THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable H. Steven DeBerry, IV

Appellate Case No. 2022-000133

South Carolina Human Affairs Commission, Appellant,

v.

Yacht Cove Owners Association, Inc.,
and Maria Dehart, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On March 7, 2021, the South Carolina Human Affairs Commission filed suit against Respondents Yacht Cove Owners Association, Inc. and Maria Dehart, the Owners Association board chair. The Commission filed this Lexington County action pursuant to S.C. Code Ann. § 31–21–130(C)(2), alleging Respondents engaged in retaliation in violation of the South Carolina Fair Housing Law, S.C. Code Ann. § 31–21–80. (R. pp. 9-14).

In lieu of answer, on June 3, 2021, Respondent Dehart filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP.[1] The Honorable H. Steven DeBerry, IV heard the motion on November 2, 2021, and dismissed Respondent Dehart as a party to this action by order dated December 16, 2021. (R. pp. 1-6). The Commission timely moved to alter or amend. (R. pp. 30-39).

By order dated January 7, 2022, the court "ratified and reconfirmed" its order granting Dehart's motion to dismiss. (R. pp. 7-8). This appeal follows. (R. p. 73).

[1] Respondent Owners Association answered the complaint on April 28, 2021. Both Respondents are represented by Eugene H. Matthews, Esq.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, the "judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action [on the face of] the pleadings filed with the court." *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 277, 648 S.E.2d 295, 298 (Ct. App. 2007). This Court reviews a Rule 12(b)(6), SCRCP, dismissal under "the same standard of review that was implemented by the trial court." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Ashley River*, 374 S.C. at 278, 648 S.E.2d at 298.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING DEHART FROM AN ACTION BROUGHT PURSUANT TO THE SOUTH CAROLINA FAIR HOUSING LAW WHERE DEHART'S VOLUNTEER SERVICE ON THE BOARD OF HER PRIVATE HOMEOWNER'S ASSOCIATION NEITHER SUPERCEDES THE CONSTITUTIONAL UNDERPINNINGS OF OUR FAIR HOUSING LAW, NOR PRESENTS A COMPELLING REASON TO DIFFER WITH THE COMMISSION'S ADMINISTRATIVE GUIDANCE, AND WHERE THE COMPLAINT SETS FORTH FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR RETALIATION PURSUANT TO S.C. CODE ANN. § 31–21–80.

This matter arises from Respondents' placement of a $2,850.00 lien against the Aggrieved Party's condominium for the purpose of recovering legal fees incurred during Respondents' defense of the Aggrieved Party's housing discrimination complaint. The Aggrieved Party did not receive notice of the lien until appearing at the closing for the sale of the

condominium. The Aggrieved Party thereafter filed a second complaint with the Commission alleging that this individualized assessment of legal fees constitutes unlawful retaliation under S.C. Code Ann. § 31–21–80. (R. p. 12).

The Human Affairs Commission investigated the retaliation claim pursuant to S.C. Code Ann. § 31–21–120. Investigation revealed Maria Dehart, the board chair of the Owners Association, played an individualized role in making the decision to levy the legal fees against the Aggrieved Party. Dehart informed the Commission's investigator that she believed the Board's bylaws allowed for this fee assessment, and that she individually consulted with legal counsel for the purpose of deciding who the fees should be assessed against. (R. p. 11). Investigation revealed Dehart was the primary contact for counsel hired to defend the Aggrieved Party's housing discrimination complaint. (R. pp. 11-12). Dehart informed the Commission's investigator that she instructed the Owners Association's accountant to charge the Aggrieved Party for these legal fees. Dehart further informed the Commission's investigator that she personally failed to send notice of this fee assessment to the Aggrieved Party prior to their real estate closing. (R. p. 12).

The Commission's action maintains Dehart's decision violated S.C. Code Ann. § 31–21–80 because the fees were levied in retaliation for the initial discrimination complaint the Aggrieved Party filed with the Commission. It is "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of . . . any right granted" by the South Carolina Fair Housing Law. S.C. Code Ann. § 31–21–80. The Commission's regulations specifically describe unlawful retaliation as an action taken "against any person because that person has made a complaint, testified, assisted, or participated in any matter in a proceeding under the Fair Housing Law." S.C. Code Regs. § 65-219(3)(e). "Persons" under the Fair Housing Law

includes one or more individuals, corporations, and associations . . . ." S.C. Code Ann. § 31–21–30(9). In 2018, the Commission cited guidance from the Department of Housing and Urban Development (HUD) and issued its Administrative Interpretation #4 asserting its position that individual board members of home and property owner's associations can be held liable as "Persons" so long as evidence demonstrates the individual board member personally contributed to the Fair Housing Law violation.[2]

When notice came of the Commission's determination that retaliation had occurred, Respondents elected to have the matter heard in circuit court pursuant to S.C. Code Ann. § 31–21–130(C). (R. p. 10). The facts alleged in the amended complaint established Dehart directly participated in imposing the Owners Association's legal fees upon the Aggrieved Party, and therefore states facts sufficient to state a cause of action against Dehart pursuant to S.C. Code Ann. § 31–21–80.[3] However, Dehart asserted, and the court agreed, she was immune from inclusion in this action because she volunteers as board chair of the private, non-profit, Owners Association. (R. p. 17). The court found the Commission's Administrative Interpretation #4 void, unenforceable, and manifestly contrary to S.C. Code Ann. § 33–31–834. (R. pp. 3-4). The court further found the Commission exceeded its authority and overrode the intent of the General Assembly when it named Dehart as an individual defendant. (R. p. 4).

The circuit court has erroneously applied a state-specific business statute to preclude liability in a fair housing action. The court relied upon the Nonprofit Corporation Act of 1994, which provides immunity for "directors, trustees, or members of the governing bodies of not-for-profit cooperatives, corporations, [and] associations" when suit arises "from the conduct of the

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[2] *Available at* schac.sc.gov>About Us>Divisions & Departments>Legal Division>Administrative Interpretations (last visited Mar. 3, 2022).

[3] The Commission notes that the resolution of matters it investigates does not require representation by counsel. S.C. Code Regs. § 65-232.

affairs of these cooperatives, corporations, associations, or organizations," and so long as the conduct alleged is not "willful, wanton, or gross negligence." S.C. Code Ann. § 33–31–834(a).

In dismissing Dehart, the court has concluded that a homeowners association board member cannot be alleged liable for independent, discriminatory acts undertaken in furtherance of a private owners association agenda. The ruling impermissibly insulates individual homeowners association board members from regulation by the body charged with enforcing the South Carolina Fair Housing Law. This error limits the Commission's vested authority to regulate fair housing practices in this State in contravention of S.C. Code Ann. § 31–21–100.

A. The South Carolina Fair Housing Law is constructed in a manner that impliedly preempts state-specific business law, leading to an absurd result should Dehart be dismissed from this action pursuant to the Nonprofit Corporation Act.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Though legislative intent "should be derived primarily from the plain language of the statute," that plain language must be read "in conjunction with the purpose of the entire statute and the policy of the law." *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599-600, 654 S.E.2d 284, 289-90 (Ct. App. 2007). "In construing a statute, the court looks to the language as a whole in light of its manifest purpose." *State v. Sweat*, 379 S.C. 367, 376, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). Courts "should reject statutory interpretations that lead to results so plainly absurd they could not have been intended by the legislature or that defeat the plain legislative intention." *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. at 599, 654 S.E.2d at 289.

Additionally, when "a state statute conflicts with or frustrates federal law, the former must give way." *Quigley v. Rider*, 357 S.C. 477, 483, 593 S.E.2d 476, 479 (Ct. App. 2003)

(citing *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114 (1981). Implied preemption mandates that a federal objective prevail in state court when "the rule of state law [presents] an obstacle to important means-related federal objectives." *Priester v. Cromer*, 401 S.C. 38, 46, 736 S.E.2d 249, 253 (2012) (holding state-law products liability claims are preempted by federal motor vehicle safety standards).[4] "Evidence of preemptive purpose is sought in the text and structure of the statute at issue." *Quigley v. Rider*, 357 S.C. at 483, 593 S.E.2d at 479. "The party claiming preemption has the burden of proving that an agency deliberately sought a variety of means to achieve a 'significant' federal purpose." *Priester v. Cromer*, 401 S.C. at 47, 736 S.E.2d at 254.

Here, the integration of the federal Fair Housing Act and the South Carolina Fair Housing Law demands the Fair Housing Law impliedly preempts the immunity provided in S.C. Code Ann. § 33–31–834(a), the state-specific business rule the court relied upon to dismiss Dehart. To apply the Nonprofit Corporation Act rather than the South Carolina Fair Housing Law would lead to an absurd result. Unlike the Nonprofit Corporation Act, the Fair Housing Law is entrenched with Title VIII of the Civil Rights Act and contemplates the naming of individual respondents under the circumstances giving rise to the complaint in this case. Accordingly, the Commission has determined that individual board members of property owners associations are not immune to liability in actions brought pursuant to the Fair Housing Law, and this Court should defer to that interpretation.

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[4] "Implied conflict preemption occurs in one of two ways—either where compliance with both federal and state regulations is physically impossible or where the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Preister v. Cromer*, 401 S.C. at 44, 736 S.E.2d at 252 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941)).

1. The Fair Housing Law is analogous to, derived from, and enforced alongside, the federal Fair Housing Law for the purpose of protecting the civil rights of aggrieved parties.

In 1989, our General Assembly passed the Fair Housing Law for the purpose of implementing a policy "to provide, within constitutional limitations, for fair housing throughout the State." S.C. Code Ann. § 31–21–20; *compare* 42 U.S.C. § 3601 (federal Fair Housing Act "Declaration of policy"). As this Court has stated, both "[t]he federal Fair Housing Act and South Carolina Fair Housing Law prohibit discrimination in the rental of a dwelling based upon a person's race, color, religion, sex, familial status, or national origin." *SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 89, 781 S.E.2d 115, 124 (Ct. App. 2015) (citing S.C. Code Ann. § 31–21–40; 42 U.S.C. § 3604). Our Fair Housing Law is based upon, and was adopted for the identical purpose, as the federal Fair Housing Act. *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. 509, 522, 846 S.E.2d 861, 867 (2020).

The Commission is vested with the "power to cooperate with the United States Department of Housing and Urban Development to achieve the purposes of that department . . . ." S.C. Code Ann. § 31–21–100(5). In fact, a complaint filed under the Fair Housing Law "means a written charge alleging a discriminatory housing practice in compliance with the Act . . . **or** with the Department of Housing and Urban Development [HUD] and referred to the Commission pursuant to Section 810(f) of Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1968." S.C. Code Regs. § 65-210(D)(2)(c) (emphasis supplied).

Unlike the Nonprofit Corporation Act, "[o]ur state's Fair Housing Law is based on a federal counterpart, Title VIII of the Civil Rights Act of 1968 (as amended), the federal Fair Housing Act." *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. at 522, 846 S.E.2d at 867. The Fair Housing Law, and the Commission's role in enforcing it, is to prevent housing

discrimination—a matter inextricably linked to the Equal Protection Clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260, 97 S.Ct. 555, 561 (1977); *see also Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1724 (1966) (state may enact legislation "to enforce the Equal Protection Clause" so long as statute(s) is "plainly adapted to that end" and "consistent with the letter and spirit of the constitution"). The Supreme Court long ago "noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S. Ct. 836, 845 (1948). The Amendment's purpose "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495, 495 (1918).

The Nonprofit Corporation Act should not be applied in a manner that abridges the civil rights of the aggrieved parties whose interests the Commission is tasked to represent. Shielding Dehart from liability pursuant to a state-created business rule frustrates the federal underpinnings of this Fair Housing action and hinders legislative efforts to promote the enforcement of the Commission's prescribed civil rights objectives.

2. The Fair Housing Law is a substantial equivalent to the federal Fair Housing Act, and the judicial gloss interpreting the federal Act contemplates that an individual board member may be held liable.

The circuit court erroneously and incongruently concluded the Commission's reliance upon "federal interpretations of federal statutes regarding housing [was] unavailing." (R. p. 5). "Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation." *Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982). While *Clyburn* specifically addressed South

Carolina Human Affairs Law and Title VII of the Civil Rights Act of 1964, the "essentially identical" provisions of the federal Fair Housing Act and the South Carolina Fair Housing Law similarly demand that cases interpreting provisions of the federal Fair Housing Act "are certainly persuasive if not controlling" in construing our State's Fair Housing Law. *Id.* The South Carolina Supreme Court has adopted this view, and has held "the circuit court committed an error of law by failing to give due consideration to comparable federal authority, as [they] indicated was appropriate in *Orr*, . . . and by failing to give proper deference to the agency's interpretation[.]" *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. at 526-27, 846 S.E.2d at 870.

"It is clear that the Fair Housing Act allows for claims to be brought against individual Defendants." *Hous. Opportunities Project For Excellence, Inc. v. Key Colony No. 4 Condo. Assoc., Inc.*, 510 F. Supp. 2d 1003, 1013 (S.D. Fla. 2007). The Department of Housing and Urban Development's longstanding guidance instructs that an individual board member of a community association is a proper party when evidence shows the individual "personally participated in discriminatory acts taken on behalf of the association." Sara Pratt, "Proper Respondents in Fair Housing Complaints" (Sept. 4, 2014 HUD memo) (citing *Hous. Opp. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Ass'n*, *supra*); 1 Housing Discrim. Practice Man. § 2:26 ("Who can be sued"); Robert G. Schwemm, *Housing Discrimination Law and Litigation* § 12B:2 (July 2021) ("Who may be liable under the Fair Housing Act—Principals and agents"). The rationale lies in general principles of agency law, which the Supreme Court has expressly applied to housing discrimination actions. *Meyer v. Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 828 (2003). Elected board members are charged with representing the communal interest of all property owners and are therefore "in a position to deny or make unavailable a portion of the building to plaintiff, or to discriminate against plaintiff in the provision of housing

services or facilities," to include retaliation. *Schroeder v. De Bertolo*, 879 F. Supp. 173, 178 (D.P.R. 1995).

An individual member of the defendant homeowner's association's board of directors was properly named in *Scoggins v. Lee's Crossing Homeowner's Ass'n*, a Fourth Circuit case wherein plaintiffs brought suit for the board's failure to act on a requested exception to the covenants sought to accommodate the plaintiffs' partially paralyzed son. 718 F.3d 262, 267 (4th Cir. 2013). Evidence showed the plaintiffs informed the association's board members of their request in writing, but the board tabled the request and failed to communicate with the plaintiff. Sixteen months later, one board member finally reached out to the plaintiffs seeking details in support of their request. *Id.* at 268.

Other courts have declined to grant summary judgment in favor of individual board members. The Georgia Court of Appeals has vacated summary judgment in a retaliation case against a condominium association and individual members of its board of directors. *Bailey v. Stonecrest Condominium Ass'n, Inc.*, 304 Ga.App. 484, 484, 696 S.E.2d 462, 464 (Ga. Ct. App. 2010). In that case, the plaintiffs alleged individual members of their owner's association board proposed amending the by-laws for the discriminatory purpose of prohibiting property owners from leasing their units to minorities. *Id.* at 489, 696 S.E.2d at 467. The Georgia Court of Appeals found the plaintiffs had established a prima facie case for discrimination, therein noting that the Georgia Fair Housing Act "is nearly identical to the Federal Fair Housing Act," and expressly "consider[ing] federal cases construing the FHA persuasive precedent applicable to the instant dispute." *Id.* at 487, n.3, 696 S.E.2d at 466, n.3.

Relying upon *Meyer v. Holley*, *supra*, the United States District Court for the Southern District of Florida found plaintiffs in a fair housing action stated a sufficient claim against

individual board members by alleging "that the board of directors each personally and intentionally discriminated against" them. *Hous. Opportunities Project For Excellence, Inc. v. Key Colony No. 4 Condo. Assoc., Inc.*, 510 F. Supp. 2d at 1014; *Sabal Palm Condominiums of Pine Island Ridge Assoc., Inc. v. Fischer*, 6 F.Supp.3d 1272, 1294 (S.D. Fla. 2014) (holding president of HOA's board of directors liable for personally contributing to HOA's refusal to accommodate under FHA).

Courts in the Ninth Circuit have similarly declined to find individual board members could not be held liable in fair housing actions. *Hernandez v. Golf Course Ests. Home Owners Ass'n*, 454 F. Supp. 3d 1029, 1039 (D. Or. 2020); *Sanzaro v. Ardiente Homeowners Ass'n*, 364 F.Supp.3d 1158, 1177-80 (D. Nev. 2019) (finding board members individually liable for denying reasonable accommodation); *Fielder v. Sterling Park Homeowners Ass'n*, 914 F.Supp.2d 1222, 1229 (W.D. Wash. 2012) (holding that president and board members may be held individually liable for their personal involvement in FHA violations); *United States v. Tropic Seas, Inc.*, 887 F.Supp. 1347, 1365 (D. Haw. 1995) (denying HOA board member's summary judgment motion because there was a genuine issue of material fact as to whether defendant participated or acquiesced in FHA violations).

3. Policy considerations germane to the Fair Housing Law weigh against immunizing board members of private owners associations from liability.

Dehart sits as a board member of a private homeowners association. She does not serve the public. *See Williams v. Condon*, 347 S.C. at 233, 553 S.E.2d at 500 ("American courts have long recognized the existence of immunity for public officers from personal liability for tortious acts committed while serving in an official capacity."). Individual leaders of private homeowners associations should not be free to engage in independent, discriminatory behavior without recourse. This is especially true when the facts alleged demonstrate a single

decisionmaker acted on behalf of an entire board, and creates a question of fact appropriate for resolution at a later stage than a motion filed under Rule 12(b)(6), SCRCP. Given evidence of her direct involvement in the retaliatory fee assessment giving rise to this action, insulating Dehart from liability further frustrates the purpose and objectives of the Fair Housing Law. *See S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989) (in determining legislative intent, "there is no room for the courts to impose a different judgment based upon their own notions of public policy").

On this point, it bears noting that the circuit court found it "undisputed" that Dehart has not been alleged to have "acted in a manner that amounts to willful, wanton, or gross negligence." (R. p. 2). The Commission has alleged Dehart engaged in an intentional act carrying higher scienter than the willful, wanton, or grossly negligent conduct exempted by the Nonprofit Corporation Act's immunity provision. Intentionality is inherent in S.C. Code Ann. § 31–21–80: "to coerce, intimidate, threaten, or interfere with any person" requires a deliberate intent to harm. "Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74, 125 S. Ct. 1497, 1504 (2005) (discussing Title IX). If Dehart would not be immune from liability had the Commission alleged willful or wanton conduct or gross negligence, it follows that Dehart should not be found immune from liability in a retaliation action brought under the Fair Housing Law. *Cf. Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) ("Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do."); *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 11, 530 S.E.2d 132, 137 (Ct. App. 2000) ("a party may not invoke coverage by couching intentional acts in

negligence terms").

Applying the proposed immunity provision would also have a chilling effect on aggrieved parties wishing to invoke the Fair Housing Law against the decisionmakers governing their capricious homeowner's associations and boards. *See Foster v. Barilow*, 6 F.3d 405, 408 (6th Cir. 1993) (private party plaintiffs "are, in reality, the primary enforcers of the Fair Housing Act"); *MHANY Mgmt. Inc. v. Inc. Vill. of Garden City*, 985 F. Supp. 2d 390, 415 (E.D.N.Y. 2013), *aff'd sub nom, Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016) (refusing to weigh evidence which "would have a chilling effect on any [housing] entity's willingness to enact similar [antidiscrimination] guidelines"). The Fourth Circuit has spoken directly to this policy consideration, stating:

> In light of the public policy objectives inherent in encouraging private plaintiffs to seek redress of [Fair Housing Act] violations, it would be incongruous to allow bodies such as the HOA to enforce by contract an attorneys' fees provision against a plaintiff who has brought an [Fair Housing] action in good faith. Such a provision, if enforced by the courts, would have the natural and counterproductive effect of dissuading individuals from filing [a Fair Housing] lawsuit when they have a reasonable basis on which to assert their claims.

Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d at 276 (refusing to award attorneys' fees and costs to prevailing defendants); *see also Bryant Woods Inn, Inc. v. Howard Cnty, Md.*, 124 F.3d 597, 606 (4th Cir. 1997) (rejecting ordinary application of loser-pays system to plaintiffs bringing suit pursuant to the Fair Housing Act).

As applied in this case, the Nonprofit Corporation Act "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" and leads to an absurd result that could not have been intended by the General Assembly. *Priester v. Cromer*, 401 S.C. 38, 44, 736 S.E.2d 249, 252 (2012) (internal quotation omitted); *see Quigley v. Rider*, 357 S.C. at 483, 593 S.E.2d at 479. Its application should be rejected for that reason.

B. The Nonprofit Corporation Act does not offer a compelling reason to differ with the Commission's Administrative Interpretation #4, which is neither arbitrary, capricious, nor manifestly contrary to the statutes and regulations the General Assembly has enumerated to the Commission.

As previously delineated, HUD instructs that an individual board member of a community association should be named as a party when evidence shows that individual "personally participated in discriminatory acts taken on behalf of the association." Sara Pratt, "Proper Respondents in Fair Housing Complaints" (Sept. 4, 2014 HUD memo) (citing *Hous. Opp. Project for Excellence, Inc. v. Key Colony No. 4 Condo. Ass'n*, *supra*); 1 Housing Discrim. Practice Man. § 2:26 ("Who can be sued"); Robert G. Schwemm, *Housing Discrimination Law and Litigation* § 12B:2 (July 2021) ("Who may be liable under the Fair Housing Act—Principals and agents"). And, the South Carolina Supreme Court has held that the circuit court should "give due consideration to comparable federal authority" in actions brought pursuant to the Fair Housing Law. *S.C. Hum. Affs. Comm'n v. Zeyi Chen*, 430 S.C. at 527, 846 S.E.2d at 870. The Commission's Administrative Interpretation #4 requires deference, and the court erred in declaring "the administrative rule [ ] void and unenforceable." (R. pp. 3-4).

When "an agency's construction of a statute regarding its operation . . . is reasonable and furthers the legislative intent," the court must defer to the agency's interpretation. *Mitul Enterprises, L.P. v. Beaufort Cty. Assessor*, 410 S.C. 430, 434, 764 S.E.2d 720, 722 (Ct. App. 2014). "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984)). "The construction of a statute by the agency charged with its administration will be accorded the most

respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (internal quotation and citation omitted). This is the general rule. *City of Arlington, Tex. V. F.C.C.*, 569 U.S. 290, 307, 133 S.Ct. 1863, 1874-75 (2013).

> Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. . . .
>
> Advancing to the second step, we must first consider the scope of South Carolina's deference doctrine. In this State, the doctrine can be traced back to *Read Phosphate Co. v. South Carolina Tax Commission*, 169 S.C. 314, 168 S.E. 722 (1933), where this Court adopted the deference doctrine from United States Supreme Court precedent, stating: "The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." The Court, again relying on federal case law, stated the rationale for the rule as: "The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are . . . called upon to interpret." Thus, we give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations.
>
> As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ.
>
> Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. at 32-35, 766 S.E.2d at 717-18 (cleaned up).

Citing the South Carolina Fair Housing Law, HUD guidance, and relevant case law, the

Commission issued Administrative Interpretation #4 in 2018.[5] This Administrative Interpretation asserts that individual board members of homeowner's associations can be held liable as "Persons" contemplated under S.C. Code Ann. § 31–21–30(9). In reaching its Interpretation, the Commission relies upon HUD guidance stating that individual board members should be named when "the facts presented during intake allege that these board members directly participated in the alleged discriminatory housing practice." *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* (8024.1) at 4-16.[6] This Interpretation was issued in consideration of, and in accord with, the Commission's "power to cooperate with the United States Department of Housing and Urban Development to achieve the purpose of that department." S.C. Code Ann. § 31–21–100(5).

Dismissing a defendant to a fair housing action pursuant to an inapposite, state-created business rule offers no compelling reason to diverge from the Commission's implemented procedures and administrative interpretations, particularly when that state-created business rule lacks the same constitutional roots as those grounding the state Fair Housing Law. *Compare* S.C. Code Ann. § 33–31–301, *et. seq.* (purposes and powers of nonprofit corporations) *with SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. at 89, 781 S.E.2d at 124 (acknowledging classifications of persons protected by state and federal housing laws). To find, as the lower court has, that the Nonprofit Corporation Act invalidates the Commission's interpretation and administration of its own Fair Housing Law erroneously implies that the Nonprofit Corporations Act impliedly repealed the Fair Housing Law. This is not a compelling reason to hold void and unenforceable the Commission's administration of its own law. *See Kiawah*, 411 S.C. at 32-35, 766 S.E.2d at 717-18.

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[5] *Available at* schac.sc.gov>About Us>Divisions & Departments>Legal Division>Administrative Interpretations (last visited Mar. 3, 2022).

[6] *Available at* https://www.hud.gov/program_offices/administration/hudclips/handbooks/fheo/80241.

The lower court misapprehended the deferential standard pertaining to an agency's interpretation of its own statute or regulation. It expressly relied on *Kiawah* to conclude that an administrative interpretation is afforded no deference should circumstances give rise to discord between the interpretation and a statute wholly outside the scope of the laws administered by the agency. (R. p. 4). Yet *Kiawah* advises that deference is given to an administrative interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute" that is the subject of the agency's interpretation. *Kiawah* at 34-35, 766 S.E.2d at 718.

The agency cases *Kiawah* catalogues for its enunciated test consistently apply the proper deference doctrine to situations where a regulation or administrative interpretation is alleged to conflict with a statute charged to the agency's enforcement—not to a statute from an Act not within the agency's purview. *Barton v. S.C. Dept. of Probation Parole and Pardon Services*, 404 S.C. 395, 415-18, 745 S.E.2d 110, 121-23 (2013) (reviewing DPPPS' application of its own statute); *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) (reviewing DOR's interpretation of the revenue laws DOR administers); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 363 S.C. 67, 74, 610 S.E.2d 482, 486 (2005) (determining which DHEC regulation applied to action undertaken by DHEC's OCRM); *Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (deciding reasonableness of Worker's Compensation Commission's interpretation and administration of a statute from Worker's Compensation Act); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (deciding reasonableness of DHEC's OCRM interpretation and administration of DHEC's regulations relating to stormwater management); *Dunton v. S.C. Bd. Of Examiners in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (reviewing Board of Optometry's interpretation of its own statutes); *Faile v. S.C. Employment*

Sec. Comm'n, 267 S.C. 536, 230 S.E.2d 219 (1976) (reviewing Employment Securities Commission's administration of its own regulations); *Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 38, 190 S.E. 249, 252-53 (1937) (deferring to construction given to income tax statute by tax commission charged with duty of executing said statute). *See Kiawah*, 411 S.C. at 33 n.7-8, 766 S.E.2d at 717 n.7-8 (reminding of adoption of deference test enunciated in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782 (1984)).

The lower court's reliance on *Brooks v. S.C. State Bd. of Funeral Service*, 271 S.C. 457, 247 S.E.2d 820 (1978), additionally highlights the applicability of *Kiawah's* deference test to an agency's **own** statutory and regulatory interpretations, rather than the transposition of one agency's enforcement standards to a statute from a wholly unrelated Act. In *Brooks*, the court reviewed the State Board of Funeral Service's own administrative regulation and found it in conflict with the statute governing the State Board of Funeral Service. 271 S.C. at 461-63, 247 S.E.2d at 822-23. Yet, in this case, the circuit court cited *Brooks* in support of its finding that the Nonprofit Corporation Act takes precedence over an administrative interpretation promulgated by the agency charged with carrying out the Fair Housing Act, in a suit brought by that agency under the Fair Housing Act. To conflate a statute from the Nonprofit Corporation Act as a compelling reason to reject the Commission's agency interpretation regarding a suit brought pursuant to its own Fair Housing Law is a misapprehension of the standard to be applied to the issue before the Court.

The Court should instead address the plain language of the Commission's own statute, S.C. Code Ann. § 31–21–40(9), which defines person as "one or more individuals . . . ." alleged by the Commission to have violated the Fair Housing Law, in relation to the Commission's Administrative Interpretation #4, which asserts that individual board members of homeowner's

associations can be held liable as "Persons" subject to the Fair Housing Law. The Court should defer to the Commission's Administrative Interpretation #4, as that Interpretation pertains to the law it is charged with enforcing, and as the Commission's Administrative Interpretation #4 is not arbitrary, capricious, or manifestly contrary to the Fair Housing Law.

CONCLUSION

For the reasons stated, this Court should reverse the circuit court's order of December 16, 2021 and find the Commission's amended complaint states facts sufficient to constitute a cause of action. This Court should further find the South Carolina Fair Housing Law impliedly preempts the South Carolina Nonprofit Corporation Act and gives rise to a private cause of action against volunteer board members of a homeowners association.

Respectfully submitted,

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