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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' REPLY BRIEF

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Respondents ask this Court to stand aside while Appellants are compelled into a "sham" arbitration before Respondents' handpicked arbitrator—without an arbitral administrator, without consumer arbitration rules, and without any meaningful guarantee of impartiality. Worse, Respondents insist that their chosen arbitrator must decide whether Respondents' unilateral power to select them is valid. That is not neutral arbitration. It is not consistent with due process. And it strips Appellants of the most basic protection of any adjudicative process: a neutral decisionmaker. Respondents' scheme is, from start to finish, a self-validating process controlled exclusively by them.

Although the circuit court committed numerous errors, this dispute turns on one seven-word sentence: "The arbitrator shall be selected by VI." (R.__.) Respondents identify no case enforcing that arrangement in a consumer contract—because the premise is indefensible. "An impartial decisionmaker is an essential element of due process." *Pro. Massage Training Ctr., Inc. v. Accreditation All. of Career Schs. & Colleges*, 781 F.3d 161, 177 (4th Cir. 2015) (internal quotations and citation omitted); *see also Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Yet Respondents ask this Court to enforce a clause that gives one side unilateral control over the decisionmaker, without an administering arbitral body, without consumer arbitration safeguards, and without any meaningful protection of neutrality. Respondents' answer is to invoke AAA Commercial Rules that presuppose a valid agreement and an administered proceeding, while disregarding the AAA Consumer Rules applicable to consumer disputes and the Consumer Due Process Protocol's requirement that the parties have equal participation in selecting a neutral arbitrator. Respondents then compound the problem by materially misstating *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019), just as they did in the circuit court. Contrary to the representations in their brief, Henry Schein expressly did not decide whether incorporation of AAA rules, standing alone, delegates questions of arbitrability to the arbitrator.

This is therefore an extraordinary case requiring immediate judicial intervention. Appellants are not merely objecting to arbitration in the abstract; they are objecting to a compelled proceeding with known, facial, and structural defects that strike at the basic guarantees of due process, fundamental fairness, and a neutral decisionmaker. Those guarantees lie at the heart of Appellants' substantial rights.

Although the unilateral selection provision is sufficient by itself to require reversal, the defects do not end there. Nearly every term either expands Respondents' control or imposes unusual risk on the consumer. VI selects the decisionmaker, controls the forum, eliminates neutral administration and consumer safeguards, and shifts the potentially uncapped costs of its chosen process to the consumer. These provisions cannot be viewed in isolation; each magnifies the others. Together, they create an integrated, one-sided dispute-resolution system that preserves the label of arbitration while stripping away arbitration's essential guarantee: a neutral tribunal.

Under Respondents' interpretation, they could appoint virtually anyone—a friend, a family member, a business associate, or even a non-lawyer—to adjudicate the dispute. It is therefore unsurprising that courts consistently condemn unilateral appointment provisions as fundamentally incompatible with a neutral arbitral forum.

STATEMENT OF FACTS

Respondents' brief treats the arbitration clause as though it were negotiated at arm's length between sophisticated commercial parties. The Verified Complaint makes the opposite clear. Appellants are elderly consumers from out of state who were approached while visiting Charleston and told they could receive free sightseeing tickets if they attended a sales presentation. ((R.__ Compl. ¶¶ 1, 10–12.) Once there, Respondents subjected them to a scripted, high-pressure sales process: they were shown purported favorable reviews too quickly to verify them; they were barred from using cellphones during the presentation; Appellants were publicly reprimanded for attempting to search for information about Respondents on Google; they were told the offer was available only that day; they were passed from one salesperson to another; and, after being "worn down," were rushed through signing without a meaningful opportunity to read the documents or consult counsel. ((R.__ Compl. ¶¶ 15–17, 22–25, 29–41).)

That matters. The arbitration provision was not a separately negotiated procedural bargain. It was embedded in a form contract that Respondents filled in with Plaintiffs' information, and presented at the end of the sales process. ((R.__ Compl. ¶¶ 40, 51–54, 63–64).) The Complaint specifically alleges that the arbitration terms lack mutuality because Respondents alone select the arbitrator and control the location; that the proceeding would occur outside AAA administration; that the loser pays the arbitrator's compensation and location costs; and that, as a whole, the clause gives VI unfair control over the process and threatens an *in terrorem* effect on consumers seeking relief. ((R.__ Compl. ¶¶ 53(d), 61–70, 72–76).)

Appellants pleaded that Respondents' sales tactics were deceptive, high-pressure, coercive, and unconscionable; that they prevented a free and informed choice; and that they violated the South Carolina Unfair Trade Practices Act. ((R.__ Compl. ¶¶ 49–51, 78–95).) Against that factual backdrop, Respondents cannot recast the arbitration clause as the product of voluntary, equal bargaining. It was part of the very consumer transaction Appellants challenged as pressured, unfair, and unlawful.

ARGUMENT

I. RESPONDENTS' EXCLUSIVE POWER TO SELECT THE ARBITRATOR RENDERS THE FORUM FUNDAMENTALLY UNFAIR FROM THE OUTSET

A. THE LANGUAGE OF THE ARBITRATION PROVISION

The arbitration provision states: "The arbitrator shall be selected by VI." (R.__.) It does not provide Appellants a strike, veto, ranked list, joint-selection right, or neutral appointing institution. It contains no objective qualifications. It establishes no independent mechanism to resolve a challenge to the appointment. And because the arbitration is "not under the auspices of AAA," the AAA will not make or supervise the appointment, or the broader arbitration. The agreement gives Respondents alone the power to choose the person who will decide their dispute with their consumers, such as Appellants here.

To be clear, this is not a complaint about potential future misconduct by a particular arbitrator. It is a facial challenge to the selection mechanism itself. Actual-bias principles address whether a particular neutral later acts improperly. Structural-neutrality principles address the threshold question whether the arbitrator was selected through a process that can fairly be called neutral in the first place. Appellants challenge the latter.

B. ARBITRATION PRESUPPOSES AN INDEPENDENT AND IMPARTIAL DECISIONMAKER

Respondents speak as though the FAA can be used to compel any procedure labeled "arbitration." It does not. Arbitration is protected because it is "a system whereby disputes are fairly resolved by an impartial third party." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999). Parties who agree to arbitrate "do not agree to forego their right to have their dispute fairly resolved by an impartial third party." *Murray v. United Food & Commercial Workers International Union*, 289 F.3d 297, 303 (4th Cir. 2002). South Carolina likewise directs courts to ask whether the clause is "geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668–69 (2007).

As the United States Supreme Court has emphasized, courts "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." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). The Second Circuit recently synthesized that principle: independence between the parties and the arbitrator is fundamental to the FAA's conception of arbitration, and a process lacking that independence is "arbitration in name only." *Flores v. New York Football Giants, Inc.*, 150 F.4th 172, 183–84 (2d Cir. 2025). The Fourth Circuit has succinctly described this safeguard: "[O]ur Constitution expresses a deep-seated policy against biased adjudication." *Employers' Innovative Network, LLC v. Bridgeport Benefits, Inc.*, 144 F.4th 571, 579 n.13 (4th Cir. 2025) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 876 (2009)).

C. RESPONDENTS' FAILURE TO ADDRESS *LACKEY* CONCEDES THE DEFECT IN THEIR UNILATERAL ARBITRATOR-SELECTION CLAUSE

In *Lackey v. Green Tree Financial Corp.*, this Court 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 [Respondents]." *Id*. Here, there is no such veto, no consent, and no shared control—only Respondents' unilateral authority to select the arbitrator. Under *Lackey*'s reasoning, the arbitrator-selection clause cannot stand. Respondents' fail to distinguish, discuss, or even mention this binding authority.

D. UNILATERAL SELECTION PROCESSES ARE UNLAWFUL EVERYWHERE

Hooters[1] condemned a process in which the employer controlled the pool from which arbitrators were chosen, calling it "a sham system unworthy even of the name of arbitration." 173 F.3d at 940.[2] *McMullen v. Meijer, Inc.* invalidated a procedure that allowed the employer to create an initial pool even though the candidates were subject to substantial neutrality qualifications. 355 F.3d 485, 493–94 (6th Cir. 2004). *Flores* expressly found the reasoning of *Hooters* and *McMullen*, "which refused to enforce arbitration provisions because of the unilateral selection of arbitrators," "persuasive." 150 F.4th at 185 n.62. This Court should do the same.

Nevertheless, the provision here is more direct. Respondents do not merely control a candidate list from which both parties participate in selection. Respondents select the sole arbitrator. As explained throughout Appellants' Initial Brief, "[i]t is well established that the most important decision in connection with arbitration is the parties' choice of an arbitrator." 3 Ian R.

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[1] Respondents claim that because the AAA Commercial Rules purportedly apply to this consumer dispute, the arbitration provision does not "suffer the infirmities cited by the Court in Hooters." *See* Resp. Br. at 10. They further assert that they "do[] not have the authority to amend or change" those rules. *Id*. But that is precisely what Respondents' position requires.

Respondents contend that 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—does not apply. *But see Cristales v. Scion Grp. LLC*, 478 F. Supp. 3d 845, 855 (D. Ariz. 2020) (compelling arbitration under the AAA consumer rules because the agreement "clearly is a 'consumer agreement'" and thus "the arbitrator must apply the AAA Rules most appropriate to the dispute, regardless of what the agreement said" (internal quotation marks and citation omitted)). They likewise contend that the AAA Consumer Due Process Protocol, which exists to ensure basic fairness in consumer arbitration, does not apply. And they contend that AAA rules requiring AAA administration of disputes under its rules do not apply either. *See* AAA Consumer Rule R-3; AAA Commercial Rule R-2(a).

Respondents cannot have it both ways. They cannot invoke AAA rules to avoid *Hooters* while simultaneously disclaiming the AAA rules that require consumer protections, neutral administration, and AAA oversight. Their argument confirms the very defect Appellants identify: Respondents seek the benefits of an AAA label without the safeguards that make AAA arbitration materially different from the one-sided scheme condemned in *Hooters*.

[2] Respondents spill much ink cataloging (Resp. Br. at 10–11), the other defects in the arbitration rules at issue in *Hooters*. But the Fourth Circuit in *Hooters* left no doubt about which defect mattered most in echoing a "leading arbitration expert[]": the "'most serious flaw'" was that the "'mechanism for selecting arbitrators violates the most fundamental aspect of justice, namely an impartial decision maker.'" *Hooters*, 173 F.3d at 939. And although the court recognized that the agreement contained "many biased rules," it again emphasized "especially the scheme whereby one party to the proceeding so controls the arbitral panel." *Id.* Respondents cannot avoid *Hooters* by pointing to its additional defects when the court repeatedly identified unilateral control over the arbitral tribunal as the central—and most serious—one.

Macneil, Federal Arbitration Law § 27.1 (1995) (selecting the arbitrator is "the most important decision arbitrating parties can make," and "[i]n arbitration, to a great degree, the arbitrator is the process."); 2 Domke on Commercial Arbitration § 24:1 ("The arbitrator is the decisive element in any arbitration.").

Respondents do not—and cannot—cite any case enforcing the arrangement they drafted. The ramifications of upholding such an arbitrator-selection scheme extend far beyond this case. If left undisturbed, the circuit court's decision would invite more businesses to insert one-sided arbitrator-selection provisions into their adhesion contracts, creating an *in terrorem* effect that deters consumers from seeking redress at all.

II. THE EXTRAORDINARY ORDER IS IMMEDIATELY REVIEWABLE

Respondents devote substantial space to the uncontroversial rule that an ordinary order compelling arbitration and staying proceedings is generally not immediately appealable.[3] Appellants do not dispute that general rule. This case poses a narrower question: whether consumers may be forced into arbitration before an arbitrator chosen solely by their adversary, devoid of AAA administration, or other neutral mechanism to protect the fairness of the proceeding.

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:

[3] 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.

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.[4]

A. 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 Resp. Br. at 7 (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* Resp. Br. at 7. 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 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

[4] 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.

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.

B. THE ORDER IS APPEALABLE UNDER § 14-3-330 BECAUSE IT AFFECTS APPELLANTS' SUBSTANTIAL RIGHT OF DUE PROCESS

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 Resp. Br. at 7. 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 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 9–11. 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.

1. The Substantial Right to A Neutral Adjudicator

It is hard to find a more substantial right than the right to due process, which requires a fair and impartial tribunal. *See* App. Br. at 10 (citing *In re Murchison*, 349 U.S. 133, 135–36 (1955); *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016)). South Carolina courts describe the expectation of an impartial tribunal as "axiomatic." *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996). That right is not reduced to a contractual preference merely because the adjudicator is called an arbitrator. Arbitration presupposes an impartial third party; it does not authorize one litigant to select the judge of its own dispute.

Respondents answer that Appellants signed the contract. But parties may agree to arbitration; they do not thereby waive the essential neutrality that makes the process arbitration. A purported contractual waiver imposed through an unconscionable provision cannot establish its own validity. And a post-award challenge cannot fully restore the right to an initially neutral adjudicator after the parties have spent time and money before the challenged tribunal.

2. 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* Resp. Br. at 7–8. That cramped 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 decisionmaking 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.

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.").[5]

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.

C. § 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:

[5] *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.").

"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.

D. WHEN APPLYING THE FAA, COURTS REPEATEDLY HOLD "PROCEDURAL UNFAIRNESS INHERENT IN AN ARBITRATION AGREEMENT MAY BE CHALLENGED BEFORE THE ARBITRATION"

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.

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.

E. *TOLER'S COVE* INDEPENDENTLY SUPPORTS REVIEW OF THESE RECURRING ISSUES.

"[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]

The case for review is stronger 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

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[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.

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.

III. RESPONDENTS DO NOT MEANINGFULLY CONTEST THE SUMMARY JUDGMENT STANDARD

Respondents' sole response to Appellants' extensive authority establishing that the FAA requires a summary-judgment-like standard is this: "Appellants attempt to recast the motion to compel as a motion for summary judgment in an apparent effort to confuse the issues, but the Court should not be distracted by those arguments." *See* Resp. Br. at 14. That conclusory dismissal neither addresses Appellants' authorities nor identifies the standard Respondents believe applies. Such a "failure to provide arguments or cite to authority in support of [an] argument constitutes abandonment of [the] issue on appeal." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 327, 730 S.E.2d 282, 284 (2012).

[7] Respondents state that "even if Consumer Rules applied, which they do not, those rules contain the same requirement for independent, impartial neutrals . . ." Resp. Br. at 13. 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.

That abandonment is unsurprising given the overwhelming and uniform authority cited by Appellants. Indeed, Respondents' lead counsel has repeatedly advanced—and the Fourth Circuit agreed with—the ordinarily uncontroversial proposition that courts considering motions to compel arbitration must apply a standard akin to summary judgment. In *Berkeley County School District v. HUB International Ltd.*—a decision Respondents themselves cite—Respondents' counsel argued that, when a party challenges "'the existence of an agreement to arbitrate,'" courts must apply a standard "'akin to . . . summary judgment.'" No. 19-1158, ECF No. 25 at 47, 49 (4th Cir.) (quoting *Chorley Enterprises, Inc. v. Dickey's Barbecue Restaurants, Inc.*, 807 F.3d 553, 564 (4th Cir. 2015)); 2019 WL 1472738, at *32, *33.[8]

As such, the circuit court erred in failing to apply the summary-judgment like standard to the motion to compel arbitration.[9]

IV. THE COURT, NOT VI'S HAND-PICKED ARBITRATOR, MUST DECIDE THE ARBITRATION PROVISION'S VALIDITY

A. *SIMPSON* AND *315 CORLEY* CONTROL

As explained on page 33 in Appellants' initial brief, *Simpson* and *315 Corley* are clear: "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.*

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[8] Respondents' Counsel took the same position in *Charleston Advancement Academy High School v. Acceleration Academies, LLC*, asserting that "'[m]otions to compel arbitration in which the parties dispute the validity of the arbitration agreement are treated as motions for summary judgment.'" 2020 WL 5985341, at *3 (D.S.C.) (citation omitted).

[9] Although the parties agree that the FAA governs, the same standard would apply under the South Carolina Uniform Arbitration Act ("SCUAA"). The SCUAA employs materially identical language requiring a summary judgment standard. *Compare* 9 U.S.C. § 4 ("the court shall proceed summarily to the trial thereof"), *with* S.C. Code Ann. § 15-48-20(a)–(b) ("the court shall proceed summarily to the determination of the issue so raised" and the issue "shall be forthwith and summarily tried"). Thus, even if the FAA did not apply, the SCUAA's parallel text independently supports application of the same summary-judgment-like framework. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

Palmetto Bluff Dev., LLC, 444 S.C. 521, 530, 908 S.E.2d 892, 896 (Ct. App. 2024), *aff'd*, No. 2024-002098, 2026 WL 1675036 (S.C. June 10, 2026); *see also* App. Initial Br. at 36.

Just recently, the Supreme Court of South Carolina affirmed this Court's decision in *315 Corley*. In the Supreme Court's recent decision, it "disagree[d]" with the same argument that Respondents posit here: that "the incorporation of the AAA rules in the arbitration provision clearly and unmistakably indicates the parties agreed to have an arbitrator—not a court—decide issues of arbitrability." *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, No. 2024-002098, 2026 WL 1675036, at *2 (S.C. June 10, 2026). As here, "the parties did not effectively delegate issues of arbitrability to the arbitrator, the circuit court was correct in determining it was required to decide whether the arbitration provision was unconscionable." *Id.* at *4.

315 Corley could not be more on point. That decision involved an arbitration provision invoking the AAA Commercial Arbitration Rules. The challenging party argued unconscionability. This South Carolina Court of Appeals held, in direct and unqualified terms, that "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." 444 S.C. at 530, 908 S.E.2d at 896. Respondents offer no principled distinction.

The only differences suggested by Respondents are nonsensical. *First*, many of their arguments do not go to question of who decided validity, such as whether SCUTPA remedies at issue or that the present dispute concerns a vacation membership rather than real estate. The court in *315 Corley* did not rest its holding on the nature of the underlying claims or the subject matter of the contract; it rested it on the presence of an unconscionability challenge to the arbitration provision. That challenge is present here.

Respondents also attempt to distinguish *315 Corley* as not being an FAA case (*see* Resp. Br. at 17), but the Supreme Court held "the FAA applies" because the "transactions implicate interstate commerce." *315 Corley*, 2026 WL 1675036, at *2.[10] The Court then applied the FAA's delegation framework, explaining that the relevant inquiry is whether there is "'clear and unmistakable' evidence of delegation of the authority to determine issues of arbitrability." *Id*. (citing *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020)).

That holding directly rejects Respondents' position here. Respondents argue that incorporation of the AAA Rules, standing alone, "clearly and unmistakably" delegated arbitrability to the arbitrator. But *315 Corley* expressly "disagree[d]" with that same proposition Respondents urge the Court to adopt here, that "the incorporation of the AAA rules in the arbitration provision clearly and unmistakably indicates the parties agreed to have an arbitrator—not a court—decide issues of arbitrability." *Id*.

Respondents cannot have it both ways. They rely on the "state procedural rule on appealability of arbitration order[s]" when arguing this appeal should be dismissed, Resp. Br. at 11, but then resist application of South Carolina law governing who decides arbitrability. *See* Resp. Br. at 16–18. For the avoidance of doubt, state courts ***always*** apply state procedural rules. *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 450, 748 S.E.2d 221, 226–27 (2013) ("The FAA's substantive provisions apply to arbitration in federal or state courts, but a state's procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA.").

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[10] The treatment of the FAA in relation to South Carolina procedural and substantive law presents yet another recurring issue warranting immediate appellate review and independently supporting appellate jurisdiction.

The space occupied by the FAA as compared to South Carolina procedural and substantive law presents yet another recurring issue that warrants immediate appellate review and independently supports appellate jurisdiction.

Nor is there any meaningful conflict here. The Supreme Court of South Carolina has explained, in the context of the FAA and South Carolina arbitration law, that "the analysis under state law is ultimately the same as the analysis under federal law." *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1. Respondents therefore have no reasonable basis to argue that *315 Corley* does not apply. If anything, *315 Corley* involved less disparity in bargaining power than this consumer adhesion arbitration agreement, which only further confirms the absence of clear and unmistakable intent to delegate arbitrability here.[11]

B. RESPONDENTS MISCHARACTERIZE *SCHEIN* JUST AS THEY DID IN THE CIRCUIT COURT

Respondents repeatedly assert that *Henry Schein* "held the requirement the arbitration be conducted in accordance with the Arbitration Rules of the American Arbitration Association means that only the arbitrator and not the trial Court could decide the arbitrability question." Respondents' Br. 9; *see also id*. at 15. That is not what *Schein* held and the same misstatement, which was presented to the circuit court, is more serious than a casual overreading.[12]

[11] Respondents also argue that because Appellants challenge the entire Purchase Agreement, including the Arbitration Provision, as unconscionable, unconscionability must be decided by the arbitrator. That is wrong for two independent reasons. *First*, South Carolina law is clear that "the court is always the proper body to determine whether the parties agreed to arbitrate in the first instance." *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 388, 892 S.E.2d 112, 118 (2023). Citing *Berkeley County School District v. HUB International Ltd.*—a case Respondents themselves rely on—*Sanders* reiterated that "court[s] must decide a party's contention that the container contract was never formed in the first place." *Id*. at 387, 892 S.E.2d at 117.

Second, Appellants' challenge reaches the purported delegation itself. A party specifically challenging delegation "may rely on the same arguments" used to challenge the arbitration provision where the delegation suffers from the same defect. *Mod. Perfection, LLC* v. *Bank of Am., N.A.*, 126 F.4th 235, 243 (4th Cir. 2025); *see also Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 291 (4th Cir. 2020) ("[I]n specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions." (internal quotation marks and citations omitted)). That is precisely the case here. The purported delegation would send the question of validity to the same arbitrator selected solely by Respondents under the same structurally unfair mechanism Appellants challenge. The defect therefore infects both the arbitration provision and any claimed delegation, and the court—not Respondents' handpicked arbitrator—must decide validity.

[12] Respondents' blatant misreading of *Schein*, adopted by the circuit court, presents a further recurring issue that warrants immediate appellate review and independently supports appellate jurisdiction.

The Supreme Court explicitly stated that it "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator." *Henry Schein*, 586 U.S. at 71–72. The Court therefore left unresolved the very question Respondents claim it decided.

This recurring mischaracterization of *Schein*—which the circuit court unfortunately accepted—lies at the heart of the error below. *Schein* addressed the "wholly groundless" exception. That Court held only that when parties have validly delegated arbitrability to an arbitrator, a court may not disregard that delegation on the ground that the argument for arbitration is wholly groundless. *Id.* at 68–71. Appellants have not raised the "wholly groundless" exception at any stage of the proceedings.

Accordingly, *Schein* does not establish that mere incorporation of AAA Rules creates a delegation provision. It certainly does not establish delegation in a consumer agreement that excludes AAA administration, grants one party unilateral authority to appoint the arbitrator, and is challenged as unconscionable. Nothing in *Schein* displaces *Simpson* or *315 Corley*. Respondents' delegation argument therefore rests on a proposition the Supreme Court expressly declined to decide.

Indeed, Respondents' reliance on *Schein* omits the decision's critical threshold requirement. The Supreme Court explained that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein*, 586 U.S. at 69 (citing 9 U.S.C. § 2). Only after that predicate determination does the delegation inquiry arise: "But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Id.* (emphasis added). Thus, *Schein* itself recognizes that courts must first determine the existence of a valid arbitration agreement before enforcing any purported delegation provision. Respondents' delegation argument therefore rests on a proposition the Supreme Court expressly declined to decide while simultaneously overlooking the threshold validity inquiry the Court expressly required. *See Johnson v. Cont'l Fin. Co., LLC*, 131 F.4th 169, 175 (4th Cir. 2025) ("It would put the cart before the horse to enforce any provision of the agreement, including the delegation clause, before deciding whether the agreement itself was ever formed.").

C. RESPONDENTS CITE NO ANALOGOUS CONSUMER CASE

Every case Respondents cite for the proposition that AAA rule incorporation establishes delegation involved commercial contracts between sophisticated businesses. *See* Resp. Br. at 15. None involved a consumer who signed a form agreement in a high-pressure sales environment without counsel, without explanation of the arbitration clause, and without knowledge of what AAA Commercial Rules R-7 provided.

A delegation doctrine calibrated to commercial sophistication cannot be extended to a consumer who, as the record reflects, was instructed how to fill out an acknowledgment form by the same party now invoking the delegation. Courts have rightly recognized that this extension would make the clear-and-unmistakable standard meaningless. *See Ashworth v. Five Guys Operations, LLC*, 2016 WL 7422679, at *3 (S.D.W. Va. Dec. 22, 2016) ("[I]t is so unlikely as to be bordering on the absurd that an unsophisticated party . . . would know what the AAA is, much less the contents of its governing rules."). Respondents' theory would allow any form-contract drafter to delegate arbitrability simply by referencing the AAA in the fine print, regardless of whether the consumer could possibly have understood the implication.

The Supreme Court of South Carolina's recent decision in *315 Corley* confirms that South Carolina courts may not mechanically conclude that a contract "clearly and unmistakably" delegates arbitrability simply because other courts have reached that conclusion in other cases.

The Court must examine the particular agreement before it and determine whether there is "'clear and unmistakable' evidence of intent" to delegate the issue. *315 Corley*, 2026 WL 1675036, at *3.

D. THE CONTRACT'S CONTRADICTORY LANGUAGE DEFEATS CLEAR AND UNMISTAKABLE DELEGATION.

The clause never expressly states that the arbitrator will decide arbitrability. It merely references Commercial Rules, immediately excludes AAA administration, and supplies a conflicting one-party appointment method. Courts may not "assume" delegation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The standard is heightened and exacting. A cross-reference that requires an unsophisticated consumer to locate Rule R-7, disregard the clause's exclusion of AAA auspices, and infer that Respondents' own appointee will decide validity is neither clear nor unmistakable.

V. THE ARBITRATION PROVISION IS UNCONSCIONABLE

A. THE PRESUMPTION THAT A SIGNER READS A CONTRACT DOES NOT DEFEAT UNCONSCIONABILITY

The circuit court held:

> "The Court need not consider Plaintiffs' unconscionability arguments because parties are presumed to have read the agreement they signed."

(R_(Arb. Order at 3).) Unsurprisingly, Respondents do not discuss that remarkable holding, but they nevertheless echo the same premise. *See* Resp. Br. at 19. That approach is clear reversible error. The presumption that a party read and understood a contract does not excuse a court from conducting the fact-intensive unconscionability analysis required by South Carolina law. Respondents' argument therefore warrants little weight and is squarely foreclosed by the South Carolina Supreme Court's unconscionability precedent.

For example, in *Simpson*, the Court analyzed unconscionability despite explaining "the general legal presumptions that a party to a contract has read and understood the contract's terms."

373 S.C. at 27–28, 644 S.E.2d at 670–71. In *York v. Dodgeland of Columbia, Inc.*, the Court acknowledged that "a party who signed a contract is deemed to have read and understood" it but nevertheless undertook a full unconscionability analysis. 406 S.C. 67, 81, 85–91, 749 S.E.2d 139, 146, 148–52 (Ct. App. 2013).

There is no authority for the proposition that the general presumption invoked by Respondents has any ability to defeat unconscionability.

B. Unconscionability Arguments

1. There was no Meaningful Choice Here

As *Damico* recognized, "it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). Respondents do precisely that here. The handwritten addendum does not transform Respondents' form agreement into an arm's-length negotiated contract.[13] As Appellants explained, the addendum was part of the same standardized transaction, and materially similar handwritten language appears across three similar agreements. *See* App. Initial Br. at 47. Respondents cite no authority holding that such circumstances defeat adhesion, especially where the arbitration clause itself was preprinted, nonnegotiated, and imposed as part of a consumer sales presentation.[14]

[13] Respondents repeatedly claim that the addendum provided an opportunity to alter the arbitration provision. But no evidence shows that arbitration was discussed, that Appellants were told it was negotiable, that Respondents would have accepted a modification, or that Appellants requested the handwritten terms. None of the handwritten entries concerns dispute resolution. The existence of unrelated boilerplate sales terms cannot establish that the embedded arbitration provision was negotiated.

[14] Respondents claim that Appellants' inability to consult legal counsel is "irrelevant." South Carolina law says otherwise. *See* Resp. Br. at 22. In determining whether a party lacked a meaningful choice, courts consider, among other things, "the relative disparity in the parties' bargaining power, the parties' relative sophistication, ***whether the parties were represented by independent counsel***, and whether the plaintiff is a substantial business concern." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (internal quotation marks and citation omitted) (emphasis added). Appellants' inability to consult counsel before signing therefore bears directly on procedural unconscionability.

2. The Nature of the Purchase Has No Effect on South Carolina Unconscionability Analysis

Respondents' "luxury item" distinction is not supported by a single cited case—because no South Carolina authority recognizes it. *See* Resp. Br. at 18–19. *Damico* applied the full unconscionability analysis to a home purchase. *Simpson* applied it to an automobile. This Court in *315 Corley* applied it to a commercial real-estate transaction. None of those courts asked whether the purchase was "essential" before applying the doctrine. Nor could they: the unconscionability inquiry asks whether a party lacked meaningful choice and whether the terms were oppressive—questions that turn on the circumstances of formation and the one-sidedness of the provision, not on whether the purchased service was necessary to daily life. Respondents' invitation to create a new carve-out for "non-essential" consumer arbitration agreements should be declined.

VI. RESPONDENTS' REMAINING MERITS ARGUMENTS DO NOT SAVE THE CLAUSE.

A. FAA § 4 EVIDENTIARY HEARING MUST BE CONDUCTED BY A COURT

Respondents are wrong that an arbitrator can conduct a hearing under § 4 of the FAA. Their own authority defeats their argument. *Berkeley County* recognizes that § 4 of the FAA requires the court—not the arbitrator—to resolve disputes over "the making of the arbitration agreement." *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019); *see also* 9 U.S.C. § 4. That threshold question includes whether a valid arbitration agreement was formed under ordinary state-law principles. *Id.* at 236. Respondents therefore cannot dismiss Appellants' factual showing in the Verified Complaint as "irrelevant" while simultaneously relying on a statute that requires judicial resolution when the making of the arbitration agreement is in issue. *See* Resp. Br. at 20. Nor can they avoid that inquiry by invoking efficiency; arbitration's efficiency does not permit a court to compel arbitration before deciding whether a valid agreement to arbitrate exists.

See id. at 21. Thus, to the extent any factual disputes remain, *Berkeley County* would support remand for judicial resolution under § 4—not referral of those threshold issues to the arbitrator.[15]

B. Respondents Cannot Use Consumer Disclaimers to Erase the Circumstances of Contracting

Respondents argue that Appellants' high-pressure-sales allegations are "unsubstantiated" because Appellants signed a preprinted acknowledgment stating their purchase was not based on high-pressure sales tactics. *See* Resp. Br. at 21. If a seller could defeat procedural unconscionability merely by requiring consumers, during the same challenged sales presentation, to check a box disclaiming "high pressure sales tactics," then the doctrine would be meaningless. The relevant question is not whether Respondents included a self-serving disclaimer in their own form, but whether the totality of the circumstances showed meaningful choice. Here, Appellants alleged under oath in their Verified Complaint that they were subjected to high-pressure tactics, rushed through signing, denied a meaningful opportunity to review the documents, and directed how to complete the forms. ((R.__ Compl. ¶¶ 31–40, 51).) The acknowledgment was part of that same transaction. It is therefore not conclusive proof that no pressure occurred; at most, it creates a factual issue for the court to resolve under the FAA's summary-trial framework. Respondents cannot use a scripted disclaimer, procured during the very process challenged as unconscionable, to erase the contemporaneous facts showing procedural unconscionability.

[15] Rules R-14 and R-19 do not and cannot validate the appointment scheme either. Rule R-14 generally directs that an agreed method of appointment be followed. It presupposes a valid method; it does not decide whether a one-party appointment clause is unconscionable or inconsistent with the FAA. Respondents' argument is circular: the clause is valid because Rule R-14 respects valid clauses. A procedural rule cannot create assent or cure structural unfairness.

Rule R-19's requirement that an arbitrator be impartial likewise does not cure one party's exclusive appointment power. It provides no equal participation, strike, veto, independent list, or institutional appointment. An abstract duty to act impartially is not a substitute for a neutral selection process. And because the agreement excludes AAA administration, no AAA institution will supervise disclosures or challenges.

VII. THE UNCONSCIONABLE CLAUSES CANNOT BE SEVERED

Respondents have not even advanced what would be their least unreasonable fallback position: severance of the unilateral appointment mechanism. But severance would fail in any event. South Carolina courts do not rescue sophisticated drafters by excising pervasive, overreaching terms and rewriting the contract to create a fair agreement the drafter did not provide. *Damico*, 437 S.C. at 618–23, 879 S.E.2d at 758–61. Here, the challenged provisions are not isolated defects; they form an integrated scheme that gives Respondents control over the arbitral forum. Once those provisions are removed, no workable neutral arbitration process remains. The entire arbitration provision is therefore unenforceable. *See, e.g. Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 676 (4th Cir. 2016) (declining to sever because "[g]ood authority counsels that severance should not be used when an agreement represents an "integrated scheme to contravene public policy." (internal quotation marks and citations omitted)).

CONCLUSION

This appeal presents an extraordinary arbitration order. Appellants are not seeking to avoid arbitration merely because they prefer a judicial forum. They seek review because the order compels them into a process that lacks the defining feature of lawful arbitration: a neutral decisionmaker. Respondents' contract gives Respondents unilateral authority to select the arbitrator, excludes AAA administration, disclaims consumer-arbitration safeguards, shifts substantial costs, and embeds those terms in a form consumer agreement obtained through the very sales process Appellants challenge as unconscionable. The FAA does not require courts to enforce arbitration in name only. Nor does it require consumers to submit first to a structurally biased process and seek relief only after the harm has occurred.

For these reasons, Appellants respectfully request that this Court reverse the circuit court's order compelling arbitration and staying this action, hold that the arbitration provision is unenforceable, and remand with instructions that Appellants' claims proceed in the circuit court. In the alternative, if the Court concludes factual issues remain, Appellants request that the order be vacated and the case remanded for judicial resolution under the proper summary-judgment standard.