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Reeling in the Supreme Court of North Carolina: Judicial Intervention in the Internal Dispute Resolution of Voluntary Associations under Topp v. Big Rock Foundation, Inc.

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Reeling in the Supreme Court of North Carolina: Judicial Intervention in the Internal Dispute Resolution of Voluntary Associations under *Topp v. Big Rock Foundation, Inc.*

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INTRODUCTION

Voluntary associations play an integral role in the United States and North Carolina. In their various forms, they leverage social capital,1 build the foundation of democracy,2 and even mobilize the public for political action.3 They are an important part of the way individuals interact with society,4 and they also contribute significantly to the economy.5 The definition is broad and includes any “gathering of people for a common purpose; the persons so joined.”6 The concept of a voluntary association stems from the

1. See generally ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 214 (Sanford Kessler ed., Stephen D. Grant trans., Hackett Publishing 2000) (“Nothing... merits our attention more than the intellectual and moral associations of America... In order that men remain or become civilized, it is necessary that the art of forming associations grow and be improved among them in proportion as the equality of conditions increases.”); BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE 1 (Bob Edwards et al. eds., 2001) (“[T]he debate... attaches tremendous significance to the role of voluntary associations in society. Participation in such groups is said to produce social capital, sometimes linked to high levels of social trust. Social capital in turn is conceived as a crucial national resource for promoting collective action for the common good.”); Kenneth Newton, Social Capital and Democracy, 40 AM. BEHAV. SCIENTIST 575 (1997) (exploring different forms of social capital and refining the theoretical question of leverage based on these distinctions).

2. See, e.g., John C. Scott, Jr., Membership and Participation in Voluntary Associations, 22 AM. SOC. REV. 315, 315 (1957) (“The fact that pioneers through the agency of voluntary associations founded, settled and developed areas of the continent is, indeed, evidence of the early influence of this institution upon American life.”).

3. See, e.g., Frank R. Baumgartner & Jack L. Walker, Survey Research and Membership in Voluntary Associations, 32 AM. J. FOR POL. SCI. 908, 926 (1988) (“[G]roup involvement has a strong impact on [members’] likelihood to vote and to engage in other forms of conventional political action. The group system is a vast training ground for political activity and an important pathway through which citizens are linked with the political parties and the formal institutions of government.”).

4. See NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 4 (1998) (“Membership in voluntary associations is formative, sometimes powerfully so, and the currents of associational rise and decline have added drama if the moral tides of American liberal democracy can be said to shift with them.”).

5. See, e.g., Leon N. Lindberg, John L. Campbell & J. Rogers Hollingsworth, Economic Governance and the Analysis of Structural Change in the American Economy, in GOVERNANCE OF THE AMERICAN ECONOMY 3, 15 (John L. Campbell et al. eds., 1991) (“[P]olitical scientists and sociologists have shown that collective action, in the form of voting, social movements, and voluntary associations... are an important part of economic and political life, and that these phenomena play an important role in obtaining stability and social control.”).

6. BLACK'S LAW DICTIONARY 141 (9th ed. 2009). Black’s redirects “voluntary associations” to “associations,” and also notes different forms of associations, including homeowner, nonprofit, and professional associations. Id.
fundamental "right to associate," which is protected by the First and Fourteenth Amendments. Voluntary associations come in many shapes and sizes, encompassing national and local sports leagues, professional groups and societies, trade unions, political parties, and associations set up for competition among its members.

Laws governing voluntary associations function at the state level, with some state legislatures choosing to codify precedent through statutes and others allowing case law to stand on its own. In light of the critical significance of voluntary associations to individuals and society as a whole, clear laws that foster stability and predictability are crucial. Unfortunately, many jurisdictions, including North Carolina, have indefinite common law standards allowing judicial second-guessing of voluntary associations; as a result, judicial intervention in the internal decisions of voluntary associations is all too common. Without solid guidelines and instructions, lower courts will continue to interfere with the decisions of internal dispute resolution systems, and the resulting litigation costs will drain capital from voluntary associations.

Crystal Coast Tournament ("Tournament") is one such example of a large, influential voluntary association in North Carolina. The Tournament, a charitable association, takes place once a year in Morehead City, and attracts fishing crews from across the country. The Crystal Coast Tournament functions through rules that govern the relationship between members and the association—in this case,

7. See U.S. Const. amends. I, XIV. Freedom of association does not receive direct textual support in the amendments, but the Supreme Court of the United States has consistently given the right substantial constitutional protection. See generally NAACP v. Alabama, 357 U.S. 449, 449–50 (1958) (holding a right to associate is private and free from state scrutiny of membership lists); Thomas I. Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1, 5 (1964) ("Associational rights ... are not derived solely from the first amendment. Rather they are implied in the whole constitutional framework for the protection of individual liberty in a democratic society."); Jason Mazzone, Freedom's Association, 77 Wash. L. Rev. 639 (2002) (discussing the development of freedom of association and proposing a new approach to constitutional protection of associations).


9. See Big Rock Blue Marlin Tournament, http://www.thebigrock.com/ (last visited Sept. 5, 2014) (providing information on the Tournament generally, including rules, dates, a list of participants from a variety of states, entry fees, and location).
the fishermen and the Tournament Rules Committee and Board of Directors. Any individual wishing to participate in the Tournament is required to pay a substantial fee and must agree to abide by the Tournament rules.

The Tournament gave rise to significant controversy in 2010 when the crew that caught the largest blue marlin in Tournament history was disqualified, stripping the crewmembers of their record-breaking title and almost one million dollar reward. Instead of pointing to an unfair competitive advantage, or any showing of deceit or bad faith on the part of the crew, the Tournament Rules Committee based its disqualification decision solely on the failure of one member—in charge of thawing and rigging the bait—to hold an active recreational fishing license at the time of the catch. This took North Carolina media by storm, and much of the commentary sympathized with the members of the disqualified crew. Angry at

10. See Topp v. Big Rock Found., Inc., __ N.C. App. __, 726 S.E.2d 884, 886 (2012), rev'd and remanded per curiam, __ N.C.__, 736 S.E.2d 173, 173-74 (2013) (holding that there was a material question of fact regarding whether the disqualification was arbitrary).


12. See Topp, __ N.C. App. at __, 726 S.E.2d at 886-87; see also Anne Blythe, Big Rock Fishermen Still Trying to Reel in the Prize That Got Away, NEWS & OBSERVER, Jan. 7, 2013, http://www.newsobserver.com/2013/01/07/2589771/big-rock-fishermen-still-trying.html ("A fishing crew from 2010’s Big Rock Blue Marlin Tournament is still trying to reel in the one that got away—not the 883-pound marlin they hooked, but the $910,000 prize for the biggest catch.").

13. Wann, the member who did not have a recreational fishing license, was specifically in charge of thawing the frozen fish used as bait and then attaching the fish to the rig, or hook, that is used for catching marlin. Topp, __ N.C. App. at __, 726 S.E.2d at 886.

14. Topp, __ N.C. App. at __, 726 S.E.2d at 887. Wann, a twenty-two-year-old college student, claimed that he was unaware that he needed an individual fishing license and instead assumed that the boat contained a blanket fishing license that covered him. See Catherine Kozak, Citation Mate Has Charges Dismissed in Big Rock Tournament Controversy, ISLAND FREE PRESS (Aug. 2, 2013), http://islandfreepress.org/2013Archives/08.02.2013-CitationMateHasChargesDismissedInBigRockTournamentControversy.html ("In interviews with several news outlets, Wann said that he has assumed that the Citation possessed a blanket fishing license, and that no one on the boat told him that he was required to have his own fishing license.").

15. See, e.g., Fishing Competition Lands in North Carolina’s High Court, $1M On Line, FOXNEWS.COM (Jan. 8, 2013), http://www.foxnews.com/us/2013/01/08/fishing-competition-lands-in-north-carolina-high-court-1m-on-line/ ("But their luck soured. The boat’s owners landed in a fight for the $910,000 in prize money that continued Tuesday with arguments to North Carolina’s Supreme Court."); Annie Gowen, Fishing License Dispute Costs Virginia Team $1 Million Prize in Outer Banks Big Rock Blue Marlin Contest, WASH. POST. (June 24, 2010), http://www.washingtonpost.com/wp-
the result, the crewmembers filed a claim for breach of contract against the Crystal Coast Tournament.¹⁶

The Tournament Rules Committee's controversial decision presented the Supreme Court of North Carolina with its first opportunity to address the standard for judicial intervention in the decisions of voluntary associations that function primarily to operate tournaments. Unfortunately, instead of creating a predictable and workable standard, the court issued a three-sentence, per curiam decision reversing the court of appeals' decision to grant summary judgment in favor of the Tournament "[for] the reasons stated in the dissenting opinion."¹⁷

This Recent Development argues that the Supreme Court of North Carolina has provided little guidance to lower courts tasked with reviewing the internal rulemaking functions of voluntary associations. Rather than first addressing the threshold question of whether judicial intervention was even appropriate, the court looked directly to common law contract principles and determined that summary judgment was improper.¹⁸ By requiring courts to impose contract principles before analyzing the threshold question of jurisdiction, the court has effectively eliminated all of the benefits of the noninterference standard that it purported to adopt. Furthermore, the court did not clearly define whether this standard presents questions of law or fact. Instead, the court employed a competitive advantage inquiry, which is problematic when applied across the broad context of voluntary associations.¹⁹ Given these flaws in the court's analysis and conclusion, and the consequential rise of

dyn/content/article/2010/06/23/AR2010062305322_2.html (quoting Wann, "I feel bad"); Tim Hall, Big Rock President Says Fishing Without License Is a Substantial Violation, WRALSPORTSFAN.COM (Jun. 23, 2010), http://www.wralsportsfan.com/fishing/story/7836005/ ("Seems like a harsh penalty for a small crime.").

¹⁶. Topp, __ N.C. App. at __, 726 S.E.2d at 887.


¹⁸. See Topp, __ N.C. App. at __, 726 S.E.2d at 893 (Hunter, J., concurring in part and dissenting in part) ("I would also hold that... Plaintiffs raised a genuine issue of material fact as to whether their disqualification from the Big Rock Blue Marlin Tournament was arbitrary and thus a material breach of the parties' contract... ").

¹⁹. See id. at __, 726 S.E.2d at 889 (majority opinion) ("Whether a board's decision is to be disturbed due to arbitrariness, fraud, or collusion is a question of law."). But see Topp, __ N.C. App. at __, 726 S.E.2d at 892 (Hunter, J., concurring in part and dissenting in part) (emphasizing the "genuine issue of material fact" created by a decision's arbitrariness). The Supreme Court of North Carolina explicitly adopted the dissent, which purported to adopt the same standard as the majority. The contrast between the language employed by the majority and dissent regarding questions of law and fact creates substantial ambiguity as to what the real standard actually is. See infra Part III.B (arguing that treating the question of whether a voluntary association's decision is arbitrary as a question of law will promote more stability and predictability in the court system).
litigation costs in the area, this Recent Development encourages clearer guidelines for lower courts. Another alternative is differentiating between types of voluntary associations, which might allow the court to reconcile the heightened judicial intervention in a tournament context with such a deferential standard.

Analysis proceeds in four parts. Part I explores the background law of voluntary associations, the general principle of judicial noninterference, and the limited exceptions to this principle. Part II discusses the North Carolina Court of Appeals' decision *Topp v. Big Rock Foundation, Inc.*,\(^\text{20}\) with particular emphasis on the dissent adopted by the Supreme Court of North Carolina. Part III argues that the court's application of the *Topp* test flows from a muddled conception of voluntary associations, is in complete contrast to the policy reasons underpinning the test, and is rooted in reasoning that cannot be applied across the broad spectrum of voluntary associations. Further, the court's endorsement of the court of appeals' dissent has rendered the law governing judicial intervention in voluntary associations ambiguous and unpredictable. Finally, Part IV offers recommendations for providing clear and workable guidelines for lower courts, which this Recent Development argues are in dire need given the current state of this area of law in North Carolina.

I. Judicial Review of Voluntary Associations

A. Background

Voluntary associations are an integral part of American society, so much so that the Supreme Court of the United States has held that the Constitution protects the private right to associate.\(^\text{21}\) Voluntary associations are broad and diverse, encompassing a variety of unincorporated entities, such as sports leagues like the National Collegiate Athletic Association ("NCAA"),\(^\text{22}\) the National Football League ("NFL"),\(^\text{23}\) local bowling leagues,\(^\text{24}\) homeowners


\(^{21}\) See *supra* note 7 and accompanying text.

\(^{22}\) See, e.g., McAdoo v. Univ. of N.C. at Chapel Hill, _ _ N.C. App. _, 736 S.E.2d 811 (2013) (treating the NCAA as a voluntary association).


associations,\textsuperscript{25} and charitable organizations.\textsuperscript{26} Associations can be both for profit and not for profit.\textsuperscript{27}

Over time, voluntary associations have evolved and assumed elements commonly found in corporations. Corporate elements including bylaws, regulations, and constitutions often define and tailor the association's overarching purpose.\textsuperscript{28} In general, these reciprocal restraints function as contracts between the individual members and the associations to which they belong.\textsuperscript{29} An association's bylaws will often include at least a reference to any rules that govern the members, including any agreement to submit to an internal dispute resolution body.\textsuperscript{30} The bylaws of larger voluntary associations also often describe conduct standards for its members and lay out the consequences for violating these standards.\textsuperscript{31}

Voluntary associations can function solely to operate tournaments, like the Big Rock Blue Marlin Tournament. It is important to distinguish these voluntary associations from tournaments that purely function as contracts. For example, in \textit{Jones v. Capitol Broadcasting Co.},\textsuperscript{32} a voluntary association did not control the tournament that the Plaintiffs entered into, and thus the Supreme Court of North Carolina correctly held that the Plaintiffs stated a claim for breach of contract.\textsuperscript{33} The key difference between the two models is often the presence of an internal dispute resolution body. Whereas the tournament in \textit{Jones v. Capitol Broadcasting Co.} did not require competitors to agree to any kind of dispute resolution, voluntary associations often do.\textsuperscript{34}

\textsuperscript{25} See generally, Pine Knoll Ass'n, Inc. v. Cardon, 126 N.C. App. 155, 484 S.E.2d 446 (1997) (treating a property owners association as a voluntary association and applying applicable precedents).

\textsuperscript{26} See N.C. GEN. STAT. § 59B (2013) (regulating nonprofit associations).

\textsuperscript{27} 7 C.J.S. \textit{Associations} § 3 (2014).

\textsuperscript{28} 7 C.J.S. \textit{Associations} § 14 (2014).

\textsuperscript{29} \textit{Id}.

\textsuperscript{30} See 6 AM. JUR. 2D \textit{Associations and Clubs} § 7 (2014); 7 C.J.S. \textit{Associations} § 16 (2014); see also NCAA, DIVISION I MANUAL, Art. 6 (Aug. 1, 2013) [hereinafter MANUAL], http://www.ncaapublications.com/DownloadPublication.aspx?download=D114.pdf (devoting an entire article to discussing “institutional control” in its bylaws).

\textsuperscript{31} \textit{See, e.g., MANUAL, supra} note 30, at Art. 10 (“Ethical Conduct”) and Art. 10.4 (“Disciplinary Action”).

\textsuperscript{32} 128 N.C. App. 271, 495 S.E.2d 172 (1998).

\textsuperscript{33} \textit{Id} at 273, 495 S.E.2d at 174–75.

\textsuperscript{34} \textit{Id}.
B. When Can Courts Intervene?

There is a strong tendency amongst higher courts in all jurisdictions to adopt standards that defer to the decisions of voluntary associations and to refrain from interfering with these internal rules.\(^{35}\) Strong policy reasons support this deferential trend, including respecting the autonomy and expertise of the voluntary association,\(^{36}\) avoiding a heavy burden on the court through excessive litigation, and promoting predictability and stability.\(^{37}\) This tendency results in a legal doctrine that treats deference to voluntary associations as the default rule, and intervention is only limited to a few, specifically announced exceptions.\(^{38}\) These exceptions are worded slightly differently depending on the jurisdiction, but courts generally focus on (a) the lack of due process afforded by the voluntary associations to their members, or (b) a showing of some kind of fraud, collusion, bad faith, or arbitrariness.\(^{39}\) Most jurisdictions also require the plaintiff to show that the voluntary

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\(^{35}\) See 7 C.J.S. Associations § 82 (2014), ("Courts must guard against unduly interfering with an organization's autonomy by substituting judicial judgment for that of the organization in an area where the competence of the court does not equal that of the organization.").

\(^{36}\) As the California Court of Appeals described in a case dealing with the NFL's duties to its members, "given the unique and specialized nature of this association's business—the operation of a professional football league—there is significant danger that judicial intervention in such disputes will have the undesired and unintended effect of interfering with the League's autonomy in matters where the NFL and its commissioner have much greater competence and understanding than the courts.


\(^{37}\) See id. at 283 (["A court's"] determination not to intervene [in the internal rulemaking functions of an association] reflects [its] judgment that the resulting burdens on the judiciary outweigh the interests of the parties at stake. One concern in such cases is that judicial attempts to construe ritual or obscure rules and laws of private organizations may lead the courts into . . . the dismal swamp." (internal quotation marks omitted)).

\(^{38}\) In California this default rule is referred to as the "abstention doctrine." See id. at 266. The doctrine mandates that courts defer to a voluntary association unless a "particular instance in which judicial intervention would be appropriate" applies. Id. at 283.

\(^{39}\) Different jurisdictions word these different exceptions differently. The North Carolina Court of Appeals has articulated the due process exception for voluntary associations as more limited than violations by the state and only requires that the association "(1) follow [its] own internal rules and procedures, and (2) adhere to principles of 'fundamental fairness' by providing notice and opportunity to be heard." McAdoo v. Univ. of N.C. at Chapel Hill, ___ N.C. App. ___, 736 S.E.2d 811, 813 (2013). But see infra Part III.A, which highlights the Topp decision's lack of clarity in regard to the arbitrariness exception.
association's decision somehow implicated his property rights, which may include the right to continued membership.\textsuperscript{40}

North Carolina has also formally adopted this principle of judicial noninterference in the internal dispute resolution of voluntary associations. Even before the Supreme Court of North Carolina was presented with the Crystal Coast Tournament issue, the court of appeals expressed that "[i]t is well established that courts will not interfere with the internal affairs of voluntary associations"\textsuperscript{41} and that North Carolina follows this "well-established rule."\textsuperscript{42}

Although the supreme court eventually confirmed a "deferential" standard for review of decisions made by tournament-oriented voluntary associations, its application of this standard was far from accommodating. The standard adopted by the supreme court, as articulated in the court of appeals' dissent,\textsuperscript{43} on its face appears to extend this rationale and deferential trend.\textsuperscript{44} The dissent articulated that where a voluntary association has provided for dispute resolution among members, the courts should not review a final and conclusive action unless the decision was (a) inconsistent with due process; (b) arbitrary; (c) fraudulent; or (d) arrived at through collusion.\textsuperscript{45} Under this standard, these are the only exceptions to the general rule of deference.\textsuperscript{46} That is, the language of this standard seeks to emphasize that judicial intervention in the internal decisions of voluntary associations should not be the norm and instead should only occur when absolutely necessary to prevent a previously recognized evil. However, as this Recent Development will argue, the application of this standard by the court of appeals' dissent is not faithful to a trend of deference to an association's internal rulemaking function, and therefore resembles something very different from the deferential majority rule that North Carolina sought to replicate.\textsuperscript{47}

\textsuperscript{40} See 7 C.J.S. Associations § 82 (2014) ("Generally, courts will not interfere with the internal affairs of an unincorporated association... so long as... no property or civil rights are invaded.").


\textsuperscript{43} Hereafter referred to as the "Topp test."

\textsuperscript{44} See Topp v. Big Rock Found., Inc., __ N.C. App. __, __, 726 S.E.2d 884, 889 (2012).

\textsuperscript{45} Id.

\textsuperscript{46} Id.

\textsuperscript{47} See infra Part III.A, notes 91–101 and accompanying text.
II. TOPP V. BIG ROCK FOUNDATION, INC.

A. Factual and Procedural Background

Every summer the Crystal Coast Tournament, a voluntary nonprofit association, holds one of the oldest and largest fishing tournaments in the country in Morehead City, North Carolina: the Big Rock Blue Marlin Tournament. The roots of the Tournament date back to 1957, when the first informal competition was held. Boat crews wishing to participate in the Tournament pay a hefty entry fee and agree to the Tournament rules. The rules require each member of the crew to hold a highly migratory species fishing permit ("HMS permit") and emphasize the state requirement for a North Carolina Coastal Recreational Fishing License ("CFRL") for every crewmember. Additionally, the rules empower the Tournament Rules Committee to disqualify "[a]ny boat breaching any of the above Tournament Rules" and state that "[d]ecisions of the Rules Committee and Board of Directors are final." The Topp Plaintiffs were members of a fishing crew that competed in the 2010 Tournament and caught an 883-pound blue marlin, dwarfing the next biggest catch by over 300 pounds. After catching the marlin, the crew discovered that Wann, the member responsible for thawing and rigging bait, did not hold a valid CFRL. The Tournament Rules Committee learned of this and subjected the crewmembers to a polygraph test. During the test, Wann eventually admitted to not holding an active CRFL at the time the marlin was

48. See generally BIG ROCK BLUE MARLIN TOURNAMENT, supra note 9 (providing general information about the Tournament, including past winners, entry fees, and Tournament Rules).


50. See Topp, __ N.C. App. at __, 726 S.E.2d at 892 (Hunter, J. concurring in part and dissenting in part) (stating that Plaintiffs paid an entry fee of $18,025); Registration, BIG ROCK BLUE MARLIN TOURNAMENT, http://www.thebigrock.com/registration (last visited Sept. 5, 2014) (noting seven levels, ranging from $500 to $5,000 per level).


52. Topp, __ N.C. App. at __, 726 S.E.2d at 889 (quoting the 2013 Tournament Rules).

53. See id. at __, 726 S.E.2d at 886.

54. Id. at __, 726 S.E.2d at 886.

55. Id. at __, 726 S.E.2d at 887.
caught. Based on this information, the North Carolina Marine Fisheries Commission ("MFC") issued Wann a citation. Under the authority of Rule 20, the Tournament Rules Committee and Board of Directors found that Wann's failure to possess a valid CFRL at the time of the catch was a breach of the Tournament Rules and subsequently disqualified him, and the rest of the crew, from the Tournament. Consequently, the crew lost the nearly one million dollar prize reserved for the biggest catch.

In response to the decision, Plaintiffs brought suit against the Tournament for breach of contract on June 25, 2010, and the prize money was enjoined from being paid to the second-place and third-place crews. On January 18, 2011, Defendants moved for summary judgment, and on March 3, 2011, the superior court granted the motion and ordered Crystal Coast Tournament to pay the prize money to the runners-up. Plaintiffs submitted a timely appeal.

B. The North Carolina Court of Appeals Decision and the Supreme Court of North Carolina's Subsequent Reversal

On appeal, the North Carolina Court of Appeals reviewed the question de novo, stating that the reviewability of a decision made by a tournament rules committee is a case of first impression in North Carolina. The Defendants put forth supporting authority from other jurisdictions, most notably Ohio's articulation in Lough v. Varsity Bowl, Inc. This case, from which the court of appeals modeled its standard, involved a dispute between the American Bowling Congress, a voluntary nonprofit membership association, and some of its members over whether the association's decision to disqualify the members from a tournament was in error. The Lough court categorized the issue as a "jurisdictional requirement," and held that there were no grounds for judicial review where there was no showing of a violation of due process, "arbitrariness, fraud, or collusion."

56. Id. at __, 726 S.E.2d at 887.
57. Id. at __, 726 S.E.2d at 887.
58. Id. at __, 726 S.E.2d at 887.
59. Id. at __, 726 S.E.2d at 887.
60. Id. at __, 726 S.E.2d at 887.
61. Id. at __, 726 S.E.2d at 887.
62. Id. at __, 726 S.E.2d at 888-89.
63. 243 N.E.2d 61 (Ohio 1968).
64. Topp, ___ N.C. App. at __, 726 S.E.2d at 889 (quoting Lough, 243 N.E.2d at 63).
65. See Lough, 243 N.E.2d at 62.
66. Id.
67. Id. at 63.
Persuaded by the Defendants' supporting authority from other jurisdictions, the Topp majority held that:

[W]here the duly adopted laws of a voluntary association provide for the final settlement of disputes among its members, by a procedure not shown to be inconsistent with due process, its action thereunder is final and conclusive and will not be reviewed by the courts in the absence of arbitrariness, fraud, or collusion.68

The North Carolina Court of Appeals defined abuse of discretion as requiring the decision of the voluntary association to be “manifestly unreasonable” and “so arbitrary that it could not have been the result of a reasoned decision.”69 The due process exception found in Lough was also included in the majority's articulation of the standard; the court required the voluntary association to provide its members with notice and opportunity consistent with due process of law.70

In applying this newly adopted standard and asking whether summary judgment was properly granted, the majority emphasized the existence and clarity of Tournament Rules 9 and 20, which explicitly required the permits and authorized the Tournament Rules Committee to disqualify participants for any violation of the rules at its discretion.71 Based on this reasoning, the majority concluded that the Plaintiffs did not present evidence that forecasted a genuine issue

68. Topp, __ N.C. App. at __, 726 S.E.2d at 889 (quoting Lough, 243 N.E.2d at 63). The standard was adopted word for word from Lough.
69. Id. at __, 726 S.E.2d at 889 (citation omitted). The abuse of discretion standard, at least as articulated in the majority of jurisdictions, has striking similarities to judicial review of arbitrary and capricious agency decisions. The Supreme Court of North Carolina stated that when applying the arbitrary and capricious test to agency decisions, “[t]he court] may not replace the agency's judgment as between two reasonably conflicting views of the evidence.” White v. N.C. Dept. of Env't., Health, and Natural Res., 117 N.C. App. 545, 547, 451 S.E.2d 376, 378 (1995). Just as the North Carolina Court of Appeals majority equated the arbitrariness standard for voluntary associations to “an abuse of discretion,” Topp, __ N.C. App. at __, 726 S.E.2d at 889, the Supreme Court of North Carolina has held that the arbitrary and capricious standard for agencies is “a difficult one to meet” and “agency decisions may be reversed . . . if they are . . . 'whimsical' [or] 'indicate a lack of fair and careful consideration.'” Lewis v. N.C. Dept. of Human Res., 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (quoting Comm'r of Ins. v. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)). The presence of such a strong analogy is further evidence that the Supreme Court of North Carolina is straying from the fundamental rationale driving judicial review of voluntary associations.
70. Topp, __ N.C. App. at __, 726 S.E.2d at 889. The majority stated, “Plaintiffs also presented no evidence that the board did not afford Plaintiffs procedural due process, and, thus, we hold the trial court did not err in granting summary judgment for Defendants.” Id. at __, 726 S.E.2d at 890.
71. Id. at __, 726 S.E.2d at 889–90.
of material fact and held that there was "no evidence that the board's decision to disqualify... for failure to have a CRFL on board was manifestly unreasonable."\(^{72}\) Consequently, the majority affirmed the trial court's grant of summary judgment for Defendants.\(^{73}\)

Although the dissent adopted the same Lough standard as the majority, its interpretation of the standard varied substantially. Justice Robert C. Hunter, authoring the dissent, concurred with the standard, but he concluded that the grant of summary judgment was in error since there was a genuine issue of material fact as to whether the decision to disqualify the crew was arbitrary, "resulting in a breach of the contract between [the crew] and Crystal Coast Tournament."\(^{74}\) The dissent missed the threshold question of whether judicial intervention was appropriate, or, in other words, whether one of the four limited exceptions applied. Instead, the dissent skipped straight to an application of contract principles, conceptualizing the Plaintiffs as contracting for the prize money and thus being in privity with Crystal Coast Tournament.\(^{75}\) Therefore, in the dissent's view, the Plaintiffs must have materially breached the agreement in order to terminate Crystal Coast Tournament's obligation to perform its end of the bargain.\(^{76}\) In analyzing the materiality of the rules violation, the dissent applied state contract law, asking whether the breach went to the "very heart of the agreement"\(^{77}\) and whether it was "vital to [the contract's] existence."\(^{78}\) According to the dissent, if the breach was not material, the next question presented to the court would be whether the breach could be compensated in damages.\(^{79}\) If so, then the other party must perform.\(^{80}\) The dissent emphasized the word "may" in Rule 20 and imposed a burden on the voluntary association to consider whether or not the violations were material.\(^{81}\) Under North Carolina contract principles, the dissent reasoned that the

\(^{72}\) Id. at __, 726 S.E.2d at 890.

\(^{73}\) Id.

\(^{74}\) Id. at __, 726 S.E.2d at 892 (Hunter, J., concurring in part and dissenting in part).

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Id. (quoting Long v. Long, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003)).

\(^{78}\) Id. (quoting Statesville Flour Mills Co. v. Wayne Distrib. Co., 171 N.C. 708, 711, 88 S.E. 771, 773 (1916)).

\(^{79}\) Id. (citing Statesville Flour Mills Co. v. Wayne Distrib. Co., 171 N.C. 708, 712, 88 S.E. 771, 773 (1916)).

\(^{80}\) Id. ("Here, if Wann's failure to possess a CRFL was not a significant violation of the Tournament Rules, it would not excuse Defendants from their obligations under the contract.").

\(^{81}\) Id. ("Because the Rules Committee and Board of Directors have discretion in reaching their decision, it follows that they must consider whether a violation of the rules is a material violation and what penalty is appropriate.").
crew's violation was insignificant and could have been addressed with an alternative penalty, and therefore the Tournament Rules Committee's disqualification was inappropriate. 82

After articulating this different interpretation of the *Lough* standard, the dissent then applied common law contract principles to the Tournament Rule Committee's decision. 83 The court asked whether the breach of the rules afforded the crew any competitive advantage. 84 According to the dissent, the lack of a competitive advantage afforded by Wann's failure to have an active CFRL created a genuine issue of material fact as to whether the Tournament Rules Committee's decision was arbitrary. 85 The dissent also noted that other prizewinners only held blanket fishing licenses and that the Tournament registration form did not mention CRFLs. 86 For these reasons, the dissent stated that it would reverse the grant of summary judgment for the Defendants and remand the case for further proceedings to apply this new standard. 87 Although the dissent did not employ abuse of discretion language, it made a point to state that it adopted the same standard as the majority. 88

In 2013, the Supreme Court of North Carolina issued a three-sentence, per curiam decision that reversed the decision of the court of appeals "[f]or the reasons stated in the dissenting opinion." 89 After the case was remanded back to the superior court, the parties settled. 90

82. *Id.* at __, 726 S.E.2d at 892–93.
83. *Id.* at __, 726 S.E.2d at 892 (noting that a breach must be material to be actionable).
84. *Id.*
85. *Id.* at __, 726 S.E.2d at 893.
86. *Id.*
87. *Id.*
88. *Id.* at __, 726 S.E.2d at 892.
89. Topp v. Big Rock Found., Inc., __ N.C. __, __, 736 S.E.2d 173, 174 (2013) (per curiam) (“For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.”).
90. See Jannette Pippin, *Nearly $1 Million Marlin Tournament Prize Dispute Settled*, *Star News Online* (May 28, 2013, 8:54 AM), http://www.starnewsonline.com/article/20130528/articles/130529589 (“[The] Tournament President . . . confirmed the settlement as did attorneys representing parties on each side of the case.”). The amount of the settlement was kept confidential.
III. THE NEW Topp TEST PROVIDES LITTLE GUIDANCE FOR WHEN LOWER COURTS CAN POLICE THE INTERNAL RULEMAKING DECISIONS OF VOLUNTARY ASSOCIATIONS

The Supreme Court of North Carolina's three-sentence adoption of the dissent creates a standard that is ambiguous and unworkable for lower courts. Part III.A will address how the court failed to impose the threshold question of justiciability, which should be the first step whenever a court is presented with the internal decisions of a voluntary agency. Next, Part III.B will address the fundamental differences between treating this initial question, including the exception of arbitrariness, as a question of law or fact, and calls for the court to clarify. Part III.C will argue that the "competitive advantage" rationale employed by the dissent will prove unworkable across the contexts of different voluntary associations, especially sports leagues. Finally, the policy implications underlying the Lough standard will be discussed, and this Recent Development will argue that the dissent's application of the standard ameliorates all of the benefits that the standard seeks to impose. Ultimately, regardless of the test the court wants to adopt in this area, it must clarify the standard carefully to provide clear guidelines for lower courts.

A. The Supreme Court of North Carolina Missed the Threshold Question of Justiciability

This subpart breaks down the standard adopted by the Supreme Court of North Carolina for judicial intervention in a voluntary association's internal dispute resolution and then compares this standard to its practical application by the court of appeals' dissent. Ultimately, the difference between the written standard and its application is substantial. By affirming the dissent's reasoning, the Supreme Court of North Carolina has essentially rendered the abuse of discretion standard meaningless. What is left are empty words, and lower courts will be left scrambling to put the pieces back together.

The dissent adopted by the Supreme Court of North Carolina replaced the threshold question of whether courts are permitted to review a claim with an immediate application of state contract law.91 This application by the dissent stands in complete opposition to the majority rule, which explicitly delineates the exceptions to the rule of noninterference: a lack of due process, arbitrariness, fraud, and

91. Topp, __ N.C. App. at __, 726 S.E.2d at 892 (Hunter, J. concurring and dissenting in part).
collusion. Without one of these triggering events, a court has no authority to review an association’s internal decision.

Deconstruction of the newly adopted standard is the first step in its interpretation and application. The standard begins by stating, “[W]here the duly adopted laws of a voluntary association provide for the final settlement of disputes among its members . . . .” The presence of this clause is intuitively intentional, the most plausible explanation being that it contrasts the broader judicial review that courts are allowed to engage in when the bylaws of a voluntary association do not provide for final dispute resolution with the limited exceptions available when the bylaws are unambiguous. When the governing regulations of a voluntary association are clear, the court exercises much more limited judicial review and can only intervene when the voluntary association’s decision is arbitrary, fraudulent, collusive, or not in accordance with due process. It is counterintuitive for the court to allow the term “arbitrary” to function as a window to apply state common law, especially when the majority analogized the exception to an “abuse of discretion” standard.

By skipping this threshold question of whether the voluntary association unambiguously provided for final settlement of disputes, the court of appeals’ dissent essentially allows for any internal dispute decision made by a voluntary agency to raise a genuine issue of material fact and therefore go to a jury. Other jurisdictions have avoided this circular reasoning altogether by emphasizing the threshold question of justiciability and defining the “arbitrary” exception more restrictively to only apply where voluntary

92. See supra notes 65–72 and accompanying text.
93. Topp, N.C. App. at _, 726 S.E.2d at 889 (alteration in original) (quoting Lough v. Varsity Bowl, Inc., 243 N.E.2d 61, 63 (Ohio 1968)).
94. See McAdoo v. Univ. of N.C. at Chapel Hill, N.C. App. at _, 736 S.E.2d 811, 825 (2013) (“Thus, under the Topp test, when a plaintiff challenges a voluntary organization’s decision, the case will be dismissed as nonjusticiable unless the plaintiff alleges facts showing (i) the decision was inconsistent with due process, or (ii) the organization engaged in arbitrariness, fraud, or collusion.” (internal quotation marks omitted)).
95. Topp, N.C. App. at _, 726 S.E.2d at 889 (referring to the Topp test as an “abuse of discretion” standard); McAdoo, N.C. App. at _, 736 S.E.2d at 826 (“Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” (quoting State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (internal quotation marks omitted))).
96. The ease of raising a genuine issue of material fact defeats the entire purpose of the discretionary standard; in these circumstances, judicial intervention is encouraged, not limited.
associations make decisions that conflict with their own bylaws or regulations.\textsuperscript{97}

The result is a standard that is not discretionary at all. Tournament Rule 20 is unambiguous: "Any boat breaching any of the above Tournament Rules may be disqualified. . . . Decisions of the Rules Committee and Board of Directors are final."\textsuperscript{98} There is no ambiguity in this provision that the court needed to reconcile; it simply reserved discretion to the Tournament Rules Committee to disqualify any crew for violation of the agreed upon rules.\textsuperscript{99} There are numerous potential reasons why the Crystal Coast Tournament wanted to adopt a flexible provision, including to prevent unjust decisions and to be able to take into account all the surrounding facts and circumstances.\textsuperscript{100} But the association’s rationale is irrelevant here. Instead, the unambiguous intent of the voluntary association to reserve final disqualification for rule violations should have been a red flag to the courts to exercise limited review and not to apply common law contract principles unless there was a clear showing that at least one of the exceptions applied. By allowing the arbitrariness exception to apply in any instance where the court disagrees with an internal decision of an association, the court completely obliterated this fundamental limitation on judicial review and instead transferred the decision-making powers from associations to triers of fact.

Finally, the dissent’s application of the standard rendered the majority’s analogy to an “abuse of discretion” standard meaningless.\textsuperscript{101} In setting forth the standard, the majority equated this limited form of review with an “abuse of discretion” inquiry, requiring the decision of the voluntary association to be “manifestly

\textsuperscript{97} See, e.g., Cal. Dental Ass’n v. Am. Dental Ass’n, 590 P.2d 401, 403 (Cal. 1979) (defining one limited example of when the court can interfere in the internal rulemakings of voluntary associations as when an association “plainly contravenes the terms of its bylaws”).

\textsuperscript{98} Topp, __ N.C. App. at __, 726 S.E.2d at 889 (quoting Tournament Rule 20).

\textsuperscript{99} Id. at __, 726 S.E.2d at 889 ("Rule 20 stated, ‘Any boat breaching any of the above Tournament Rules may be disqualified, except as previously stated. Decisions of the Rules Committee and Board of Directors are final.’").

\textsuperscript{100} Indeed, in defending its decision to disqualify the Plaintiffs based on Wann’s failure to hold an active recreational fishing license, the Tournament Director asserted, “There will be some lessons learned from this one.” Lee Tolliver, Big Rock Fishing Tourney Decision: Team Citation Disqualified, PILOTONLINE.COM (June 23, 2010), http://hamptonroads.com/2010/06/big-rock-fishing-tourney-decision-team-citation-disqualified.

\textsuperscript{101} Topp, __ N.C. App. at __, 726 S.E.2d at 889.
unreasonable." The dissent also adopted this standard, but did not use "abuse of discretion" language in the opinion. Instead, the dissent held that there was a genuine issue of material fact as to whether the Crystal Coast Tournament's decision was arbitrary and favored remanding the issue back to the lower court. This issue is very nuanced. The dissent was not explicitly substituting its judgment for that of the voluntary association but was instead allowing a jury to substitute its judgment as to whether it thinks that the internal rule maker made the right decision. But just because the court is considering these internal decisions as questions of fact does not make this form of review permissible. Regardless of the characterization of the issue as a question or law or fact, the problem is still the same: the autonomy of the association is diminished. This clearly points to a nondeferential standard, a standard that stands in complete contradiction when applied to the rule allegedly adopted. The Supreme Court of North Carolina needs to speak to exactly what arbitrariness means in the context of voluntary associations, including whether the standard reaches the level of an abuse of discretion, or whether courts—or juries—are able to substitute their own reasoned judgment for that of the voluntary association. Without this guidance, lower courts can intervene freely, and predictability will decline.

B. The Supreme Court of North Carolina Turns a Question of Law into a Question of Fact

In addition to missing the threshold question of justiciability, the Supreme Court of North Carolina also did not confirm whether lower courts should treat arbitrariness of a voluntary association's decision as a question of law or fact. This distinction is critical for promoting certainty of the law and controlling the flow of litigation in lower courts. The majority of the North Carolina Court of Appeals referred to determinations of exceptions as "question[s] of law." This implies that judges can make determinations as to when an internal decision is reviewable, promoting predictability by allowing judges,

102. Id. at __, 726 S.E.2d at 889 (citing White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (defining "manifestly unreasonable" as "so arbitrary that it could not have been the result of a reasoned decision.").

103. See id. at __, 726 S.E.2d at 893 (Hunter, J., concurring in part and dissenting in part) ("I would also hold that... Plaintiffs raised a genuine issue of material fact as to whether their disqualification from the Big Rock Blue Marlin Tournament was arbitrary and thus a material breach of the parties' contract.").

104. Id. at __, 726 S.E.2d at 889 (majority opinion) ("Whether a board's decision is to be disturbed due to arbitrariness, fraud, or collusion is a question of law." (citation omitted)).
rather than juries, to make informed decisions based on solid, deferential guidelines. The dissent purported to adopt the same standard but, in applying the standard, concluded that there was a "genuine issue of material fact" in the materiality of the Plaintiff's violation of the rules.\footnote{105}{Id. at __, 726 S.E.2d at 893 (Hunter, J., concurring in part and dissenting in part).}

The difference between a question of law and fact is critical for predictability. Instead of adopting a deferential standard that allows voluntary associations to function independently from the judicial branch, the Supreme Court of North Carolina brought a new actor into play: the jury. The parties' decision to settle before a jury determined the "genuine issue of material fact"\footnote{106}{Id.} is persuasively generalizable to future parties in similar positions. Given the application of contract principles and the malleable concept of materiality, it is difficult for either party to predict what the ultimate outcome of the dispute will be. Rendering the question of arbitrariness a question of law and articulating the standard for judicial review clearly and concisely would promote a more predictable and stable system.\footnote{107}{See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1182 (1989) ("[W]e should recognize that at the point where an appellate judge says that the remaining issue must be decided [as a question of fact], he begins to resemble a finder of fact more than a determiner of law.... And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired."). Additionally, adopting and clarifying the standard to coincide with the majority of jurisdictions, or, in other words, actually applying the new \textit{Topp} test as an abuse of discretion standard, would bring the test in line with the laws governing judicial intervention into agency decisions and thus create even more coherency in the justiciability of internal decisions of voluntary associations by giving parties another body of case law—case law from other jurisdictions—to supplement the scarce and conflicting precedent. See supra note 62 and accompanying text.}\footnote{108}{\textit{Topp}, __ N.C. App. at __, 726 S.E.2d at 889 (referring to the question of arbitrariness as "a question of law").}
apply the "competitive advantage" rationale across different types of voluntary associations. *McAdoo v. University of North Carolina at Chapel Hill* presents the perfect example of the problem inherent in the application of this reasoning. *McAdoo* is the only North Carolina case to quote the *Topp* test. When the NCAA disqualified McAdoo, a football player at the University of North Carolina, for academic dishonesty, he challenged the decision in court, claiming arbitrariness. Although the North Carolina Court of Appeals did not apply the *Topp* test because it held that McAdoo lacked standing after he signed with the Baltimore Ravens, the court still articulated the standard as an "abuse of discretion" standard, implying that the *Topp* test would have been applied but for McAdoo's lack of injury.

Although the standard was not applied to the NCAA in *McAdoo*, it is clear that such an application would have led to absurd results. First, application of the *Topp* dissent would force every state court to review decisions by associations like the NCAA, which govern competitive events, with an eye towards a "competitive advantage." Permanently excluding a student-athlete member from the association based on noncompetitive reasons, such as academic dishonesty, would suggest a lack of materiality under the *Topp* dissent's analysis. These determinations of nonmateriality would leave voluntary associations with a complete lack of power to enforce these noncompetitive, yet vital aspects of the associations' internal functionings, which cannot possibly be the correct result.

One response to the argument that the competitive advantage rationale is unworkable is that sports leagues like the NCAA might have a broader, deeper, overarching purpose in comparison to a voluntary association that functions primarily to operate a single tournament. Indeed, the NCAA asserts the goals of "advancing academics," "providing opportunities," "developing life skills," and "enhancing communities" as its common goals. However, it is equally as problematic for a court to be responsible for defining the

109. *Id. at ___*, 726 S.E.2d at 892 (Hunter, J., concurring in part and dissenting in part) ("Plaintiffs' violation of the Tournament Rules did not afford the Plaintiffs any competitive advantage.").
111. *Id. at ___*, 736 S.E.2d at 825-26.
112. *Id. at ___*, 736 S.E.2d at 825.
113. *Id. at ___*, 736 S.E.2d at 826.
114. *Topp*, ___ N.C. App. at ___, 726 S.E.2d at 892 (Hunter, J., concurring in part and dissenting in part).
115. See [The Value of College Sports](http://www.ncaa.org/student-athletes/value-college-sports) (last visited Sept. 5, 2014) (describing the various goals of the NCAA and providing information on each).
often ambiguous boundaries of a voluntary association's defined purpose, including deciding if a certain violation is within the stated purpose. The basic policy behind this deferential standard is to let voluntary associations decide how to function independently, without judicial interference. By imposing contract law at the threshold issue of justiciability, the Supreme Court of North Carolina has effectively eliminated every benefit that the noninterference standard is designed to promote.

D. The Dissent's Application of the Standard Stands in Stark Opposition to the Policy Reasons for Adopting the Deferential Standard

Yet another indication that the standard adopted by the Supreme Court of North Carolina differs from the Lough test is that the policy reasons traditionally used to defend the standard are in complete opposition to the application of the Topp test by the dissent. There are a few general policy reasons that are commonly asserted by other jurisdictions to defend deference to the internal decisions of associations. These policy justifications include maintaining an association's autonomy, respecting its expertise, and minimizing the burden of litigation on state courts and the associations. Although jurisdictions use slightly different wording to describe these policies, and some place special interest on certain rationales, there are general themes of judicial competency, freedom of contract, and cost concerns.

The dissent's application of the Lough standard conflicts with these policies in several ways. By allowing arbitrariness to be judged by principles of contract law, the dissent creates a loophole for judicial review. This completely undermines the rationale to minimize judicial costs, since every voluntary association's decision is now reviewable, regardless of whether the provisions are unambiguous. Additionally, by skipping the threshold question of justiciability, an

116. Indeed, this type of judicial second-guessing is exactly what the standard seeks to avoid by giving deference to the entity that is deemed to have the greatest expertise and thus the best knowledge for deciding whether a member has broken the rules. See Oakland Raiders v. Nat'l Football League, 32 Cal. Rptr. 3d 266, 284 (Cal. Ct. App. 2005) ("Given the unique and specialized nature of this association's business—the operation of a professional football league—there is significant danger that judicial intervention in such disputes will have the undesired and unintended effect of interfering with the League's autonomy in matters where the NFL and its commissioner have much greater competence and understanding than the courts." (internal quotation marks omitted)).

117. See id.

118. Id.
association's autonomy is far from respected. To the contrary, the standard as applied by the Supreme Court of North Carolina removes the decision-making power from the association and places it in the hands of the jury. Moreover, the dissent's finding of a genuine issue of material fact also allows the jury to review the internal rulemakings of an association, which even further decreases predictability. This will almost certainly drain voluntary associations, which often operate for charitable purposes, through huge litigation costs and settlements.\textsuperscript{119} The fact that the common policy justifications for the \textit{Lough} standard—the standard adopted by the Supreme Court of North Carolina\textsuperscript{120}—are contradicted by the dissent's application of the standard is yet another reason why clarification is desperately needed. Without more guidance, lower courts will be left to transfer the decision-making abilities to the jury, and will therefore promote the opposite of all of the policy justifications that the standard seeks to protect.

\section*{IV. Recommendations}

The confusing state of the law on voluntary associations strongly calls for clarification, especially since voluntary associations are abundant, and they play a vital role in the economy and promotion of communities.\textsuperscript{121} The voluntary association, its constituent members, and their representing lawyers should be able to predict how and when a court can intervene in the internal decision-making processes of the voluntary association and whether such an intervention will be decided by a judge or a jury. As law currently stands in North Carolina, none of these key players will be able to come close to a reliable prediction. At best, lawyers may hope to raise a genuine issue of material fact that will go to a jury, where the outcome will be systematically difficult to predict. Based on the rationale asserted by the court of appeals' dissent in \textit{Topp}, creating this issue of material fact will not be difficult—even when there is an agreement that specifically governs the issue by giving discretion to the voluntary association. The dissent's decision to impose a materiality standard—a question of fact—further muddles this standard. This uncertainty

\textsuperscript{119} See Scalia, \textit{supra} note 107.

\textsuperscript{120} Topp v. Big Rock Found., Inc., ___ N.C. ___, ___, 736 S.E.2d 173, 174 (2013) (per curiam) ("For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals.").

\textsuperscript{121} For example, the Tournament raises money for a wide variety of charities and has contributed over three million dollars to these charities. See \textit{Charities}, BIG ROCK BLUE MARLIN TOURNAMENT, http://www.thebigrock.com/charities (last visited Sept. 5, 2014) ("The tournament is very proud of its past contributions totaling $3,133,216 after the 2013 tournament.").
will create more litigation than necessary and has the potential to drain many of the nonprofit voluntary associations that add to the rich and charitable culture of North Carolina.

Given the uncertainty resulting from these opinions, this Part provides three recommendations. First, the Supreme Court of North Carolina should provide more guidance to lower courts that are seeking to apply the new Topp test. Second, but not completely distinct, the court should also make sure to answer the question of whether the application of the exceptions is a question of law or fact. Finally, much of the confusion in the application of the Topp test has centered on the type of voluntary association at issue. For this reason, the third subpart will discuss the possible solution of distinguishing between different types of voluntary associations, and creating different applications for each.


The Supreme Court needs to explicitly delineate the step-by-step application of the Topp test. The majority of jurisdictions have adopted this deferential rule for justiciability for sound policy reasons, policy reasons that the Supreme Court of North Carolina and the North Carolina Court of Appeals’ dissent must have considered as persuasive when choosing to affirmatively adopt the standard. The first step when a court is presented with the opportunity to review an internal decision by a voluntary association should always be to ask whether the matter is justiciable. That is, the court should ask whether it is being called on to interpret a contract, or if the contract is clear on the matter in dispute. If the contract is ambiguous, the court is allowed to determine that it is being called on to interpret the contract, and should apply state contract principles freely. This is in line with the deferential standard, with its roots in Lough, and is also in line with state precedent.122 If, on the other

122. In North Carolina, a contract is ambiguous if “the language...is fairly and reasonably susceptible to either of the constructions asserted by the parties.” Bicket v. McLean Sec., Inc., 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996) (quoting Glover v. First Union Nat’l Bank, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993)). If the contract is deemed to be ambiguous, and the “intention of the parties is unclear, interpretation of the contract is for the jury.” Int’l Paper Co. v. Corporex Constructors, Inc., 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989). If the contract governing the Tournament were ambiguous, the dissent’s application of the Topp test would have been in line with case law and the Lough standard. The issue here is that the Tournament Rules
hand, the contract clearly speaks to the matter being reviewed, the court should end its inquiry and grant summary judgment for the party not seeking to overturn the decision barring a few, specified exceptions.

Articulating this process should not be too difficult, since the court in *Topp v. Big Rock Found., Inc.* has already delineated four such exceptions: when the association's decision is arbitrary, fraudulent, collusive, or if the association did not afford the member due process. But the court needs to define each exception explicitly, so as not to allow for genuine issues of material fact that will subsequently allow every claim to go to a jury. If the court does want to equate a reservation of discretion by the voluntary association to determine its own internal matters to an imposition that the same voluntary association follow state contract law, the court needs to do so explicitly. This conclusion is in complete opposition to any form of the standard in other jurisdictions and also seems to contradict the adopted, deferential language.124

B. Reducing the Heavy Burden of Litigation Costs and Settlement by Separating Questions of Law from Questions of Fact

Another way that the court can avoid imposing such a heavy burden on voluntary associations and the court system is by clearly articulating whether the threshold question of justiciability is a question of law or fact. Normally, a question of fact arises when there are credibility determinations—for example, where the parties give conflicting accounts of facts determinative to the outcome. But, where the answer to the inquiry can be found in the law, the examination is better left to the judge. In the particular case of reviewing the internal decisions of voluntary associations, a judge is in a better position to determine whether a decision is arbitrary, especially when the present state of the law is so confusing, and there is a unanimous consensus that promoting the stability and autonomy of voluntary associations is good for the state.

By articulating a clear standard, judges will be able to decide these questions of law more easily, and this will both foster stability

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123. See supra Part II.B.
124. See, e.g., Oakland Raiders v. Nat'l Football League, 32 Cal. Rptr. 3d 266, 284 (Cal. Ct. App. 2005) (describing the rationale of a court that adopted the Lough standard as being primarily to protect the autonomy of associations and making sure to factor this underlying policy into judicial intervention).
and promote voluntary associations. For example, a lower court presented with the reviewability of a voluntary association's decision armed only with the Topp test as it stands today will be much more likely to send question of arbitrariness, or materiality, to a jury than if there was a clearer standard for a question of law. If, on the other hand, a lower court judge were instructed that the threshold question of justiciability is a question of law, and such reviewability is limited only in the case of a voluntary association's "abuse of discretion," the judge would confidently be able to dismiss a case, notwithstanding a conflict in the determinative facts between the parties. The latter approach will promote a stable and predictable legal system, and will remove the heavy burden that the dissent's new Topp test has put on voluntary associations and the North Carolina judicial system.

C. Differentiating Between Different Types of Voluntary Associations, and Tailoring the Topp Test to Each

Finally, it might be the case that the Supreme Court of North Carolina wants to apply different standards of justiciability to different types of voluntary associations. This would explain why the court affirmed the dissent, including its "competitive advantage" reasoning, even though this reasoning proves to be incredibly problematic in different contexts. The court may want to carve out some situations, like where a member is specifically involved in the association for the purpose of contracting for prize money, where a higher level of fairness should be given to members or where greater regulations are necessary. Such a differentiation might be based on the intuition that it is not fair to distinguish between a tournament run by a voluntary association and one that is not. Another possible rationale is that courts should have a greater role in regulating contests that deal with prizes and money than in regulating sports teams, political parties, or homeowner's associations, which are more private. If this is the case, the court needs to explicitly delineate these contexts and articulate the different standards of judicial review for each. If it is not the case, the court still needs to rectify the conflicting rationales and provide guidelines for lower courts to apply the Topp test, including the reasoning articulated by the North Carolina Court of Appeals' dissent across different contexts. Even more so, the court

125. See generally BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 27 (2010) ("[Rules] are inspired by the same yearning for consistency, for certainty, for uniformity of plan and structure.").
126. Topp, ___ N.C. App. at __, 726 S.E.2d at 826.
needs to redact the "abuse of discretion" language to avoid confusion, unpredictability, and instability amongst lower courts. The court must either limit the weight of this language or confine it to its proper application.

CONCLUSION

As the law stands now, judicial intervention into the internal decision-making of voluntary associations in North Carolina is up in the air. By affirming the dissent's markedly different articulation of the Lough standard, the Supreme Court of North Carolina has created a new rule that is in complete opposition to the standard it claimed to adopt. This new Topp test purports to be deferential to voluntary associations but actually creates a loophole by which courts are not required to ask the threshold question of whether to intervene; instead, courts can immediately apply contract principles that will almost always create a genuine issue of material fact, thereby sending the dispute to a jury. Regardless of its position, the court desperately needs to articulate clear and workable standards for lower courts to apply. These standards should be in accordance with the underlying policies behind the Lough standard and should promote predictability and stability. If the court wants to employ stricter judicial review in the context of tournaments, it needs to do so explicitly. The reliance on the competitive advantage rationale will prove to be problematic and unworkable, especially considering the abundance of sports leagues that comprise voluntary associations. Additionally, the court needs to clearly announce whether the limited exception of arbitrariness is a question of law or fact and, consequently, whether these important questions of judicial review should go to a jury or to the judge. Voluntary associations are too integral to our society and economy to leave these important questions unanswered.

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128. Topp, ___ N.C. App. at __, 726 S.E.2d at 826.