this doctrine. This Court applied the same "capable of repetition" doctrine in *Huskins v. Mungo Homes, LLC*. 439 S.C. 356, 365, 887 S.E.2d 534, 539 (Ct. App. 2023), *rev'd on other grounds*, 444 S.C. 592, 910 S.E.2d 474 (2024). South Carolina appellate courts have also considered the doctrine more recently, including in an unreported May 2025 decision.

[7] Respondents state that "even if Consumer Rules applied, which they do not, those rules contain the same requirement for independent, impartial neutrals . . ." Mot. at 11. True, but the Consumer Rules also require application of the Consumer Due Process Protocol, which includes a requirement of, among other things, "a fundamental-fair ADR process" and "[t]he Consumer and Provider [] hav[ing] an equal voice in the selection of Neutrals in connection with a specific dispute." AAA Consumer Due Process Protocol. Without AAA administration to enforce the Due Process Protocol, there is no neutral institution to: (i) screen the arbitration clause for consumer-protection compliance; (ii) administer the case and communicate with the parties; (iii) provide a neutral arbitrator-selection process; (iv) require disclosures and resolve challenges for bias; and (v) ensure that the designated rules are actually followed.

Appellants submit that the issues presented here are likewise capable of repetition warranting immediate appellate review. The challenged Arbitration Provision is not unique to this case. Respondents have already invoked the same provision in two other actions—both now on appeal before this Court—arising from the same form contract and identical dispute-resolution language. *See Perrelli v. Vacation Inspirations*, No. 2024-CP-1004606 (S.C.Com.Pl.), *on appeal*, *Perrelli v. Vacation Inspirations*, No. 2026-000043 (Ct. App.); *Skoler v. Vacation Inspirations*, No. 2024-CP-1002646 (S.C.Com.Pl.), *on appeal* No. 2026-0000058 (Ct. App.). In addition, numerous consumer complaints filed with the South Carolina Department of Consumer Affairs allege the same high-pressure sales practices and the same one-sided arbitration scheme reflected in the Verified Complaint here.

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 is consistent with its application nationwide and does not permit enforcement of arbitration schemes that federal appellate courts have repeatedly found unenforceable due to structural unfairness.

2. This Appeal Also Presents Recurring Issues Beyond the Merits That Must Be Addressed

Apart from the underlying substantive allegations of deceptive practices in violation of SCUTPA—which Appellants submit 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 can establish "clear and unmistakable" delegation of arbitrability merely by invoking the AAA Commercial Rules, particularly where the provision itself is challenged as unconscionable; and (iv) the proper application of binding Supreme Court of South Carolina precedent—namely *Damico* and *Simpson—*by circuit courts. Although Appellants briefly address these issues here, they are discussed more fulsome *infra*.

First, 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). Numerous federal courts have reached the same conclusion that unilateral arbitrator selection provisions are invalid. *E.g., Flores*, 150 F.4th at 185 (aligning the Second Circuit with the "Fourth and Sixth Circuits [] which refused to enforce arbitration provisions because of the unilateral selection of arbitrators." (citing *Hooters*, 173 F.3d at 939–40 & *McMullen*, 355 F.3d at 493–94).[8] Despite this authority, the circuit 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,

[8] 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 circuit 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.

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").[9] Here, the circuit court erred by failing to apply a summary-judgment-like standard or even any identifiable standard when ruling on the motion to compel arbitration.

Third, the circuit 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 circuit

[9] 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 courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17–18 (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, 132 (2016).

court's delegation ruling cannot be squared with that binding authority—especially given that the provision here invokes the same arbitral rules.

Fourth, the circuit court's arbitration and reconsideration orders are devoid of any reference to *Damico* or *Simpson* and in fact contain no analysis of unconscionability. Instead, the circuit court erroneously states "The Court need not consider Plaintiffs' unconscionability arguments because parties are presumed to have read the agreement they signed." (Arb. Order at 3.) South Carolina law requires courts to engage in a fact-specific, case-by-case analysis of unconscionability before 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.

This appeal fits squarely 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 substantial importance, and will continue to evade review absent immediate appellate intervention. Because the issues recur in consumer arbitration disputes, implicate the proper application of controlling South Carolina law and the Federal Arbitration Act, and require appellate guidance to prevent continued enforcement of structurally unfair arbitration schemes, the circuit court's order is immediately appealable under *Toler's Cove*.

This Court has appellate jurisdiction under S.C. Code Ann. § 14-3-330 because the circuit court's orders deny Appellants their substantial right to due process, and independently under

Toler's Cove because the issues presented are capable of repetition and warrant appellate guidance. A contrary determination would leave Appellants without any meaningful opportunity for a fair hearing before a neutral decisionmaker and would leave recurring arbitration issues of significant importance unresolved.

III. CONCLUSION

For these reasons, Appellants respectfully request that the Court deny Respondents' Motion to Dismiss and consider the appellate-jurisdiction issues in the ordinary course of briefing, consistent with the Court's prior directive.

Respectfully submitted,

s/David W. Wolf
David W. Wolf (S.C. Bar No. 17041)
DAVID W. WOLF, P.A.
748-D St. Andrews Boulevard
Charleston, South Carolina 29407
Tel. (843) 853-9000
Fax (843) 853-9002
Email: david@wolflaw.com

s/Abby Edwards Saunders
Abby Edwards Saunders (S.C. Bar No. 17234)
Law Office of Abigail Edwards Saunders, LLC
1021 Sea Mountain Highway, Suite B2
North Myrtle Beach, South Carolina 29582
Tel. (843) 491-9770
Fax (843) 491-9760
Email: abigail@abbysaunderslaw.com

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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

Thomas J. Rode, Circuit Court Judge

Appellate Case No. 2026-000910
Case No. 2024-CP-10-2642

Christopher Sawyer and Terese Sawyer, ... Appellants,

v.

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

PROOF OF SERVICE

I certify that I have served the Appellants' Return to Respondents' Motion to Dismiss and Memorandum in Support on the above-named Respondents by email on June 29, 2026 addressed to counsel of record as follows:

Firm:	Attorney:	Email Address:
Wills Massalon & Allen LLC	John A. Massalon (SC Bar #10279)	jmassalon@wmalawfirm.net
	Carissa Steichen Land (SC Bar #103264)	cland@wmalawfirm.net
Uricchio Howe Krell Jacobson Toporek Theos & Keith	Jeffrey Wayne Buncher, Jr.	jeff@uricchio.com

Date: June 29, 2026

s/David W. Wolf
David W. Wolf (S.C. Bar No. 17041)
DAVID W. WOLF, P.A.
748-D St. Andrews Boulevard
Charleston, South Carolina 29407
Tel. (843) 853-9000

Fax (843) 853-9002
Email: david@wolflaw.com

s/Abby Edwards Saunders
Abby Edwards Saunders (S.C. Bar No. 17234)
Law Office of Abigail Edwards Saunders, LLC
1021 Sea Mountain Highway, Suite B2
North Myrtle Beach, South Carolina 29582
Tel. (843) 491-9770
Fax (843) 491-9760
Email: abigail@abbysaunderslaw.com