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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2022-000134

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC
d/b/a Keller Williams Realty ..... Petitioners,

v.

Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness
Founders Group; and South Carolina
Association of REALTORS®..... Respondents.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS®

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INTEREST OF AMICUS CURIAE

In 1908, the National Association of Realtors® (NAR) was founded to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to advance the professional competence of real estate licensees in their rendering of services to the public as well as their interactions with each other.

NAR is a nonprofit professional association of persons and entities engaged in all aspects of the real estate business, including brokerage, appraisal, management, and counseling. Its membership is comprised of 54 state and territorial associations; approximately 1,200 local associations; and over 1.5 million Realtors®.[1] Members must agree to abide by NAR's Code of Ethics, which—among other things—ensures that consumers are served by requiring members to cooperate with each other in furthering clients' best interests. (App. pp. 555-667). As relevant here, the Code of Ethics requires members to resolve real estate-related controversies with other members through arbitration rather than litigation.

The Code of Ethics and Arbitration Manual (Manual) sets forth NAR's suggested rules for arbitration proceedings involving members (Arbitration Rules). State and local Realtor® associations are required to adopt the Manual, including the Arbitration Rules, verbatim or otherwise establish local procedures that ensure due process and comply substantively with the policies and procedures set forth in Manual. Arbitration proceedings before members are then conducted by state and local Realtor® associations in accordance with their adopted rules.

NAR is an ardent proponent of arbitrating disputes among members because of the many benefits to members and their clients. *See, e.g.*, *Lane v. Urgitus*, 145 P.3d 672, 680 (Colo. 2006)

[1] The term "Realtor®" has only one meaning: a federally registered collective membership mark that identifies a real estate professional who is a member of the National Association of Realtors® and subscribes to its strict Code of Ethics.

("An articulated purpose and objective of joining the REALTOR® organization is to facilitate the resolution of disputes through arbitration. This duty to arbitrate is a condition of their membership agreements and, consequently, of their professional relationship while members.").

From NAR's perspective, arbitration of disputes between members offers at least three benefits. *First*, arbitration affords Realtors® an opportunity to resolve disputes in a forum that is substantially faster and less expensive than litigation. *Second*, arbitration protects consumers of real estate services provided by Realtors® from being drawn into costly and time-consuming court battles among real estate professionals. *Third*, arbitration facilitates and encourages cooperation between Realtors® in the sale of properties by eliminating the risk of litigation stemming from disputes between them. This cooperation, in turn, enhances the marketing of properties, the effectiveness of services provided to buyers and sellers, and the satisfaction of all parties (including buyers and sellers) to a real estate transaction.

Courts have repeatedly recognized that the duty to arbitrate imposed upon Realtors® by NAR is reasonable, consistent with due process, and a source of significant judicial economy. *See, e.g.*, *Rogers Realty, Inc. v. Smith*, 76 P.3d 71, 72 (Okla. Civ. App. 2003) ("hold[ing] that when realtors voluntarily submit to their organizations' authority, then they are bound by its rules"); *Sobol v. N.Y. State Ass'n of Realtors, Inc.*, 235 A.D.2d 966, 966 (N.Y. App. Div. 1997) (noting, in a collateral case, "the due process safeguards afforded plaintiff at the hearing" before an Ethics Hearing Panel created by NAR's Code of Ethics because "he had ample opportunity to present evidence, call witnesses[,] and cross-examine witnesses"); *Lane*, 145 P.3d at 680 (stating the record "demonstrate[d] that arbitration is both a benefit and duty that DMCAR REALTOR® professionals undertake to receive and perform from, for, and with each other"); *id.* at 681 ("Valid contractual duties can arise out of a network of agreements involving commercially sophisticated

parties who are able to bargain for an allocation of risks, duties, and remedies. . . . REALTOR® members are encouraged to refer real estate transactions to each other, to contract with each other for a fee for such referrals, and to avoid a course of contested litigation should a dispute arise while they are members.").

This case is far more than an intramural dispute between two real estate firms over entitlement to a portion of a commission earned on the sale of a golf course. Petitioners themselves agree "this case shall affect far more than a single commission dispute; rather, it has far-reaching implications for all South Carolina realtors and all buyers and sellers of real estate, as well as the standard for vacating an arbitration award." Pet'rs' Br. at 25. Given the breadth of NAR's membership—including over 25,000 members in South Carolina—and its mission to advance the professional competence of its members rendering services to the public, NAR has a strong interest in this case, which has the potential to curb the laudable aims and definitive benefits of arbitration.

To that end, NAR wishes to submit this brief as *amicus curiae* in support of the South Carolina Association of Realtors® (SCAR). NAR believes it can provide a useful voice as the Court considers whether the court of appeals properly reversed the master-in-equity for exceeding the scope of her authority in reviewing the Arbitration Award.

PETITIONERS' STATEMENT OF THE ISSUES

I. Did the Court of Appeals err by ignoring the South Carolina General Assembly's requirement that a real estate agent have a written agency agreement before being entitled to a real estate commission, and that any common law to the contrary was superseded?

II. Did the Court of Appeals err by reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS' Arbitration Panel manifestly disregarded South Carolina law by awarding a commission to Appellant Cousins in the absence of any written agency agreement?

III. Did the Court of Appeals err in reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS prejudiced Petitioner's rights by not including findings of fact and conclusions of law in its award?

IV. Did the Court of Appeals err by reversing the Master-in-Equity's finding that the South Carolina Association of REALTORS prejudiced Petitioners' rights by prohibiting a court reporter from recording of the Procedural Review Hearing, which is an integral part of the Association's arbitration process?

COUNTER-STATEMENT OF THE ISSUES

I. Did the Arbitration Award have a colorable basis such that it cannot amount to a manifest disregard of the law?

II. Did the lower court err in substituting its own judgment for that of the Arbitrator?

III. Did the court of appeals properly find, consistent with the NAR's arbitration rules and policies, that the Arbitrator was not required to issue a detailed judgment with findings of fact and conclusions of law, and SCAR did not prejudice Petitioners by not allowing recording of the Procedural Review Hearing?

STATEMENT OF THE CASE

NAR respectfully adopts Respondent SCAR's Statement of the Case and Facts. *See* Rule 208(b)(6), SCACR.

STANDARD OF REVIEW

"Arbitration is a favored method of settling disputes in South Carolina." *Pittman Mortg. Co., Inc. v. Edwards*, 327 S.C. 72, 75, 488 S.E.2d 335, 337 (1997).[2] "Judicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like proceeding is looked upon with disfavor." *Lauro v. Visnapu*, 351 S.C. 507, 516, 570 S.E.2d 551, 555 (Ct. App. 2002). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Pittman Mortg. Co., Inc.*, 327 S.C. at 76, 488 S.E.2d at 337. And "[a]n award will only be vacated under narrow, limited circumstances." *Id.* "Absent one of [the statutory] grounds, an arbitration award will be vacated only on the non-statutory ground of 'manifest disregard or perverse misconstruction of the law.'" *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting *Lauro*, 351 S.C. at 516, 570 S.E.2d at 556). After all, "[a]rbitration is not litigation carried on by other means. It is intended to be, and is, an alternative means for resolving disputes without the cost and delay of a lawsuit." *White v. Preferred Rsch., Inc.*, 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993).

ARGUMENT

This appeal is about two members of NAR who voluntarily agreed to submit their commission dispute to arbitration pursuant to the Arbitration Rules. Petitioners ask the Court to

[2] While the Court recently clarified that there is technically "no public policy—federal or state—'favoring' arbitration," the Court still recognizes that "when considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).

reverse the court of appeals' opinion for three reasons. Petitioners contend the court of appeals erred because "(1) the Opinion completely disregards and is contrary to express South Carolina statutory law; (2) the Opinion eviscerates the 'manifest disregard of the law' standard for vacating an arbitration award; and, as such (3) the Opinion effectively shields the South Carolina Association of REALTORS from compliance with South Carolina law." Pet'rs' Br. at 9. But Petitioners' framing of the issues conveniently omits the lens through which the Court must review an arbitrator's award. The Court cannot disregard the arbitration context in which this case arose and upon which NAR's 1.5 million members rely to fairly and efficiently adjudicate commission disputes involving members.

The real question before this Court is thus whether the Arbitrator—followed by the Arbitration Panel—manifestly disregarded or perversely misconstrued the law such that the circuit court was justified in vacating the Arbitration Award. And the answer is no.

Because the master-in-equity exceeded the permissible scope of review and committed errors of law, the court of appeals correctly reversed the order vacating the Arbitration Award. *Waldo v. Cousins*, Op. No. 2021-UP-368 (S.C. Ct. App. filed Oct. 7, 2021). The Court should therefore affirm the court of appeals' opinion and confirm the Arbitration Award. This result is essential to preserve the benefits conferred by the arbitration process and the Arbitration Rules, to which all NAR members voluntarily commit. Allowing members to digress from this commitment and seek a court's intervention contravenes NAR's basic tenet of facilitating the expeditious resolution of disputes among its members and undermines the usefulness of arbitration as an alternative dispute resolution tool.

I. The Arbitrator did not manifestly disregard the law.

This Court has acknowledged that the "grounds" for disturbing an arbitration award "must

be construed in light of the rule that the Court's function in vacating, or confirming, an arbitration award is severely limited." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 106, 333 S.E.2d 781, 786 (1985). "Absent one of [the statutory] grounds, an arbitration award will be vacated only on the non-statutory ground of 'manifest disregard or perverse misconstruction of the law.'" *Weimer*, 364 S.C. at 80, 610 S.E.2d at 852 (quoting *Lauro*, 351 S.C. at 516, 570 S.E.2d at 556). "However, for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

Even under the manifest disregard of the law exception, courts have held that the party seeking to vacate the award must show "something beyond a mere error in construing or applying the law." *Id.* at 241, 676 S.E.2d at 323. Indeed, this Court has held that "even a 'clearly erroneous interpretation of a contract cannot be disturbed.'" *Harris v. Bennett*, 332 S.C. 238, 244, 503 S.E.2d 782, 786 (Ct. App. 1998) (quoting *Trident Tech. Coll.*, 286 S.C. at 108, 333 S.E.2d at 787).

> Generally speaking, "[a]n award within the scope of submission is conclusive on fact issues and interpretation of law." The award is presumptively correct, and "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award." Otherwise, an arbitration award would signify "the *commencement*, not the end, of litigation."

Trident Tech. Coll., 286 S.C. at 111, 333 S.E.2d at 788–89 (internal citations omitted).

Here, as the court of appeals noted, "[s]everal cases have upheld the division of real estate commissions without written agreements." *Waldo*, Op. No. 2021-UP-368, at 2; *see also Batten v. Howell*, 300 S.C. 545, 549, 389 S.E.2d 170, 172 (Ct. App. 1990) (affirming confirmation of arbitration award of commission share from other broker and finding "there is clearly at least an arguable ground for the award"); *Hackler v. Earl Wiegand Real Est., Inc.*, 295 S.C. 396, 398, 368 S.E.2d 686, 687 (Ct. App. 1988) (upholding a verdict in favor of a broker in a commission dispute

with another broker because "the record fully supports the proposition that there was an implied in fact contract").[3]

Because these cases have not been clearly and explicitly overruled, the court of appeals properly held that "they provide at least 'barely colorable justification' for the Arbitration Panel's award." *Waldo*, Op. No. 2021-UP-368, at 2; *cf. Grp. III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 151–52, 819 S.E.2d 781, 786 (Ct. App. 2018) ("A . . . court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award 'should be enforced, despite a court's disagreement with it on the merits, if there is a barely colorable justification for the outcome reached.'" (quoting *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004))); *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (holding "for a court to vacate an arbitration award based upon an arbitrator's 'manifest disregard for the law,' the 'governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable'" (quoting *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323)). As a result, the Court's inquiry is at an end, and the Court should affirm the Arbitration Award.

II. The lower court erred in substituting its own judgment for that of the Arbitrator.

Historically, the Federal Arbitration Act[4] and South Carolina law call for great deference to arbitration awards. *See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir. 1998); *Trident Tech. Coll.*, 286 S.C. at 106, 333 S.E.2d at 786. To be sure, "[t]he

[3] Further, the statue on which Petitioners rely—section 40-57-137 of the South Carolina Code—is silent regarding agreements between agents when buyers or sellers are not affected. Moreover, section 40-57-10 of the South Carolina Code states that the purpose of the South Carolina Real Estate Commission "is to regulate the real estate industry so as *to protect the public's interest* when involved in real estate transactions." (emphasis added). In light of these statutes, coupled with the fact that *Batten* has not been overruled, the Arbitrator had at least a colorable basis for concluding *Batten* remains good law.

[4] 9 U.S.C. §§ 1–10.

fundamental premise upon which" the federal policy favoring arbitration "is grounded is the laudable goal of providing 'a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.'" *Trident Tech. Coll.*, 286 S.C. at 104, 333 S.E.2d at 785 (quoting *Diapulse Corp. of Am. v. Carba Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980)).

"When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. "Review of an arbitrator's award is severely circumscribed." *Apex Plumbing Supply, Inc.*, 142 F.3d at 193. "If an issue is within the scope of the arbitration agreement, the court need not review the merits of the decision." *Harris*, 332 S.C. at 243, 503 S.E.2d at 785. "Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers." *Pittman Mortg. Co., Inc.*, 327 S.C. at 76, 488 S.E.2d at 338. Further, "[a] party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power." *Id.* at 76–77, 488 S.E.2d at 338.

As the U.S. Court of Appeals for the Fourth Circuit has recognized, "the scope of review of an arbitrator's valuation decision is *among the narrowest known at law* because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." *Apex Plumbing Supply, Inc.*, 142 F.3d at 193 (emphasis added) (footnote omitted); *see also Trident Tech. Coll.*, 286 S.C. at 105, 333 S.E.2d at 785 (observing that "[b]road judicial review on the merits would render resort to arbitration wasteful and superfluous" and frustrate the "purpose for arbitration, i.e., avoidance of litigation" (alteration in original) (quoting *Farris v. Alaska Airlines,*

Inc., 113 F. Supp. 907, 908 (D. Wash. 1953); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960), *cert. denied*, 363 U.S. 843 (1960))). After all, "[t]he primary function of arbitration is to serve as a substitute for and not a prelude to litigation." *Id.* at 104–05, 333 S.E.2d at 785 (quoting *Farris*, 113 F. Supp. at 908).

This matter stems from an NAR member's effort to avoid the context of arbitration—and the sound conclusion of the arbitrator—on grounds not permitted under the Arbitration Rules or the law. All members across the country, including Petitioners, agree to abide by NAR's Code of Ethics and Arbitration Rules as a condition of joining NAR and receiving the multitude of benefits offered to members. NAR carefully drafted its Arbitration Rules to give members a reliable and efficient dispute resolution mechanism that contains multiple levels of due process protections, including review of the arbitration proceedings by a procedural review panel. *See* (App. pp. 417–785). And the Arbitration Rules do not contemplate the courts intervening and upsetting arbitration awards simply because they would have reached a different result. Engaging in a sweeping review ignores the very spirit of arbitration—as well as the Arbitration Rules themselves—and has the potential to curb the laudable aims of arbitration.

NAR has an interest in courts across the country uniformly applying the correct standard of review for arbitration awards in disputes among its members. One of the primary attractions NAR's arbitration process offers is the predictability and consistency of the Arbitration Rules. As the court of appeals understood, a decision upholding the lower court's ruling here, which rewrites those Arbitration Rules, would impact arbitrations in this state—as well as in other states—because other Realtors® with a dispute would point to it as support to deviate from the majority rule governing the review of arbitration awards. Further, permitting the de novo review employed by the lower court would undercut the very purpose behind submitting broker disputes to arbitration,

converting arbitrators into mere first-level trial courts.[5] *Cf. Trident Tech. Coll.*, 286 S.C. at 104–05, 333 S.E.2d at 785 (stating "[t]he primary function of arbitration is to serve as a substitute for and not a prelude to litigation" (quoting *Farris*, 113 F. Supp. at 908)).

Petitioners nevertheless contend the court of appeals opinion "effectively shields" SCAR "from compliance with South Carolina law." Pet'rs' Br. at 9, 10, 14. Not so. Interestingly, Petitioners are the ones who filed this action in arbitration and, in doing so, agreed to have the dispute heard pursuant to NAR's Arbitration Rules. The court of appeals' opinion is consistent with the South Carolina law and the Arbitration Rules upon which NAR and NAR's 1.5 million members rely in providing for nationwide arbitration by its members of commission disputes. In compliance with the law and NAR's Arbitration Rules, the court of appeals correctly enforced the agreement between the parties to allow an arbitrator to decide this case and applied the proper standard of review.

Because the Arbitration Award did not manifestly disregard the law, the Court should respect and give effect to the award.

III. The court of appeals properly found, consistent with the NAR's Arbitration Rules, that the Arbitrator was not required to issue a detailed judgment with findings of fact and conclusions of law, and SCAR did not prejudice Petitioners by not allowing recording of the Procedural Review Hearing.

NAR's arbitration procedure does not permit findings of fact for a number of reasons that are beneficial to NAR's arbitration procedures and arbitration in general.

Arbitration awards are based on the hearing panel's analysis of the entire course of conduct giving rise to a dispute, and there is usually no single act, statement, or particular event that forms

[5] This would also open the floodgates to more litigation between and among South Carolina's 25,000 Realtors® in our court system, clogging up dockets and judicial resources and, thus, negating the benefits of the mandatory arbitration rules.

the basis for an award. Findings of fact by an arbitrator could lead to arbitration jurisprudence that panels could rely on rather than considering each disputed transaction in totality. Reducing the grounds on which an arbitration award is made to writing is viewed as too complex and difficult to require in arbitration disputes in this context.

Nor is it unusual to preclude findings of fact in arbitration awards. "It is well settled that arbitrators are not required to disclose the basis upon which their awards are made[,] and courts will not look behind a lump-sum award in an attempt to analyze their reasoning process." *MCI Constr., LLC v. City of Greensboro*, 610 F.3d 849, 862 (4th Cir. 2010). Indeed, "the Supreme Court has held that arbitrators need not state reasons for reaching a particular result." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 151 (4th Cir. 1994) (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)).

As the court of appeals has recognized, "courts defer to the arbitral panel both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'" *Grp. III Mgmt., Inc.*, 425 S.C. at 150, 819 S.E.2d at 785–86 (quoting *UBS Fin. Servs. v. Padussis*, 842 F.3d 336, 339 (4th Cir. 2016)). The court of appeals has further explained:

> Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. [A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.

Grp. III Mgmt., Inc., 425 S.C. at 150, 819 S.E.2d at 786 (alteration in original) (quoting *Remmey*, 32 F.3d at 146).

Arbitration, of course, "is a matter of contract." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is not the function of the courts to rewrite or torture the meaning of a contract." *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 649, 491 S.E.2d 272, 274 (Ct. App. 1997). The court's role is limited to enforcing the terms of a plain and unambiguous contract, not rewriting or distorting the contract "under the guise of judicial construction." *S.S. Newell & Co. v. Am. Mut. Liab. Ins. Co.*, 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942).

Again, NAR members are voluntarily agree to arbitrate disputes as a condition of membership. NAR has promulgated detailed arbitration procedures in its Code of Ethics and Arbitration Manual upon which Realtor® associations around the country—including the SCAR and the various local REALTOR® associations in the State—rely in conducting arbitration proceedings. (App. pp. 555–667). The Arbitration Rules did not require the arbitrator to provide a factually detailed or reasoned award. Nor did state or federal law. *See MCI Constr., LLC*, 610 F.3d at 862; *Remmey*, 32 F.3d at 151; *United Steelworkers of Am.*, 363 U.S. at 598; *Trident Tech. Coll.*, 286 S.C. at 111, 333 S.E.2d at 789 (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978)). As the court of appeals recognized, the lower court therefore erred in rewriting the Arbitration Agreement to require those things. *Cf. Gray*, 327 S.C. at 649, 491 S.E.2d at 274.

Petitioners also argue SCAR's refusal to allow recording of the Procedural Review Hearing prejudiced them because it resulted in not having a full record before the Court, which essentially places the Award above judicial review. Pet'rs' Br. at 23–24. Petitioners' argument is hyperbolic and confuses the issue. Among other points, Petitioners contend that the Manual "does not state that court reporters and/or transcription is not allowed" and provides "the original arbitration

Hearing Panel Chairperson will have an opportunity to explain why the Award of Arbitrators should be upheld by [the] Procedural Review Hearing Tribunal." *Id.*

But the Arbitration Hearing, which does allow for court reporter and/or transcription, is different from the Procedural Review Hearing. The Procedural Review Hearing is essentially an appellate hearing which permits the parties, and the Arbitration Hearing Panel Chairperson, to present to an appellate body (usually comprised of representatives from a Realtor® association's Board of Directors) the grounds on which an arbitration award should be affirmed, remanded, or reversed due to procedural deficiencies. The Procedural Review Hearing may not be recorded because it is not an opportunity to relitigate the Arbitration Hearing. Rather, it is limited in scope: the Chairperson may defend the decision of the Arbitration Hearing Panel on appeal. (App. pp. 581–82, 630–32). It is not mandatory and in no way creates a requirement that the Procedural Review Hearing be recorded. After all, judicial review of arbitration awards is intended to be very narrow. *See, e.g.*, *Apex Plumbing Supply, Inc.*, 142 F.3d at 193 ("Review of an arbitrator's award is severely circumscribed.").

While recording a Procedural Review Hearing may under some circumstances help the Court review the process leading to an arbitration award, "[g]enerally, an arbitration award is conclusive," so disallowing a recording did not prejudice Petitioners as the "court[] [should] refuse to review the merits of an award." *Pittman Mortg. Co., Inc.*, 327 S.C. at 76, 488 S.E.2d at 337. Indeed, not allowing recordings of appellate arguments is commonplace. For example, no party ever had access to recordings of court of appeals arguments until that court recently published a video portal like this Court.

Further, as the court of appeals reasoned, "actions by the Association are not grounds for vacating an arbitration award." *Waldo*, Op. No. 2021-UP-368, at 3. And the South Carolina Code

requires only that the evidentiary hearing be recorded upon request. *See* S.C. Code Ann. § 15-48-50(d) ("Upon the request of any party or arbitrator, the arbitrators shall cause to be made a record of the *testimony and evidence introduced at the hearing*." (emphasis added)). There is no similar requirement for a Procedural Review Hearing.

Put simply, NAR carefully drafted its Arbitration Rules for consistent application across the United States with due process protections in mind. Allowing brokers to circumvent NAR's time-honored process for arbitrating disputes would undermine the very policy behind arbitration, eroding the predictability, consistency, and lower costs that make arbitration a favored method of resolving disputes. Further, if the Court was to reverse the court of appeals and allow the lower court's order to stand, the ruling would threaten to establish a dangerous precedent—contrary to at least a century of case law—that would permit South Carolina courts to rewrite agreements to arbitrate based upon their own preference. That is simply not permitted. Where, as here, Petitioners voluntarily agreed to submit this dispute to arbitration without a detailed written and reasoned ruling, their post-award filer's remorse is particularly unavailing.

Accordingly, the Court should affirm the court of appeals' opinion reversing the lower court's finding that NAR's arbitration proceedings were inconsistent with state law.

CONCLUSION

Uniform, consistent, and predictable application of NAR's Arbitration Rules is essential to promoting the goals of NAR, including providing a dispute forum for members that is substantially faster and less expensive than litigation, protecting consumers of real estate services provided by NAR's members from being drawn into costly and time-consuming court battles among real estate professionals, and encouraging cooperation between real estate professionals. While this dispute may center on a single transaction, the Court's decision here could have far-reaching implications

that impact thousands of NAR members—as well as the buyers and sellers that benefit from NAR's Arbitration Rules—in South Carolina and across the country. The court of appeals correctly reversed the lower court's effort to expand judicial review of the Arbitration Award because it was inconsistent with South Carolina law, thwarted the very policy behind arbitrating broker disputes, and runs afoul of the Arbitration Rules to which the parties, as well as all Realtors® across the United States, voluntarily agreed to be bound. The Court should affirm and reinstate the Arbitrator's Award.

Respectfully submitted,

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