IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187
Lower Court Case No. 2011-CP-07-3322

The Callawassie Island Members Club, Inc. .... Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis .... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Appeals err in following the clear language in the South Carolina Nonprofit Corporation Act under the facts presented?

2. Did the Court of Appeals err in ruling that ambiguous and convoluted membership documents drafted by the Club should be construed against the Club for purposes of a summary judgment motion filed by the Club?

STATEMENT OF THE CASE

A. Summary

In Petitioner's Brief, The Callawassie Island Members Club (the "Club" or "CIMC") has crafted a new, clever narrative to justify its current membership policy. In that narrative, the Club is now a "sister entity" of the separate property owners' association, to which everyone needs to pitch in to support the community. In that narrative, Respondents Mr. and Mrs. Dennis are putting the Club's very existence at risk—and the entire non-profit world as well, apparently—by not paying their dues.

This is fiction. A story devised to alarm and manipulate this Court.[1]

If we are to dwell in the world of fiction, the Club is more like the character Pennywise in Stephen King's novel It. The Club lures people into its "membership" with a promise of fun—games! food!—and then becomes something more sinister ("We all float down here."). Once the Club gets hold of members, many cannot leave, for years or decades or ever. Instead, "members" like Mr. and Mrs. Dennis are trapped paying dues in perpetuity ("You'll float too.").

It is the Club's extreme, unlawful current membership policy that elicited the unanimous rulings from the Court of Appeals.

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[1] The "sister entity" narrative is an improvement over the Club's previous catch-phrase in this litigation—the Club's "bedrock principle"—which never really caught on. Between "bedrock principle" and "sister entity," the Club briefly adopted a line from the song *Hotel California* that "We are all just prisoners here of our own device." (App. at 22) That did not catch on either.

Mr. and Mrs. Dennis have had their "membership" on the Club's "resale" list since March 18, 2008. (App. at 222) They moved away from Callawassie years ago. Mr. Dennis is 74 years old, recently had triple-bypass heart surgery, struggles with very poor health, and is largely incapacitated. The Dennises are unable to use the Club "amenities." As the Court of Appeals properly recognized, it is virtually impossible for the Dennises to rid themselves of the Club membership. To this day, the Club still bills Mr. and Mrs. Dennis monthly for unlimited golf and other "amenities." (*See, e.g.*, App. at 570 (ongoing charges)).

This unusual membership policy directly defies the South Carolina Nonprofit Corporation Statute's directive that "A member may resign at any time."

'Twas not always thus. Callawassie was deliberately set up with two entirely separate entities—one mandatory, one optional. The mandatory property owners' association (CIPOA) handles the quasi-governmental responsibilities on the island—roads, docks, and other items typical to property owners' associations. The optional Club is just that: a social club where members exercise, play golf and tennis, swim, and generally socialize and dine, if they chose to join or remain members. It is undisputed that the Dennises had, and have, no obligation to *join* the Club—the Club now just says they cannot *leave*. (App. at 421)

As the Club's brief points out, other communities were set up differently. Some other communities have a single organization to handle both quasi-governmental tasks and social amenities. Callawassie was not. Callawassie was purposefully set up so the

social amenities are optional. Many property owners on Callawassie are not members of the Club.

Accordingly, the Club governing documents were drafted with provisions that allow people to leave, so as to comply with the requirement of the Nonprofit Corporation Statute that "A member may resign at any time." The documents were written to allow members to exit the Club by a variety of mechanisms—a member could resign their membership, or terminate their membership, or be expelled. There were (are) penalties for the various exit paths, but a member could exit ("resign") at any time, as required by the statute.

The Club board, however, has "reinterpreted" the governing documents. Now, the Club's membership policy is that members may only exit the Club by jumping through hoops designed to trap members such as Mr. and Mrs. Dennis. This is such an extreme situation that the Court of Appeals properly dubbed the Club the "Hotel California" and ruled that the Club's current membership policy violates the South Carolina Nonprofit Corporation Act.

Rather than change the Club's current membership policy to fit the law, in this appeal the Club demands that this Court change the law to fit the Club's current membership policy. The Club demands that this Court "reinterpret" the South Carolina Legislature's clear directive that "A member may resign at any time" to mean that the Club can hold Mr. and Mrs. Dennis in perpetuity.

B. Background Facts

Callawassie Island is a community outside of Beaufort. Its property owners' association is the Callawassie Island Property Owners Association, Inc. ("CIPOA"). Membership in CIPOA is not in dispute.

Petitioner Club is a private social club on Callawassie Island. When Respondents Ronnie Dennis and Jeanette Dennis purchased property on Callawassie Island in or about 1999, Respondent Ronnie Dennis submitted an application to purchase a membership in a different organization, the Callawassie Island Club, Inc. ("CIC"), an entity owned by the original island developer. (App. at 161) There is, however, no evidence in the record that Mr. Dennis signed a membership purchase agreement with the Petitioner Club, only an application with CIC. (App. at 70–71)

There was, and is, no requirement that the Dennises join the Club. (App. at 421 ("Although not required to do so, they also joined the then-existing club . . . .")) Consistent with that optionality, the Dennises were told—and the Club documents stated—that Mr. Dennis could end the membership at any time. (App. at 293 ("[Membership director Ellen Padgett said] I could get my money back anytime I wanted it . . . "); App. at 304 ("She represented that I could get my money back at any time."); App. at 283 ("If we ever wanted out, then we had the four months. That was the most that we would be responsible for."). This is consistent with a member's right provided by the South Carolina Nonprofit Corporation Act. Specifically, the Club documents and witnesses' testimony show that there are at least three methods of exit from the Club: resignation; termination; and expulsion (discussed below at pp. 9–10).

The Club also at times just lets some members leave, if they keep it secret. *See, e.g.*, App. at 232–234 (allowing certain members to "concede" or "return" their memberships); *see also* App. at 318 ("Dear Mr. Dennis, The Callawassie Island Members Club (CIMC) is aware that your membership is not related to ownership of any real estate on Callawassie Island. . . .").

After a number of ill-advised changes, the Club's board now has a different, extreme policy: the Club only lets a person quit and stop paying dues by selling their property, leaving Callawassie entirely, *and selling their membership to a person of whom the Club's board approves.* (App. at 615) That re-interpretation of the Club's membership policy is where the statutory violation occurs, and is what has landed the Club in this mess. The Club's policies now block a member from "resign[ing] at any time".

C. There is no evidence supporting the Club's doomsday predictions.

Much of the Club's brief focuses on the claim that it would be "manifestly unfair" to the Club to allow the Dennises to exercise their right to resign. (Br. at p. 3) The Club's brief spends even more words predicting the end of the Club, and of much of the non-profit corporation world, if the Court of Appeals' decision stands. There is no evidence in the record supporting the Club's doomsday predictions. This case has been pending since 2011, and the Club has not submitted any evidence to support its current story that the Club will wither and die if its members can resign. Tellingly, the long passages in the Club's brief portending legal Armageddon are without citation to evidence in the Record. The Court should decline to reinterpret the Legislature's clear statutory language based

on no evidence at all. Instead, this Club's self-created circumstances are highly unusual, and should be treated as a one-off error by a misguided board of directors.

ARGUMENTS

A. The Court of Appeals properly construed the clear language of the statute.

1. The statutory language is clear and should not be twisted to fit the Club's current membership policy.

The statute is clear:

> Section 33-31-620. Resignation.
>
> (a) A member may resign at any time.
>
> (b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made before resignation.

The *South Carolina Nonprofit Corporate Practice Manual* explains this mandate as follows:

> A member can quit at any time. However, if the member has personally assumed any of the organization's liabilities, he will not be relieved of these liabilities merely by quitting.

Burnett R. Maybank, III, Professor James R. Burkhard, Jeanne M. Born, Melissa Wheeler Dunlap, Professor Jaclyn A. Cherry, *South Carolina Nonprofit Corporate Practice Manual* 61 (S.C. Bar, 2nd ed. 2015).

The Legislature is clear: if a corporation chooses non-profit status, it must allow members to quit. If the quitting member has personally assumed some of the organization's liabilities (such as by personally guaranteeing a loan, or if they have accrued charges before quitting), those pre-existing debts still stand. But "quitting" or

"resigning" means nothing if the non-profit corporation continues to charge the person new dues, new assessments, and other new charges after they quit.[2]

Ironically, the Club's documents appear to have been originally drafted to comply with this requirement. It was not until later that the Club's board "re-interpreted" its membership policy and violated the statute. As written, and as interpreted by the Respondents here, the Club's original governing documents adhered to the statute and allowed numerous ways to quit:

1. "Termination": A member may "terminate" their membership. They still must pay any unpaid (past-due) accounts, such as unpaid bar tabs, restaurant bills, golf charges incurred, past-due fees. And the person loses their equity contribution to the Club (a hefty sum, up to $45,000).[3] But their membership ends, and there are no more future dues, fees, or other charges. A person who terminates their membership can later re-apply for membership in the Club. (App. at 627 ("Suspension and Termination of Membership" § 1); App. at 648 ("Reprimand, Suspension, Expulsion and Termination of Membership" § 14.2.1).)

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[2] "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning. *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995); [*Camden v.*] *Brassell, supra* [326 S.C. 556, 486, S.E.2d 492 (Ct. App. 1997)]. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 440 S.E.2d 373 (1994)." *State v. Hudson*, 336 S.C. 237, 247, 519 S.E.2d 577, 582 (S.C. App. 1999).

[3] The Dennis equity buy-in was $31,000. (App. at 216, 222, 294–295) After Mr. Dennis exited the Club, the Club kept that money, and did not credit it toward his alleged debt. (App. at p. 570)

2. "Resignation": A member may "resign" by placing their membership on a resale list. While on that list, the person can continue to use the Club, and if they do, must continue to pay all Club charges. Once the membership is re-sold, the person receives part of their equity money back, and their membership ends. That person may still own property at Callawassie, they just are no longer a member of the Club. Or, a person who sells their property can sell their membership with it. (App. at 591, 615.)

3. "Expulsion": After three months' non-payment, a member is suspended and then "expelled." This is mandatory. Expelled members cease to be equity members. The person loses their full equity contribution (up to $45,000), and may never again be admitted to the Club's facilities "under any circumstances." (App. at 647 (§ 13.3.1), 648 (§ 14.1.5), 619, 615.)

Despite this, currently the Club only lets a person quit and stop paying dues by selling their property, leaving Callawassie entirely, *and* selling their membership to a person of whom the Club's board approves. (App. at 615.) The Club now prevents a member from "resign[ing] at any time".

2. **The Court of Appeals' decision is more measured than the Club portrays.**

The Court of Appeals' ruling is much more measured than the Club portrays. After a careful summary and analysis of the Club's governing documents and membership practices, and the Nonprofit Corporation Act, the Court of Appeals held:

> Section 33-31-620 obligates resigned members to pay any dues incurred *before* resignation. This section does not require resigned members to continue to pay any dues that accrue *after* resignation. To do so, we believe, would create an unreasonable situation where clubs could refuse to allow a member to ever terminate their membership obligations. . . .

(App. at p. 7; italics in original; underlining added.) The Court of Appeals' decision follows the clear language of the statute ("A member may resign at any time") as interpreted by the *South Carolina Nonprofit Corporate Practice Manual* ("A member can quit at any time"). Again, a resigned person still is responsible for settling all debt obligations with the Club (*i.e.*, bar tabs, restaurant bills, past-due dues and other charges, etc.) already accrued *before resignation*. That person, however, cannot be invoiced or held responsible for payment of club dues, fees, and assessments going forward in perpetuity *after resignation*. To hold otherwise would render the Legislature's words meaningless—a person "resigns" or "quits" (and no longer uses the Club's recreational facilities), but is still burdened with all the future dues, fees and assessments of full membership. That extreme position has caused this Club to be dubbed the "Hotel California"—the Dennises had no obligation to join, but they can never leave.

The Court of Appeals' decision is consistent with the Official Comment to § 33-31-620(a):

> **Section 6.20(a) sets forth the basic right of a member to resign from a nonprofit corporation at any time. A nonprofit organization cannot force a person to belong to it.** However, a person may be liable to the corporation for wrongfully withdrawing in violation of contractual or other obligations to remain as a member. Under section 6.20(b) a person may be liable for obligations incurred or commitments made prior to the resignation. These commitments may extend beyond the time the member resigns.
>
> Resignation from membership will not allow a person to avoid liability for goods or service **already provided** or for **ongoing obligations** to which the member agreed prior to resignation. Section 6.20(b). **This provision is particularly important to corporations that provide benefits or services to members' businesses. The member in joining the organization may promise to use its facilities or services for a specified period of time.** While section 6.20(a) allows a member to resign at any time, section 6.20(b) allows the corporation to enforce or obtain damages for violation of a member's agreement.

S.C. Code Ann. § 33-31-620 (Official Comment; emphasis added). The term "already provided" is clear: goods and services already rendered must be paid for, as the Court of Appeals ruled. The term "ongoing obligations" is more nuanced, and is best interpreted to mean something that is currently occurring. "Ongoing" typically is defined as "currently taking place: *an ongoing festival*" [4] or "being actually in process: *ongoing research*." [5] An easier call is what "ongoing obligations" does *not* mean: it cannot realistically mean many years later, after a member has resigned, forfeited their equity and separated from a social club, and no longer uses the facilities. "Ongoing obligations"

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4 American Heritage College Dictionary p. 954 (3rd ed. 1997).

5 https://www.merriam-webster.com/dictionary/ongoing

cannot realistically mean that a when person resigns in 2008 "ongoing" includes goods and services in 2017 and beyond. A similar analysis applies to the term "commitments made," which is an even more indefinite term (definition of "commitment": "the act or an instance of committing")[6] that cannot reasonably be construed as contracting to pay Club dues for "unlimited golf" nearly a decade after resignation. *Cf. Kidd Island Bay Water Users Co-op. Ass'n, Inc. v. Miller*, 38 P.3d 609, 612 (Idaho 2001) ("The term 'commitments made' cannot be interpreted to mean something as wide open as agreeing to assume any responsibility for any type of water system which the Board might select.") As the Comment articulates, a "specified period of time" may sometimes be acceptable, but the open-ended, 9-years-and-counting purgatory in which the Dennises are trapped violates the statute. *See* App. at 222 (Dennis membership on Club resale list since March 18, 2008).

Finally, there is no evidence in the record that—prior to their decision to quit the Club—the Dennises "incurred an obligation" or "made a commitment" which was to extend beyond their exit. Rather, the Dennises quit the Club; they ceased receiving benefits and amenities derived therefrom; and the Club kept their equity deposit. Under any reasonable interpretation of the statute, the Dennises should be allowed to exit the Club under those circumstances.

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6 American Heritage College Dictionary p. 281 (3rd ed. 1997) ("commit": "To do, perform, or perpetrate."); *see also* http://www.dictionary.com/browse/commit ("commit": "to do; perform; perpetrate").

3. The Club's argument ignores the "at any time" requirement of the statute.

The Club's analysis skips key statutory language, and a key underpinning of the Court of Appeals' decision: a member in a social club must be allowed to resign "at any time." That language too is clear; it means a member may quit at any time—not years later (if ever), not after the member is saddled with the Herculean task of finding someone, of whom the Club's board approves, to buy the membership.[7] The Court of Appeals' decision was concerned with the prospect of people like Mr. and Mrs. Dennis being "trapped" in a social club for years, under the Club's extreme re-interpretation of its membership policy. (App. at 7.) Under different, more reasonable facts, one perhaps may argue about the parameters of "at any time" (upon written notice, a reasonable transition time). However, under the undisputed facts here (*years* of purgatory in the Club, possibly in perpetuity) there is no serious question that the Club's membership policy violates the "at any time" requirement of the Nonprofit Corporation Act, and the Court of Appeals' decision was correct.

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[7] "The legislature's intent should be ascertained primarily from the plain language of the statute. *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996). Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996)." *Hudson*, 336 S.C. at 246, 519 S.E.2d at 581.

4. **The Club Brief's discussion of the enforceability of executory agreements is largely irrelevant.**

The Club's Brief argues that parties may mutually agree to contract out of the requirements of the Nonprofit Corporations Act. This argument largely ignores that there is no such contract here: Mr. and Mrs. Dennis never entered into a contract with the Club in which they agreed to pay Club dues and assessments in perpetuity, long after the Dennises leave Callawassie and are physically unable to use the Club facilities. Instead, Mr. Dennis agreed to be a member with the right to terminate, resign, or be expelled, with the various costs and benefits associated with each exit path. (App. at 293 ("[Membership director Ellen Padgett said] I could get my money back anytime I wanted it . . . "); App. at 304 ("She represented that I could get my money back at any time."); App. at 283 ("If we ever wanted out, then we had the four months. That was the most that we would be responsible for.")). That was the deal, and the Club later tried to change it. As discussed above, the Club's board unilaterally tried to "reinterpret" the termination, resignation, and expulsion provisions to prohibit Mr. Dennis from leaving the Club. Unilateral reinterpretation does not qualify as a mutually-agreed "executory agreement" that overrides the Legislature's statutory directive.

On this point, the more relevant provision is S.C. Code § 33-31-206, which states that a nonprofit corporation's board of directors may not adopt bylaws that are

inconsistent with South Carolina law.[8] This is consistent with recognized law on clubs, as articulated in *American Jurisprudence*:

> Ordinarily, an individual is free to join or resign from an association as he or she sees fit, subject to any financial obligations due and owing the group, **and a bylaw which restricts this right or makes the withdrawal subject to the organization's approval is invalid. . . . However, in order to relieve the member from the payment of dues, such resignation must be made and become effective before such fees become due** and must be made in compliance with the reasonable provisions of the bylaws. Where the rules of the association prescribe the method of voluntary withdrawal, compliance therewith is necessary in order to sever the membership relation, at least insofar as such rules **are fair and reasonable.**

6 Am. Jur. 2d *Associations and Clubs* § 26 (Aug. 2017) (emphasis added); *cf. Haynes v. Annandale Golf Club*, 4 Cal. 2d 28, 47 P.2d 470 (Cal. 1935) ("For defendant [golf club] to hold [resigning member] as a perpetual member on its mere fancy or caprice would be

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8 *See* S.C. Code Ann. § 33-31-206 (Official Comment: "The bylaws may contain any provision regulating and managing the affairs of the corporation not inconsistent with law or the articles. If a nonprofit corporation has members, its bylaws frequently contain detailed provisions dealing with their characteristics, qualifications, rights, limitations and obligations. Such provisions may relate to voting rights procedures governing admission, expulsion, suspension and other matters."). South Carolina courts have recognized the general rule that the bylaws of a corporation are invalid to the extent they are inconsistent with State law. *See King v. Ligon*, 180 S.C. 224, 185 S.E. 305 (1936) ("All resolutions and by-laws must be conformable and subordinate to the general laws"); *Davis v. S.C. Cotton Growers' Coop. Ass'n.*, 127 S.C. 353, 121 S.E. 260, 261 (1924) ("Bylaws regulating in a reasonable manner, the method of voting at corporate elections will be sustained, if their provisions do not conflict with the charter or statute"); *Lovering v. Seabrook Island Property Owners Ass'n*, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986), *aff'd as modified*, 291 S.C. 201, 352 S.E.2d 707 (1987) ("A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and any by-laws made pursuant thereto"); *Ortega v. Kingfisher Homeowners Ass'n. Inc.*, 314 S.C. 180, 182–83, 442 S.E.2d 202, 204 (Ct. App. 1994) (provision in association's bylaws calling for up to five directors with staggered terms violated statute requiring at least nine directors in order to stagger terms); *see also* 18 C.J.S. Corporations § 163 ("by laws inconsistent with statutory law, the common law, or with public policy or good morals, are void").

obnoxious to the spirit as well as to the clear meaning of the statute. The contention that an assignment of a new candidate for membership is required by the by-law is clearly untenable. . . . . So much of said by-law as allows defendant to deny the right of resignation on the ground that it has merely withheld its consent or has declined to make the necessary book entries is invalid because unreasonable and arbitrary."); 18A Am. Jur. 2d *Corporations* § 766 ("In the absence of any law or rule to the contrary, a member of a membership corporation may resign by simple announcement of his or her intention to do so, and no acceptance of the resignation is required to give it effect."); *Hirsch v. Jupiter Golf Club LLC, d/b/a Trump Nat'l Golf Club Jupiter*, 232 F. Supp. 3d 1243, 1256 (S.D. Fla. 2017) ("[T]he Court concludes that by categorically denying Class Members all rights to Club access because they remained on the resignation waiting list as of December 31, 2012, Defendant revoked or cancelled their memberships, thus recalling their memberships.").

The Club cites to an unpublished Arizona state trial court ruling as one of the strongest cases in support of its argument: *Desert Mountain Club, Inc. v. Clark*, CV-2014-015334 (Maricopa Cty. Ariz., Oct. 16, 2015). The Club does not advise the Court on key factors in that decision. For example, the Arizona statute at issue in *Desert Mountain Club* contains important differences from the South Carolina statute. Those statutory differences are what drive that Arizona court's decision:

A. A member may resign at any time, **except as set forth in or authorized by the articles of incorporation or bylaws.**

B. The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation.

C. **This section does not apply to corporations that are condominium associations or planned community associations.**

2015 Ariz. Rev. Stat. § 10-3620 (emphasis added). Unlike South Carolina's statute, Arizona's statute explicitly allows a non-profit corporation to limit resignation rights through its bylaws, and explicitly does not apply to property owners' associations. In South Carolina's statute, the Legislature deliberately omitted those qualifiers, meaning that South Carolina's statutory language that "[a] member may resign at any time" cannot be overridden by a social club's internal bylaws.[9] The Club's Brief urges this Court to read the Arizona statute's words into the South Carolina statute, despite the fact that the Legislature deliberately omitted them.

The Brief's other out-of-state case, *Jay Cty. Rural Elec. Memb. Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905 (Ind. Ct. App. 1998), involved a preliminary injunction motion filed by a rural electric utility in 1998, based on a contract for a specified duration, and has no realistic analogy to a social club under the facts presented here. In sum, there is no precedent contradicting the conclusion that the Legislature meant what it wrote: If an entity chooses non-profit status, its members may resign at any time.

In the alternative, if this Court chooses to make new law that parties may

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[9] The Desert Mountain Club litigation apparently is far from over, according to a litigation web site: www.desertmountaingolfscam.com.

contractually void § 33-31-620(a), the Court should rule that the Club's purported contract here does not meet that standard, based on at least two well-established legal principles. First, the parties must intentionally and knowingly waive their rights under § 33-31-620(a), under the rule that "[a] waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (S.C. 1992). That is, the contract should be crystal clear and mutually understood that the "member" is giving up the statutory right to exit a club at any time. The "waiver" should not be hidden in contradictory and serpentine provisions about "resignation," "termination," and "expulsion" that the Club now claims all really mean the same thing. Second, the contract should be for a specified duration, under the rule that "perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract." *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994). Respondents respectfully submit, however, that those legal principles are incorporated into §§ 33-31-620(a)-(b). That is, § 620(a) could not be overridden (even hypothetically) without an explicit waiver in the Club contract, and § 620(b) requires an explicit term of duration in the Club contract. Accordingly, this is why the Club's original claim against the Dennises fails.

5. The Club is not a property owners' association.

Throughout its Brief, the Club attempts a pivot by artificially associating itself with its so-called "sister entity," CIPOA, to invoke various decisions involving property owners' associations. (Br. at p. 11.) But the Club is *not* a property owners' association.

Callawassie has a property owners' association (CIPOA), which is an entirely separate entity from the Club, and which handles the responsibilities of the common elements at Callawassie. The Club is a social club, where members play games and eat.[10] As the Club acknowledges, the Dennises had no obligation to join the Club. (App. at 421)

The distinction is important. If the Court entertains the Club's pivot to reinvent itself as a property owners' association (POA), it will open the door for other entities to also claim those rights. Instead, POAs have distinct characteristics, such as (1) their main purpose is to maintain the common elements (unlike the Club, which is a social club); (2) membership in POAs is tied to the property (unlike the Club, where the membership is issued to the specific person, under a separate contract, with specific membership certificates, and can follow the person if they leave Callawassie); (3) all POA members typically hold the same type of membership (unlike the Club, which has various levels of golf, social, resident, non-resident, and associate memberships); (4) property owners must remain members of a POA until they sell their property (unlike the Club, where members may exit via the resale list, or by termination, or by expulsion, and where many property owners on Callawassie are not members of the Club); (5) *only* property owners generally are members of POAs (unlike the Club, which can allow non-Callawassie people to be members as well); and (6) members of POAs do not own "equity" in the

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[10] The Court should give little to no credence to Club's discussion (pp. 14–15) of the *amicus curiae* brief of the Community Associations Institute (CAI). As discussed in Respondents' filing with this Court on Dec. 19, 2016, that brief was ghostwritten, filed, served, and likely paid for by the Club. The CAI filing does not represent an independent view; it is instead a supplemental filing by the Club itself under the guise of an outside party.

association (unlike the Club, where members have an equity contribution that is partially refunded upon their exit).[11] Just as important, membership in a POA is clear and understood: the covenants require membership in the association, which is tied to the property, to support the common elements, until the property is sold. In contrast, the Club has several different exit paths—the resale list; termination; expulsion—that have no relation to the sale of property on Callawassie. *See* App. at 318 ("Dear Mr. Dennis, The Callawassie Island Members Club (CIMC) is aware that your membership is not related to ownership of any real estate on Callawassie Island."). The Court should disregard the Club's attempts to be construed as a POA and under POA cases and other law.[12]

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[11] Other areas of South Carolina law have specifications for an organization to qualify as a homeowners' associations, which the Club does not meet. *See, e.g.*, S.C. Code § 12-43-230(d): "For purposes of this article, 'homeowners' association property' means real and personal property owned by a homeowners' association if: (1) property owned by the homeowners' association is held for the use, benefit, and enjoyment of members of the homeowners' association; (2) each member of the homeowners' association has an irrevocable right to use and enjoy on an equal basis, property owned by the homeowners' association, subject to any restrictions imposed by the instruments conveying the right or the rules, regulations, or bylaws of the homeowners' association; and (3) each irrevocable right to use and enjoy property owned by the homeowners' association is appurtenant to taxable real property owned by a member of the homeowners' association." *See also In Re: Application of Woodlake Shores Subdivision for Approval of Homeowners Status for Woodlake Shores Subdivision, Chapin, South Carolina*, 2000 WL 36279699 (S.C.P.S.C., Oct. 11, 2000) (articulating five factors required to be considered a homeowners' association).

[12] A recent opinion of the South Carolina Attorney General has referred to the distinction between POAs and social clubs:

> **Membership in the association often is mandatory for members of a community**, and the actions of the association directly impact the daily lives of the members and one of their greatest investments: their homes. **While a person might leave a voluntary club** or choose not to donate to a charity which that person believes is acting contrary to their covenants and bylaws,

6. **The Court should decline the Club's invitation to nullify the statutory provision.**

Rather than conform its membership policy to the law, the Club demands that this Court conform the law to the Club's membership policy. Entertaining the Club's arguments would mean, for all practical purposes, nullifying § 33-31-620(a). If the Club's policies force a member to stay in its social club for years beyond the member's resignation, the statutory provision has no meaning or purpose. So too with allowing a member to "resign" but charging them dues and fees for years going forward—the statutory provision would mean nothing. And it would be a dangerous precedent to allow a non-profit corporation, as is the case here, to enact its own cryptic and contradictory internal governing principles that inoculate that organization from the requirements of the Nonprofit Corporation Act.

7. **Public policy supports following the Legislature's clear words.**

Resorting to a *parade of horribles* rhetorical device, the Club (p. 8) states that the Court of Appeals' decision "will ultimately threaten the very existence of community associations and amenity clubs, as well as many other non-profit associations." It speaks volumes that this social club frets over its "very existence" and "financial ruin" because it may need to keep members based on its merits, rather than by legal threat. The Club's Brief also repeatedly argues that the Club's "unfairness" or "unreasonableness" toward

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> a homeowner has a strong vested interest in monitoring the actions of their association closely, and to actively push back against any improper action.

2017 WL 569543, at *5 (A.G. Opin., Jan. 3, 2017) (emphasis added).

the Dennises, and Mr. Dennis' "ultimate physical or financial health," should be ignored by this Court.[13] If so, then the Club's hypothetical financial health should be disregarded as well.

In any event, the Club's claim is overdramatic and untrue. As an initial matter, the Club's self-created situation is so extreme, and so confined to these particular facts, that it is doubtful it would be analogous to many other situations. Other situations will be considered on a case-by-case basis. More importantly, there is no evidence in the record supporting the Club's claims that it, or any other organization, will fail if the courts follow the Nonprofit Corporation Act. It is telling that the long passages in the Brief portending the end of the Club and the nonprofit corporation world (*see, e.g.*, pp. 8, 13–14) do not contain a single factual citation supporting either of those claims. Given that this case has been pending for years, one would expect the Club to have made a record in the trial court to support its claim of "financial ruin" to itself and others. But there is nothing.

For each Club "public policy" hypothetical, Respondents can produce a counter. A social club that can bill resigned members at will can (and here does) keep them indentured for years after they wish to quit. Elderly and sick members, who can no

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13 Quoth the Club:

- "Moreover, the Dennises' ultimate physical or financial health or the convenience or inconvenience of their contractual undertakings is not at issue in this case." (Br. at p. 15)
- "It is quite simply not a court's duty or function to relieve a party from contractual obligations to which they agreed even if years later those obligations may seem onerous or unfair." (Br. at p. 18)
- "Likewise, it was error for the Court of Appeals to even consider, let alone be persuaded by, what it perceived as the unreasonableness or unfairness of the contractual obligations that CIMC is seeking to enforce." (Br. at p. 19)

longer participate or afford to pay, and heirs who may choose not to join, are billed for dues to support the active members' tastes and preferences. Those active members (and their board of directors) have no incentive to run the non-profit corporation in an efficient and fair manner, because they have a group of absent, indentured "members" to subsidize their recreational pursuits. The elderly and sick members must try to sell their property at fire-sale prices and move away (if they can), to escape the servitude of supporting the social club. This unfair and unlawful practice is directly contrary to the Legislature's directive that "[a] member may resign at any time."

Another point missing from the Club's doomsday predictions is the obvious: rather than relying on indentured members for its "survival," the Club could reduce its expenses. Or it could raise the dues of those who *do* want to be members. Or it could generate revenue from other sources (weddings, receptions, allow non-peak play for non-residents, etc.). Or it could do the many other things that organizations do to balance their budgets. But the answer is not to twist the law to prop up a social club that perceives itself as too big to fail.

B. The Court of Appeals correctly ruled that the Club documents are ambiguous.

1. The documents are ambiguous, and must be construed against the Club.

The Club documents contain at least three different methods of exiting the Club, each of which has different procedures and different consequences. As discussed on pages 9-10, above, "resignation" allows a member to continue to use the Club so long as they continue to pay charges, and the person is refunded a portion of their equity membership when (if) the membership sells. "Termination" ends the membership, the

person loses their equity contribution, but the person may later re-apply for membership. "Expulsion" ends the membership, the person loses their equity contribution, and the person may never again be admitted to Club facilities "under any circumstances." That is how the governing documents were set up, apparently in an effort to comply with South Carolina law that members of a non-profit corporation "can quit at any time."

The Club board's current interpretation of those documents is simply not credible: that the three types of exit paths, set forth in different provisions, with different procedures and consequences, really all mean the same thing (that a person cannot quit until they (1) sell their property, (2) sell their membership to a person of the Club's choosing, (3) at a price set by the Club). Obviously, different words mean different things. If the drafters of the Club documents intended that all three exit paths really just mean "resignation," they would not have used "termination" and "expulsion" elsewhere in the documents, with different procedures and consequences for each.

In any event, for purposes of the Club's motion for summary judgment, the presumption is against the drafter and the movant, the Club. "A contract is ambiguous when its terms are reasonably susceptible of more than one interpretation." *S. A. Fin. Services, Inc. v. Middleton*, 562 S.E.2d 482, 484 (S.C. App. 2002), *aff'd as modified*, 590 S.E.2d 27 (S.C. 2003); *see also Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 155–56, 161 S.E.2d 179, 181 (1968) ("[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.") "It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular

force in cases involving a contract of adhesion." *S. A. Fin. Services, Inc.*, 562 S.E.2d at 486 (S.C. App. 2002). The Court of Appeals was correct to construe these contracts of adhesion against the Club.

So too with the term "unpaid," which is not defined in the Club documents but typically means "not paid," "not receiving money for work that is done" "overdue" and "in arrears."[14] The Court of Appeals reasonably construed this ambiguous term against the drafter, the Club. This is particularly true given that, in other parts of the documents, the drafters specified that dues would continue to accrue only for the "resignation" exit path: "An equity member who has *resigned* from the Club *will be obligated to continue to pay dues and food and beverage minimums* to the Club until his or her equity membership is reissued by the Club." (App. at p. 591 (emphasis added).) In other words, the drafters knew how to specify when future payments would continue to accrue, and deliberately did not do so for "expulsion" or "termination." This too must be construed against the drafter, and the Court of Appeals correctly did so.

2. **The Court of Appeals properly construed the expulsion provision against the Club.**

The Club's Brief argues that the Court of Appeals improperly construed the "expulsion" provision as ambiguous. As an initial matter, the Brief ignores the "termination" exit path, which also is quoted and discussed in the Court of Appeals' decision.[15] (App. at p. 5: "Any *member* may terminate membership in the Club . . . ."

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[14] www.merriam-webster.com/dictionary/unpaid

[15] The definition of "terminate" is "to bring to an end or halt; to come to an end." *American Heritage College Dictionary* 1399 (3rd ed. 1997).

(emphasis added)) The termination exit path alone is sufficient to sustain the Court of Appeals' ruling.

The Club argues that suspension after non-payment was optional, not mandatory. That argument is based entirely on the word "may" in the first sentence of the expulsion provision, relating to suspension. (App. at 6.) It is well-established that "use of the word 'may' in a statute can be interpreted to mean 'shall'," depending on the context. *T.W. Morton Builders, Inc. v. von Buedingen*, 450 S.E.2d 87, 95 (S.C. App. 1994). Here, there was ample evidence in the record that suspension and expulsion both were mandatory after four months' delinquency, especially given the contract terms represented to the Dennises and others were that they *shall* be expelled. Philip Killian (Club board member, secretary, executive committee member, and chair of the legal committee) testified that suspension and expulsion were "automatic" and "the policy" of the Club. (App. at 360–361.) Karen Norwood (former marketing committee chairman and Club president) testified that it was the Club's "policy" to suspend members after 90-days' nonpayment. (App. at 329–330.) Ellen Padgett (Club membership director) testified that members would be expelled after four months' nonpayment. (App. at p. 257.) This is supported by the representations made to the Dennises when Mr. Dennis joined the Club:

> Q. And what specifically did she [membership director Ellen Padgett] tell you?
>
> A. If we ever wanted out, then we had the four months. That was the most that we would be responsible for.

App. at 154. This also is consistent with the written policy of the Club sent to members:

> Please refer to Paragraph 13.3.1 of the Club Rules that states "any member whose account is not settled within the four (4) months period following

> suspension shall be expelled from the club." Paragraph 14.1.5 states that "Any Member of the Club who has been expelled shall not again be eligible for membership nor admitted to Club Facilities under any circumstances. . . .

App. at 237. The Club's argument that "suspension is discretionary" (p. 24) is simply incorrect—to the contrary, there is no evidence in the record that suspension was anything other than mandatory after non-payment.

There also is ample evidence that expulsion ended a person's membership. Ellen Padgett testified that "The way I understand this is that if they don't settle their accounts in four months, they're going to lose their membership." (App. at 257) Examples of expulsion letters in the record show that people who did not pay their dues were expelled and were no longer members. (App. at 235-236) Harman Switzer (former board member, treasurer, and Club president) testified that his understanding was that expelled members were no longer obligated for dues, fees, and assessments. (App. at 575) The bylaws stated that expelled members no longer are members (App. at 615, ¶ 8.b: "Whenever any person shall cease to be an equity member, whether by death, resignation, recall, expulsion, or other provisions of these By-laws . . ."). The evidence shows that the Club regularly expelled members. *See* App. at 238 ("[A]ccording to the Club Rules, you are hereby expelled from membership in the Callawassie Island Members Club, Inc. Please surrender your membership certificate to the club to the attention of the Membership Director, Ellen Padgett . . . ."); App. at 235 ("[A]ccording to the Club Rules, you are hereby expelled . . . .").

This makes sense. A person who stops paying dues predictably will no longer be able to use Club facilities (because they automatically are suspended), and must (or in

the Club's words "shall") expect to be expelled (definition: to force or drive out; deprive of membership; eject)[16]. The more absurd scenario is implied in the Club's Brief: that today, many years after they stopped paying dues, the Dennises could walk into the Club and expect to be admitted and use the facilities, simply because the Club now argues it never formally "suspended" them.

3. The overwhelming evidence shows that Ellen Padgett was an agent of the Club.

The Club's Brief (p. 27) argues that the Court of Appeals erred in citing to statements of Ellen Padgett. It is telling that the Club so strongly objects to the testimony of its own membership director, the person who had the most contact with members and prospective members, and "sold" them on the Club. Padgett was clear in her deposition testimony (in 2012, as membership director of the Club) that she understood that (1) members could leave the Club without selling their property, and (2) members would automatically be expelled from the Club after nonpayment of dues. (App. at 257: "The way I understand this is that if they don't settle their accounts in four months, they're going to lose their membership.") That factual testimony shows the Club's understanding of its governing documents, which was directly relevant to the issues before the Court of Appeals. As the Court of Appeals pointed out, Padgett remained on staff with the Club after turnover from the developer, and occupied many positions with the Club, including membership administrator, membership secretary, and membership coordinator. (App. at 6.) For many years, she was *the person* selling the Club, answering questions, and

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16 *American Heritage College Dictionary* 482 (3rd ed. 1997).

running the Club's membership program.

Padgett's testimony shows, among other things, the policy of the Club regarding expulsion of members. It also shows the Club's understanding of its own documents, as recently as 2012. And Padgett's testimony is admissible to determine the meaning of a vague and ambiguous contract: "[W]here a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." *Penton v. J.F. Cleckley & Co.*, 486 S.E.2d 742, 745 (S.C. 1997) ("An ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner."); *see also Carolina Ceramics*, 251 S.C. at 151, 161 S.E.2d at 179 (contract is ambiguous if obscure in meaning or has double meaning); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 364 S.E.2d 202 (Ct. App. 1988) (where contract is silent as to particular matter and because of nature and character of transaction ambiguity arises, parol evidence admissible to supply the language's deficiency and establish true intent and meaning so long as the evidence is not contradictory). The Court of Appeals properly considered the testimony of Padgett.

CONCLUSION

Following Occam's razor, the simpler explanation usually is the right explanation. Here, the Club's documents appear to have been written in an attempt to follow the Nonprofit Corporation Statute's requirement that "[a] member may resign at any time." As written, these documents allow members to exit by several different paths: termination, resignation, expulsion.

The Club's membership policy later improperly deviated from the law. Rather than follow the law, the Club now demands that this Court declare a clear statute ambiguous, and an ambiguous contract clear. The Court should decline that invitation, should follow the Legislature's clear language, and should affirm the ruling of the Court of Appeals.

Respectfully submitted,

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December 14, 2016
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2016-002187
Lower Court Case No. 2011-CP-07-3322

The Callawassie Island Members Club, Inc. ....Petitioner,

v.

Ronnie D. Dennis and Jeanette Dennis..Respondents.

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I certify that I have served the Brief of Respondents on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on December 13, 2017, addressed to their attorneys of record:

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