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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

ON PETITION FOR WRIT TO THE COURT OF APPEALS

Appeal from Aiken County
Judge Clifton B. Newman,
Circuit Court Judge

Appellate Case No. 2020-000080

Unpublished Opinion No. 2023-UP-158 (S.C. Ct. App.
filed April 19, 2023), reh'g denied (S.C. Ct. App. June
1, 2023).

Herman Perry Holcomb,

Plaintiff/Petitioner,

v.

City of North Augusta and
Mayor and City Council of
North Augusta,

Defendant/Respondent.

PETITION FOR A WRIT OF CERTIORARI AND
MEMORANDUM WITH CITATION OF
AUTHORITIES IN SUPPORT

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Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 1, 2023.

/s/Dionè Carroll
Dionè C. Carroll, Esq.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the Court of Common Pleas decision that the City amended an “agenda” in violation of the requirements of the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* when the City amended its Regular Agenda of May 7, 2018 without required process?

STATEMENT OF THE CASE

Respondent Herman Perry Holcomb (“Holcomb”) filed an Amended Complaint seeking declaratory and injunctive relief pursuant to the State Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* on November 28, 2018 (“Amended Complaint”) (R. pp. 24-84). The Amended Complaint sought a declaration that the City Council and Mayor of the City of North Augusta (collectively the “City”) violated FOIA by amending a City Council Agenda to add a new item without following proper procedures; an injunction from certain future violations; and attorney’s fees and costs.

The City answered the Amended Complaint (R. pp. 85-89)¹ on December 14, 2018, and a hearing was held on January 15, 2019. A final Order in the matter was filed on October 8, 2019 (R. pp. 10-19).²

In the Order dated October 8, 2019 (R. pp. 10-19)(APPX000013-22), the Court held in favor of Holcomb and declared the conduct of the City in adding an item to the agenda, without adequate process, to be in violation of the Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* The Court also enjoined the City from future similar violations, and awarded Holcomb reasonable attorney’s fees and costs.

On October 18, 2019, Holcomb filed a Motion to Determine the Amount of Attorney’s Fees and Costs (“Attorney’s Fees Motion”) (R. pp. 109-150). In that motion, Holcomb requested a Judgment from the Court awarding him attorney’s fees in the amount of \$10,518.00; costs in the amount of \$699.92; and any other relief the Court deemed appropriate,

¹ “R” references in this Petition are references to the original Record on Appeal page number. “APPX” references are references to the appendix page numbers, which page numbers are designated by an “APPX” prefix. The Index to the Appendix uses the titles of appendix documents as designated in the South Carolina Appellate Case Management System.

² The October 8, 2019 Order (R. pp. 10-19)(APPX000013-22) replaced an October 7, 2019 Order (R. pp. 1-9) e-filed in error.

just and proper.

Also on October 18, 2019, the City filed a Motion for Alteration and Amendment of Findings and Judgment or, Alternatively, for a new Trial, Pursuant to Rules 52 and 59(a)(2) and (e), SCRCPP (“Motion for Reconsideration”) (R. pp. 92-108) attacking the Order dated October 8, 2019. Holcomb filed a Memorandum Response in Opposition to Defendants’ Motion for Reconsideration on October 31, 2019. (R. pp. 155-166).

The Court below, through Court of Common Pleas Judge Clifton B. Newman, held a hearing on December 5, 2019 and addressed both outstanding motions. Counsel for both parties made arguments for the Court’s consideration with respect to the City’s Motion for Reconsideration (R. pp. 92-108) and Holcomb’s Attorney’s Fees Motion (R. pp. 109-150).

On December 30, 2019, the Judge Newman issued an Order denying the City’s Motion for Reconsideration and awarding Holcomb attorney’s fees and costs. (R. pp. 20-23)(APPX000023-26). The Appellant City filed a Notice of Appeal of the October 8, 2019 Order (R. pp. 10-19)(APPX000013-22) and the December 30, 2019 Order (R. p. 167) on January 21, 2020.

The City filed its initial brief in the Court of Appeals on May 26, 2020. Holcomb filed his initial brief on June 25, 2020. The City’s initial reply brief was filed on July 7, 2020. Final briefs followed.

Two years later, on November 1, 2022, the Municipal Association of South Carolina (“Association”) moved to be allowed to Appear as *Amicus Curiae*, generally supporting the position of the City and asserting implementation of the Order below could “frustrate the purposes of SC FOIA.” Motion for Leave to file *Amicus Curiae* Brief at 3 (APPX000490). Holcomb opposed in a brief filed on November 14, 2022. The Court of Appeals, nevertheless,

allowed appearance of the Association, and Holcomb responded to its arguments in a brief filed January 23, 2023.

The Court of Appeals issued its Opinion on April 19, 2023. (APPX000541) The *Per Curiam* opinion of the Court of Appeals reversed the Opinion of the Circuit Court. *See Holcomb v. City of North Augusta et al.*, Appellate Case No. 2020-000080, Unpublished Opinion No. 2023-UP-158 (S.C. Ct. App. April 19, 2023), reh’g denied (S.C. Ct. App. June 1, 2023)(APPX000541). On May 4, 2023, Holcomb sought rehearing. Rehearing was denied on June 1, 2023. Holcomb now timely files this Petition for Certiorari seeking review by the South Carolina Supreme Court.

Such a writ is appropriate due to the novel question of law presented and substantial constitutional issues directly involved in this important Freedom of Information Act decision and conflict with decisions of this Court. The significance of this decision is highlighted by the decision of the Association to seek and obtain authorization to appear as Amicus Curiae in this matter.

The Court of Appeals ignored the case’s importance. No Oral Argument was ever held in the Court of Appeals regarding this important case interpreting the Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* brought by a dedicated private citizen even though it implicates important due process rights, an Amicus Curiae was allowed to appear, the well-reasoned decision of Circuit Court Judge Newman was erroneously reversed in its entirety, no similar case had ever been decided in South Carolina, and the appellate case alone took three and a half (3.5) long years.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN REVERSING THE COURT OF COMMON PLEAS’ DECISION THAT THE CITY VIOLATED

FOIA BY AMENDING ITS AGENDA WHEN IT ADDED A PROJECT TO THE “REGULAR AGENDA OF MAY 7, 2018 WIHTOUT GIVING TWENTY-FOUR HOURS’ NOTICE AND WHEN NO FINDING THAT AN EMERGENCY OR AN EXIGENT CIRCUMSTANCE EXISTED WAS MADE.

a. IT IS CLEAR THAT THE CITY AMENDED AN AGENDA WITHOUT PROPER NOTICE OR FINDING OF EMERGENCY OR EXIGENT CIRCUMSTANCES.

Plaintiff/Petitioner Holcomb is a citizen and resident of the City of North Augusta, County of Aiken, South Carolina. Amended Complaint at 1 (R. p. 25), ¶ 1; Merits Hearing Transcript (“M.H. Tr.”) at 43:7-9 (R. p. 210:7-9). As of the date of the Merits Hearing, Holcomb had lived there for fifty-eight (58) years, and he is active and outspoken in matters of great importance to his local and statewide community. Amended Complaint at 1 (R. p. 25), ¶ 1; M.H. Tr. at 43:10-11 (R. p. 210:10-11) and 44:2-19 (R. p. 211:2-19).

City of North Augusta is a municipal corporation of the State of South Carolina located in Aiken County, with a history of prior Freedom of Information Act violations. *See Donohue v. City of N. Augusta*, 412 S.C. 526, 531 (2015).³ Amended Complaint at 1 (R. p. at 25), ¶ 2. The Mayor and City Council of North Augusta, is a public body subject to the South Carolina Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* Amended Complaint at 1 (R. p. 25), ¶ 3. Defendants/Respondents are referred to collectively herein as the City.

Holcomb’s Amended Complaint sought declaratory and injunctive relief associated with alleged inconsistencies with FOIA arising from the May 7, 2018 meeting of the City of North Augusta City Council. The action by Holcomb against the City came before the Circuit Court

³ When Holcomb filed this case against the City to enforce his rights under the FOIA, the City totally stopping the long-standing practice of putting the Agenda Complete containing information important to meetings on the web site before City Council meetings to the detriment of its citizens. *See* Response to Motion for Reconsideration, Exhibit 2, February 1, 2019 email from City Administrator (R. p. 164-165).

for an initial hearing (hereinafter “Merits Hearing”), pursuant to Holcomb’s Amended Complaint brought under the South Carolina Freedom of Information Act (“FOIA”) as codified in §§ 30-4-10 to 30-4-165 of the South Carolina Code, including § 30-4-100, on January 15, 2019. Order dated October 8, 2019 at 1 (R. p. 10)(APPX000013).

Holcomb was present at the Merits Hearing and represented by his attorney. *Id.* The City was also represented by attorneys. *Id.* Both sides presented testimonial and documentary evidence for the Court’s consideration, and counsel for both Holcomb and the City made argument with respect to the issues raised. *Id.*

At the hearing, it was evident that the City does not have a policy regarding the composition of City agendas, *see* M.H. Tr. at 70:16-71:20 (R. pp. 237:16 – 238:20); Order dated October 8, 2019 at 2 (R. p. at 11)(APPX000014), and FOIA does not contain a definition for “agenda.”

Holcomb contends in this case that the “Regular Agenda of May 7, 2018,” Plaintiff’s Merits Hearing Exhibit 6 (R. pp. at 292-323), constitutes the complete agenda for the May 7, 2018 City of North Augusta City Council meeting. *See* M.H. Tr. at 6 (R. p. at 173); M.H. Tr. at 49-52 (R. pp. at 216-219); Order dated October 8, 2019 at 2-3 (R. pp. at 11-12) (APPX000014-15). The Regular Agenda of May 7, 2018 is the document that could be found on the City’s website at a link called “Agenda 050718 Complete.” On the stand at the January 15, 2019 Merits Hearing, Holcomb explained. Relevant testimony from Holcomb is as follows:

Q And I observe that at the top of Plaintiff’s 4, it says Document Central and then it appears that there’s a series of links that kind of show us how we got there. So it looks like you clicked on Document Central then city clerk, then counsel agenda’s 2018 and then May 18 and that got you to this page. If you wanted to know what was happening in a City of North Augusta meeting, you wanted to see the agenda, what would you look at on this page? Which link would you click in order to do so?

A I would click the Agenda 050718 Complete.

M.H. Tr. at 48:22-49:6 (R. pp. at 215:22-216:6); Plaintiff's M.H. Exhibit 6 (R. pp. at 292-323). (emphasis supplied). Holcomb went on to testify again later confirming his understanding.

Q Okay. And then you talked about the agenda and you indicated, I believe, earlier, that the agenda was what the City called -- what you have called for me the summary agenda, correct?

A That's correct.

Q Okay. And is it your understanding that a complete agenda is still an agenda or not?

A It is the agenda according to its [sic] cover page.

Q Okay. Is that why you think so?

A Yes.

M.H. Tr. at 62:11-20 (R. p. at 229:11-20). (emphasis supplied).

Counsel for the City attempted to confuse the issue several times during his questioning of Holcomb. However, the above testimony is clear. Holcomb believed that the document called "Regular Agenda of May 7, 2018," found at City website link "Agenda 050718 Complete" was the agenda for the May 7, 2018 meeting. It is the agenda according to its cover page. *See* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323).

Holcomb reviewed the materials in advance of the meeting to determine whether it was necessary for him to attend. *See* M.H. Tr. 49-54 (R. pp. 216-221). He decided not to participate in commenting because he was satisfied with the projects being considered.

The City contended at the Merits Hearing that Defendants' Merits Hearing Exhibit 1 (R. p. 329) was instead the "agenda" for the City Council meeting held on May 7, 2018, rather than the Regular Agenda of May 7, 2018 (R. pp. 292-323). This is the document Mr. Holcomb had described as a "summary agenda" in testimony.

Defendants' M.H. Exhibit 1, a single page which can be found within Plaintiff's M.H. Exhibit 6 (R. p. at 294), was also submitted at the Merits Hearing. *See Answer to Amended Complaint at 2, ¶ 8 (R. p. at 86); see Plaintiff's M.H. Exhibit 5 (R. pp. 290-291); see Defendants' M.H. Exhibit 1 (R. p. 329); see M.H. Tr. at 49 (R. p. at 216); Order dated October 8, 2019 at 2 (R. p. at 11).*

Holcomb testified that the City's Exhibit 1 was a less detailed version of the agenda and that to see the full agenda you needed to view the full "Agenda 050718 Complete" document posted on the City's web site. *See M.H. Tr. at 49 (R. p. at 216); Order dated October 8, 2019 at 3 (R. p. at 12).* The City took an adverse position.

The City asserted at hearing that Holcomb's Exhibit 6 was instead an "agenda packet" within the meaning of S.C. Code Ann. Regs. 12-604.3 rather than an "agenda." *See Answer to Amended Complaint at 2, ¶ 8 (R. p. 86, ¶ 8); Plaintiff's M.H. Exhibit 5 (R. pp. 290-291); Defendants' M.H. Exhibit 1 (R. p. 329); Order dated October 8, 2019 at 3 (R. p. at 12).* The alleged "agenda packet," however, could be found on its web site at a link entitled "Agenda 050718 Complete." *Order dated October 8, 2019 at 3 (R. p. at 12).*

There is nothing contained in the exhibit entitled "Regular Agenda of May 7, 2018" that calls Holcomb's Exhibit 6 an "agenda packet." *See M.H. Tr. at 50:2-9 (R. p. at 219:2-9); see Plaintiff's M.H. Exhibit 6 (R. pp. 292-323); Order dated October 8, 2019 at 3 (R. p. at 12).* On its cover page it is called the "Regular Agenda of May 7, 2018." Plaintiff's M.H. Exhibit 6 (R.

pp. 292-323); October 8, 2019 Order at 3 (R. p. at 12). It contains a summary agenda and more detail as to agenda items. *See* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323).

Holcomb further contended that the City amended by adding an item to the agenda in violation of FOIA during the May 7, 2018 meeting of the City Council when it added an entirely new project to the complete agenda without adequate notice or findings. M.H. Tr. at 6-8 (R. pp. at 173-175); M.H. Tr. at 56 (R. p. at 223); *see* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323); *see* Plaintiff's M.H. Exhibit 7 (R. pp. 324-328); Order dated October 8, 2019 at 3 (R. p. at 12). The New Savannah Bluff Lock and Dam Project was added to the list of projects contemplated by Resolution 2018-11 scheduled to be considered at the May 7, 2018 meeting of the City Council on the day of the meeting. M.H. Tr. at 6-8 (R. pp. at 173-175); M.H. Tr. at 49-56 (R. pp. at 216-223); Plaintiff's M.H. Exhibit 7 (R. pp. 324-328); *see* Plaintiff's M.H. Exhibit 6 (R. pp. 292-323); Order dated October 8, 2019 at 3 (R. p. at 12).

The New Savannah Bluff Lock and Dam Project had never before been presented at a City of North Augusta City Council meeting as a possible project to be paid for with the anticipated continuation of the Capital Projects Sales Tax as contemplated by the Resolution 2018-11. *See* M.H. Tr. at 55 (R. p. at 222); Order dated October 8, 2019 at 3 (R. p. at 12). It was discussed for the first time in the City Council's Study Session, which was right before the regular City Council meeting. *See* Tr. at 55 (R. p. at 222); Order dated October 8, 2019 at 3 (R. p. at 12).

Final action was taken on the agenda item at the May 7, 2018 meeting to amend and pass Resolution 2018-11 and submit the list of projects to the Aiken County Sales Tax Commission for inclusion in the 2018 referendum. M.H. Tr. at 54-55 (R. pp. at 221-222); *see* Plaintiff's M.H. Exhibit 7 (R. pp. at 324-328); Order dated October 8, 2019 at 4 (R. p. at 13). The final action

taken included adding the previously undiscussed New Savannah Bluff Lock and Dam Project. *See* M.H. Tr. at 54-55 (R. pp. at 221-222); *see* Plaintiff's M.H. Exhibit 6, "Regular Agenda of May 7, 2018," at Resolution 2018-11 (R. pp. at 297-298); *cf.* Plaintiff's M.H. Exhibit 7 (R. pp. 324-328), Minutes of May 7, 2018 (amending the list of projects to add "New Savannah Bluff Lock and Dam" and passing the Resolution as amended); Order dated October 8, 2019 at 4 (R. p. at 13). \$500,000 was thereby dedicated to the project.

The City is required to publish City Council Agendas on its web site. M.H. Tr. at 71 (R. p. at 238); Order dated October 8, 2019 at 4 (R. p. at 13). The City presented the Regular Agenda of May 7, 2019 as a complete agenda on its web site. Order dated October 8, 2019 at 4 (R. p. at 13).

After consideration of the testimony of witness, evidence presented by the parties, and argument of counsel, the Circuit Court found that the City amended its agenda when it added the New Savannah Bluff Lock and Dam Project to the list of projects contemplated by Resolution 2018-11. Order dated October 8, 2019 at 4 (R. p. at 13). The Circuit Court further found that the City did so without twenty-four hours' prior notice or a finding of emergency or exigent circumstances. M.H. Tr. at 54-56 (R. pp. at 221-223); *see* Plaintiff's M.H. Exhibit 7 (R. pp. at 324-328); Order dated October 8, 2019 at 4 (R. p. at 13). And, final action was taken with respect to the agenda item on May 7, 2018. M.H. Tr. at 55 (R. p. at 222); Plaintiff's M.H. Exhibit 7 (R. pp. 324-328); Order dated October 8, 2019 at 4 (R. p. at 13).

In its Order of October 8, 2019, the Court found the City to be in violation of FOIA and enjoined the City from other similar violations. *See* Order dated October 8, 2019 at 9 (R. p. at 18). The Court denied the City's motion for post-trial relief and granted Holcomb's motion for attorney's fees and costs. Order dated October 8, 2019 at 9 (R. p. at 18).

“[T]he trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings.” *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003) (citations omitted); *see also Harkins v. Greenville County*, 340 S.C. 606, 533 S.E.2d 886 (2000); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672 (Ct. App. 2000); *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165–66 (Ct. App. 2003). The Court of Appeals, therefore, should not have departed from the lower court’s finding that the Regular Agenda was an agenda to the extent it was a finding of fact. To the extent it was a finding law, the Court of Appeals is in error as discussed below. It is undisputed that 24 hours’ notice was not given nor that a finding of exigent circumstances or emergency was not made.

In either event, allowing any municipality to deny a published agenda is an agenda on the basis that it has another document is also called an agenda is deeply disturbing and arbitrary. It further denies statutorily and Constitutionally protected interests of great public importance. These and other special and important reasons discussed in this brief support this court granting certiorari in this case. *See* Rule 242, SCACR.

b. THE CASE IS NOVEL AND IS CONTRARY TO THE SPIRIT AND LETTER OF FOIA AND DECISIONS INTERPRETING IT. SUBSTANTIAL CONSTITUTIONAL ISSUES ARE DIRECTLY INVOLVED AS THE COURT OF APPEALS INTERFERED WITH THE PUBLIC’S DUE PROCESS RIGHTS UNDER FOIA WHEN IT DISTURBED THE DECISION OF THE CIRCUIT COURT.

“South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government.” *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004), citing, *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d

630, 633 (1996). FOIA creates an affirmative duty on public bodies to disclose information. *Burton v. York County Sheriff's Dept.*, 358 S.C. at 347, citing, *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); *Campbell v. Marion County Hospital District*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

Furthermore, the purpose of the FOIA is to protect the public by providing for the disclosure of information, *id.*, thus allowing adequate notice and opportunity to be heard. It sets forth the process that is due in meetings to put the public on notice and allow it to be heard. The Act is remedial in nature and should be *liberally construed* to carry out the purpose mandated by the legislature. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004) (*emphasis supplied*), citing, *Campbell v. Marion County Hospital District*, 354 S.C. at 281, 580 S.E.2d at 166. Any exception to FOIA's applicability must be narrowly construed. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005).

Petitioner contends the agenda was required to, but failed to meet the procedural requirements of the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* It appears uncontested that the change to the Regular Agenda of May 7, 2018 did not follow the procedural requirements of FOIA. Respondent takes the position that only one page of the document is the agenda and that one page was not changed, thus not needing to follow FOIA's procedural requirements. The Circuit Court agreed with Petitioner's position in its Order. *See* (R. pp. 10-19). The Court of Appeals reversed in favor of Respondent.

In reversing the Honorable Judge Clifton Newman's sound and well-reasoned opinion below, the Court of Appeals has allowed the City to amend a document, which

acknowledges on its face that it is an “Agenda,” in violation of FOIA, thus denying the public the process they are guaranteed, and denying their opportunity to be heard. As such the Constitutions of both South Carolina and the United States are implicated. The Association intervened in this case, by its own admission, because it asserts the Circuit Court Order could “frustrate the purposes of SC FOIA.” Motion for Leave to file *Amicus Curiae* Brief at 3 (APPX000490). While Holcomb strongly disagrees, the Association evidently believes making the City follow FOIA under the circumstances described herein “would needlessly complicate municipal meeting administration” *Id.* at 1. Petitioner strongly rejects these arguments. Making it easier for municipalities to follow procedures, when doing so denies citizens the participation guaranteed by FOIA, violates the statutorily and Constitutionally protected rights of citizens, including Holcomb. Whether the Court agrees with the Amicus or with Holcomb, it is clear that there are special and important reasons supporting this Court granting certiorari in this case. *See* Rule 242, SCACR.

It is our contention that the document entitled Regular Agenda of May 7, 2018 was the agenda for the City’s May 7, 2018 meeting. The rule of statutory interpretation doctrine of “plain meaning” means, absent ambiguity, the court will look to the plain meaning of the words used to determine their effect.

However plain the ordinary meaning of the words used in a statute may be the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

City of Rock Hill v. Harris, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011).

In this case, the agenda, as that word is used in FOIA, is the "Regular Agenda of May 7 2018." On its face, it is plain that it is an agenda. That is what it is called. The lower court agreed and found that it was the agenda.

Rejecting the lower court's finding and determining the Regular Agenda of May 7, 2018 was not an agenda rejected the plain meaning of the statute and also led to an absurd result. The City was thereby allowed to add a \$500,000 project for the City's consideration, without prior notice to the public by putting it on the Regular Agenda of May 7, 2018 without the process required by FOIA for an agenda. The Court of Appeals was in error to allow this, and the public suffers for it.

This Honorable Court should grant certiorari and reject this absurd result which, if followed by future municipalities, could result in the routine issuance of agendas that are represented as agendas to the public but amended without following the requirements of law, just because they have another document called an agenda also.

The meeting in this case related to substantial public funding, and the project was added to it for consideration without following the procedures required by FOIA as alleged in Petitioner's briefs in this case, which are adopted herein by reference. *See e.g.* S.C. Code Ann. § 30-4-80(A).

The Court of Appeals appropriately recognized, in its opinion, that that on the website of the City, the document the City contends was the City's agenda, as defined by FOIA, was at a link on the City's website entitled "Agenda 050718" and that the document Petitioner contends was the City's agenda is at a link on the City's website entitled "Agenda 050718 Complete." (APPX000541) Petitioner, and very likely other citizens, reasonably believed the "Complete" agenda was the one to review. Petitioner,

further, reasonably asserts any document called an “agenda” by the City must follow FOIA.

The document called "Regular Agenda of May 7, 2018," constitutes the agenda for the May 7, 2018 City of North Augusta City Council meeting. *See* M.H. Tr. at 6 (R. p. at 173); M.H. Tr. at 49-52 (R. pp. at 216-219); Order dated October 8, 2019 at 2-3 (R. pp. at 11-12). What could be plainer as to the nature of a document than the title page of that document? *See* M.H. Tr. at 62:11-20 (R. p. at 229:11-20); *see also* Plaintiffs M.H. Exhibit 6 (R. pp. 292-323). What is a member of the public supposed to believe when he or she reads that a document is the "Regular Agenda of May 7, 2018" for the City Council Meeting?

The Court of Appeals’ Per Curium Opinion does not acknowledge that the title of the document is not just the link on the website. (APPX000541) The Court's Opinion fails to discuss that the document the City denies is its agenda is entitled "Regular Agenda of May 7, 2018.” *See* (APPX000541) FOIA requires amendment of such a document to follow certain procedures in order to be amended. The publication of the Regular Agenda of May 7, 2018 failed to follow those procedures. It failed to publish without twenty-four hours’ prior notice or a finding of emergency or exigent circumstances as required by FOIA. M.H. Tr. at 54-56 (R. pp. at 221-223)· *see* Plaintiffs M.H. Exhibit 7 (R. pp. at 324-328); Order dated October 8 2019 at 4 (R. p. at 13). It appears these facts as to publication are uncontested. The implications of a municipality being able to misrepresent its agenda and chose another agenda and thereby avoid the requirements of FOIA are clearly special and important, strongly supporting a grant of

certiorari. *See* Rule 242, SCACR. To the best of Petitioner's knowledge, this issue has never been taken up in South Carolina before, making review by this Court all the more important.

c. FAILING TO TREAT THE REGULAR AGENDA OF MAY 7, 2018 AS AN "AGENDA" LEADS TO AN ABSURD RESULT HARMFUL TO THE PUBLIC AT LARGE WHEN FOIA REQUIRES LIBERAL INTERPRETATION TO PROTECT THE PUBLIC INTEREST.

The plain meaning rule of statutory interpretation is used in the absence of an ambiguity. Although Petitioner firmly believes that the meaning of agenda as it is used in FOIA is plain, the trial court and Court of Appeals have differed in their interpretation. Allowing the Court of Appeals' reading of the statute to stand leads to absurd results, and following the Court of Appeals reasoning harms Petitioner and the public at large in contravention of law.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 863-64 (citing *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). "Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 864 (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 155, 705 S.E.2d 53, 55 (2011)).

State v. Alexander, 424 S.C. 270, 275, 818 S.E.2d 455, 458 (2018).

If there is indeed a state of ambiguity in this case, the courts are required to hold liberally in favor of the public. In addition to the ordinary rules of statutory construction applicable when interpreting a state statute, there are special considerations when interpreting the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* Specifically, the FOIA says:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the

decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15.

“South Carolina's FOIA was designed to guarantee the public reasonable access to certain activities of the government.” *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004), citing, *Fowler v. Beasley*, 322 S.C. 463, 468, 472 S.E.2d 630, 633 (1996). FOIA creates an affirmative duty on public bodies to disclose information. *Burton v. York County Sheriff's Dept.*, 358 S.C. at 347, citing, *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991); *Campbell v. Marion County Hospital District*, 354 S.C. 274, 281, 580 S.E.2d 163, 166 (Ct. App. 2003).

Furthermore, the purpose of the FOIA is to protect the public by providing for the disclosure of information. *Id.* The Act is remedial in nature and should be *liberally construed* to carry out the purpose mandated by the legislature. *Burton v. York Cty. Sheriff Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892-93 (Ct. App. 2004) (*emphasis supplied*) citing *Campbell v. Marion County Hospital District*, 354 S.C. at 281, 580 S.E.2d at 166. Any exception to FOIA's applicability must be narrowly construed. *Evening Post Publ'g Co. v. City of North Charleston*, 363 S.C. 452, 457 611 S.E.2d 496, 499 (2005).

Last-minute agenda changes are inconsistent with the obligation imposed by FOIA to guarantee the public reasonable access. *See Fowler v. Beasley*, 322 S.C. 463 468 472 S.E.2d 630, 633 (1996); *see also* Order dated October 8, 2019 at 5. Order dated October 8, 2019 at 5. Pursuant to the FOIA, every meeting of all public bodies shall be

open to the public unless closed pursuant to § 30-4-70 of the FOIA Chapter. S.C. Code Ann. § 30-4-60.

Furthermore, although FOIA did not always, FOIA now requires agendas for regularly scheduled meetings and sets forth a specific procedure for amending agendas once an agenda has been posted. S.C. Code Ann. § 30-4-80(A); *see Brock v. Town of Mount Pleasant*, 415 S.C. 625 629 n.4, 785 S.E.2d 198,201 (2016); Order dated October 8, 2019 at 6.

South Carolina Code § 30-4-80(A) requires of a public body in part that, An agenda for regularly scheduled or special meetings must be posted on a bulletin board in a publicly accessible place at the office or meeting place of the public body and on a public website maintained by the body, if any, at least twenty-four hours prior to such meetings. . . . Once an agenda for a regular, called, special, or rescheduled meeting is posted pursuant to this subsection, no items may be added to the agenda without an additional twenty-four hours notice to the public, which must be made in the same manner as the original posting. After the meeting begins, an item upon which action can be taken only may be added to the agenda by a two-thirds vote of the members present and voting; however, if the item is one upon which final action can be taken at the meeting or if the item is one in which there has not been and will not be an opportunity for public comment with prior public notice given in accordance with this section, it only may be added to the agenda by a two-thirds vote of the members present and voting and upon a finding by the body that an emergency or an exigent circumstance exists if the item is not added to the agenda.

S.C. Code Ann. § 30-4-80(A)(emphasis supplied). FOIA was not followed in this case.

Twenty-four hours' notice was not given. An emergency or exigent circumstances found by a two-thirds vote was not obtained. The purposes of the statute have been thwarted.

The Court of Appeals in its Opinion at 3 indicates, "[a]s outlined above, we understand the term 'agenda' to describe a list of things to be done such as items to be considered at a meeting." (APPX000541) The Regular Agenda of May 7, 2018 contains

a list of things to be done such as items to be considered at a meeting too. The City should not be in a position to choose or switch in the middle of proceedings which agenda must follow FOIA. The Court of Appeals Opinion creates a situation where this can occur, creating an absurd result, contrary to law. *See* (APPX000541)

The City clearly described and added to the list of things to be done and items to be considered on its May 7, 2018 agenda too close in time to the May 7, 2018 meeting without appropriate process. It described and added The New Savannah Bluff Lock and Dam project. It had never been considered on a City agenda for tax funding before. The City assigned a value of \$500,000 to the specific project for funding, which was added to the list of items the Capital Projects Sales Tax IV funds would fund. M.H. Tr. at 49:2-2:23 (R. p. at 216:2-23). This addition to things to be done, including items to be considered occurred for the first time at, and immediately before, the May 7, 2018 meeting, thus leap frogging over the citizen rights protected by the Freedom of Information Act and violating rights of the citizens protected by FOIA, such as the right to Due Process, First Amendment Freedom of Speech and Equal Protection. It was all done in a way that prevented Plaintiff from preparing and opposing the funding of the project. *See* M.H. Tr. 49-54 (R. pp. 216-221).

The Court of Appeals opined that it was "concerned that after-the-fact evaluations such as the one conducted here would discourage public bodies from providing supplemental information." *See* Per Curium Opinion at 3 (APPX000541, 543). This statement of the Court and the associated discussion suggest that the Court of Appeals overlooked and/or misunderstood one very significant factor in this case.

The City had a choice about how to name its documents. Making the argument that public bodies will not provide supplemental information if have to clearly label and designate their agendas is absurd. In this case, the City picked which agenda was “the agenda” after changes were made. That deprives the public of important FOIA protections, in contravention of law.

The City was in a superior position to be clear for the benefit of the public, according to the requirements of FOIA. If it did not, or does not, provide clearly labeled supplemental information to the public, it further fails to fulfill its duty to the public, possibly to punish or evade review. The City should be held to the standards articulated in the Act.

Furthermore, the City had already failed to provide supplemental information on the project when it decided to announce it at the 11th hour amendment of the agenda in this case. It declined to announce properly in advance of the meeting that there would be consideration of a major project, evidently so as not to draw substantial public scrutiny.

FOIA's essential purpose is to protect the public from secret government activity. *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). Because FOIA is remedial in nature, it should be liberally construed to carry out the purpose mandated by the legislature. *Campbell*, 354 S.C. at 281, 580 S.E.2d.at 166; *see Brock v. Town of Mount Plea ant*, 411 S.C. 106, 117, 767 S.E.2d 203, 208 (Ct. App. 2014). Reversal of the decision below leaves the City free to continue to conduct secret government activity, thwarting FOIA's essential purpose of protecting the public from

such secret activity.

Respondent Holcomb contends in this case that, "Regular Agenda of May 7, 2018," Plaintiff/Petitioner's Merits Hearing Exhibit 6 (R. pp. at 292-323), constitutes the complete agenda for the May 7, 2018 City of North Augusta City Council meeting. *See* M.H. Tr. at 6 (R.p. at 173); M.H. Tr. at 49-52 (R. pp. at 216-219); Order dated October 8, 2019 at 2-3 (R. pp. at 11-12). Petitioner moves this honorable Court for a writ of certiorari, to have the Order below restored, to have a finding for the Petitioner and have restored the award of his attorney's fees and costs.

The matter is not casually pursued by Petitioner. As an individual seeking to enforce the laws of the State of South Carolina and, indeed, the United States of America for himself and for the benefit of the public at large, the last three (3) years pending before the Court of Appeals resulting in reversal has been tragic, especially given his confidence in the opinion of the Circuit Court. The novelty of this case and the substantial constitutional issues implicated by a deprivation of process and access to government guaranteed by FOIA, along with the potential negative impact to the public's access to government and government for a for speech are special and important reasons supporting the grant of certiorari in this important Freedom of Information Act case. *See* Rule 242, SCACR.

CONCLUSION

For the reasons stated, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

July 1, 2023

/s/ Dionè C. Carroll
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Jul 03 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON PETITION FOR WRIT TO THE COURT OF APPEALS

Appeal from Aiken County
Judge Clifton B. Newman,
Circuit Court Judge

Appellate Case No. 2020-000080

Unpublished Opinion No. 2023-UP-158 (S.C. Ct. App.
filed April 19, 2023), reh'g denied (S.C. Ct. App. June
1, 2023).

Herman Perry Holcomb,

Plaintiff/Petitioner,

v.

City of North Augusta and
Mayor and City Council of
North Augusta,

Defendant/Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and Incorporated Memorandum with Citation of Authorities in Support on Defendant/Respondents, City of North Augusta and Mayor and City Council of North Augusta, by electronic mail, and by having a copy of it deposited in the United States Mail, postage prepaid, on July 1, 2023, addressed to their attorney of record, Danny C. Crowe, Esquire, Crowe LaFave, LLC, Post Office Box 1149, Columbia, South Carolina 29202; danny@crowelafave.com.

I further certify that I have served the Petition for a Writ of Certiorari and Incorporated Memorandum with Citation of Authorities in Support on the Municipal Association of South Carolina, by electronic mail, and by having a copy of it deposited in the United States Mail, postage prepaid, on July 1, 2023, addressed to their attorney of record, Bryan Eric Shytle, Esquire,

Municipal Association of South Carolina, Post Office Box 12109, Columbia, South Carolina 29211; eshytle@masc.sc.

July 1, 2023

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North Augusta,

Defendant/Respondent.

PROOF OF SERVICE

I certify that I have served the Appendix on Defendant/Respondents, City of North Augusta and Mayor and City Council of North Augusta, by electronic mail, addressed to their attorney of record, Danny C. Crowe, Esquire, Crowe LaFave, LLC, Post Office Box 1149, Columbia, South Carolina 29202; danny@crowelafave.com.

I further certify that I have served the Appendix on the Municipal Association of South Carolina, by electronic mail, addressed to their attorney of record, Bryan Eric Shytle, Esquire, Municipal Association of South Carolina, Post Office Box 12109, Columbia, South Carolina 29211; eshytle@masc.sc.

July 1, 2023

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