

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Alison Renee Lee, Circuit Court Judge

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Appellate Case Nos. 2023-000667 & 2023-000668

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Intellectual Capitol, Inc., Barry Newkirk and Neil Richards, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and South Carolina Workers' Compensation Commission, Respondents.

AND

JMI Sports and JMIS College, LLC, Appellants,

v.

Michael B. Spicer, Chief Procurement Officer, South Carolina State Fiscal Accountability Authority, Division of Procurement Services, and Clemson University, Respondents.

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INITIAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

- I. Does the Chief Procurement Officer lack the authority to declare that S.C. Code Ann. § 11-35-4230 is unconstitutional?
- II. Does S.C. Code Ann. § 11-35-4230 violate the Separation of Powers Clause of the South Carolina Constitution because it grants an Executive Department officer jurisdiction over common law claims asserted *by the State*?
- III. Does S.C. Code Ann. § 11-35-4230 violate the Original Jurisdiction Clause of the South Carolina Constitution because it grants an Executive Department officer jurisdiction over common law claims asserted *by the State*?
- IV. Does S.C. Code Ann. § 11-35-4230 violate the Constitutional right to trial by jury because it grants an Executive Department officer jurisdiction over common law claims asserted *by the State*?

## STATEMENT OF THE CASE

Appellants (“JMIS” and/or “ICAP”) entered into contracts with the State and/or one of its agencies (“State”). The State asserted legal and equitable claims before the Chief Procurement Officer (“CPO”) against each Appellant under S.C. Code Ann. § 11-35-4230, (the “Contract Controversy Statute”):

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. **The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor**, when the subcontractor is the real party in interest, concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code. On behalf of any governmental body or South Carolina public procurement unit that participates in a multiagency, term, or cooperative contract awarded by or under the authority of a chief procurement officer, **the Division of Procurement Services may initiate and pursue resolution of any contract controversy which arises under or by virtue of a contract** between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

S.C. Code Ann. § 11-35-4230 (emphasis added).

Appellants did not bring a breach of contract claim *against the State* in circuit court. Instead, the State brought legal and equitable claims against each Appellant before the CPO, rather than the courts.

Appellants filed declaratory judgment actions in circuit court to declare the Contract Controversy Statute unconstitutional as it purports to authorize the CPO to hear and decide *claims by the State*, rather than only *claims against the State* (which are separately authorized by the South Carolina Constitution, art. X, § 10, and art. XVII, § 2.)<sup>1</sup>

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<sup>1</sup>Art. X, § 10, and art. XVII, § 2, in conjunction with the constitutionally compliant element of S.C. Code Ann. § 11-35-4230 regarding claims against the State, are the reason Appellant JMIS

Appellants sought declaratory judgment that the Contract Controversy Statute is unconstitutional. Specifically, the Contract Controversy Statute violates the following provisions of the South Carolina Constitution: the Separation of Powers Clause, art. I, § 8; the Original Jurisdiction Clause, art. V, § 1, 11; and the Constitutional Right to a Jury Trial, art. I, § 14. (JMIS Complaint-Petition for Declaratory and Injunctive Relief; ICAP Complaint-Petition for Declaratory and Injunctive Relief).

Respondents moved to dismiss for failure to exhaust administrative remedies before the CPO. (Def. CPO's Motions to Dismiss as to JMIS and ICAP; Def. Clemson University's Motion to Dismiss; Def. South Carolina Workers' Compensation Commission's Motion to Dismiss).

On January 31, 2023, the circuit court, the Honorable Alison R. Lee, dismissed Appellants' cases as "premature" because Appellants had "failed to exhaust their administrative remedies" before the CPO under S.C. Code Ann. § 11-35-4230. (Order On All Motions to Dismiss). Appellants moved for reconsideration, arguing that the CPO, an Executive Branch official, lacks judicial power to issue Declaratory Judgment. (JMIS Motion to Reconsider; ICAP Motion to Reconsider).

On April 13, 2023, the circuit court denied the motions for reconsideration, relying on *Unisys v. South Carolina Budget and Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). (Form 4 and Order on Plaintiff's Motion for Reconsideration in *JMI Sports, et al. v. S.C. State Fiscal Accountability Authority*, et al.; Form 4 and Order on Plaintiff's Motion for Reconsideration in *Intellectual Capitol Inc., et al. v. S.C. Workers' Compensation Commission*, et al.).

Appellants timely filed notices of intent to appeal on April 25, 2023.

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brought its own claims against the State before the CPO, not to court. That matter is not at issue in this case. Appellant ICAP has asserted no claims against the State at all in any matter or venue.

At this Court’s invitation, on April 27, 2023, Appellants moved to consolidate these cases. This Court granted the Motion to Consolidate on June 8, 2023.

Respondents moved to dismiss the appeals on May 31, 2023, for failure to exhaust administrative remedies, and this Court denied that motion on August 10, 2023.

### STANDARD OF REVIEW

The question of whether a statute is facially unconstitutional is a question of law, and the Supreme Court reviews all questions of law *de novo*. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). “When a question of law is presented, [the] standard of review is plenary.” *State v. Stewart*, 413 S.C. 308, 316, 775 S.E.2d 416, 420 (Ct. App. 2015) (quoting *State v. Cochran*, 369 S.C. 308, 312–13, 631 S.E.2d 294, 297 (Ct. App. 2006)). *State v. Shands*, 424 S.C. 106, 1116-17, 817 S.E.2d 524, 529 (Ct. App. 2018).

A statute may be unconstitutional in part. *Aiken County Bd. of Educ. v. Knotts*, 274 S. C. 144, 262 S.E.2d 14 (1980); *Dean v. Timmerman*, 234 S.C. 35, 106 S.E.2d 665 (1959). “[W]here a part of the statute is unconstitutional, and that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution, then the courts will reject that which is void and enforce the remainder.” *Knotts v. S.C. Dep’t of Natural Res.*, 348 S.C. 1, 9, 558 S.E.2d 511 (2002) (quoting *Dean v. Timmerman, supra*).

### ARGUMENT

#### **I. The CPO Lacks Authority to Issue a Declaratory Judgment that the Contract Controversy Statute is Unconstitutional.**

The circuit court dismissed these actions because Appellants failed to exhaust their administrative remedies. (Order On All Motions to Dismiss). The South Carolina Declaratory

Judgment Act does not require exhaustion of administrative remedies. “Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. § 15-53-30 (emphasis added). The “courts of record” include the circuit courts. S.C. Code Ann. § 14-5-10. The CPO and the Procurement Review Panel are not “courts of record” and lack the authority to issue a declaratory judgment or rule that any act is unconstitutional.

Requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense and certainly is not effective or appropriate. Here, declaratory relief should not be refused as there is no other effective appropriate remedy under the circumstances. The agency and the ALJ cannot rule on the constitutionality issue. **In fact, requiring the agency or ALJ to rule on the constitutionality of Act 189 would violate the separation of powers doctrine.**

*Ward v. State*, 343 S.C. 14, 548 S.E.2d 245, 247-8 (2000) (emphasis added). “ALJs are an agency of the Executive Branch of government and must follow the law as written until its constitutionality is *judicially* determined; ALJ’s have no authority to pass upon the constitutionality of a statute or regulation.” *Video Gaming Consultants, Inc. v. South Carolina Dep’t of Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000).

The lower court’s order of dismissal unconstitutionally demands that Appellants first apply to the CPO for resolution of their Declaratory Judgment claims in violation of the Separation of Powers Clause of the South Carolina Constitution. Appellants raised this issue in motions to reconsider, but the circuit court appears to have then ruled on the merits instead. For these reasons, the circuit court’s Order of Dismissal and Orders Denying Reconsideration should be reversed. This Court should determine the Contract Controversy Statute to be unconstitutional in part as set forth herein.

## **II. The Contract Controversy Statute Violates the Separation of Powers Clause as to Claims *By the State* Against Private Parties.**

This Court discussed the origin and purpose of the Separation of Powers doctrine in *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982):

Article I, § 8 of the Constitution of South Carolina provides:

**§ 8. Separation of powers.**

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

The separation of powers mandate is followed by Articles III, IV and V, which delineate the authority and functions of the three departments of government. Article III says:

The legislative power of this State shall be vested in . . . the “General Assembly of the State of South Carolina.”

Article IV states:

The supreme executive authority of this state shall be vested in a Chief Magistrate, who shall be styled “The Governor of the State of South Carolina.”

Article V specifies:

The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.

One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

*McLeod v. McInnis*, 278 S.C. at 312, 295 S.E.2d at 636.

Thus, the judicial power is vested exclusively in the Judicial Branch, and the Separation of Powers Clause precludes the General Assembly from infringing on the exclusive original

jurisdiction<sup>2</sup> of the circuit courts by empowering an officer or body of the Executive Branch to hear and decide common law and equitable claims asserted *by the State*.

Despite this prohibition, the Contract Controversy Statute purports to grant the CPO authority to resolve all variety of contract disputes between the State and a contractor. In relevant part, the statute provides:

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, **controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor**, when the subcontractor is the real party in interest, concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code.

S.C. Code Ann. § 11-35-4230 (emphasis added).

This statute appoints the CPO as the exclusive authority to hear and decide *two types* of legal claims for breach of contract, tort, and equitable relief: 1) those by private parties *against* the State under state-issued contracts; and 2) those *by the State* or its agencies against private parties under state-issued contracts.

With respect to the first category of claims – those *against* the State – such an enactment is constitutionally proper. The General Assembly may, under the Constitution, determine the circumstances under which the State may be sued<sup>3</sup>. However, when applied to the second category of claims – those *by the State* – the Contract Controversy Statute is constitutionally infirm under the Separation of Powers Clause. Apart from the limited exception expressly authorized by the

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<sup>2</sup> See discussion of the Original Jurisdiction Clause as it applies to this case at 16-17, *infra*.

<sup>3</sup> S.C. Const. art. X, § 10 and art. XVII, § 2, each provide: “The General Assembly may direct, by law, in what manner claims *against the State* may be established and adjusted.” (Emphasis added).

Constitution for claims made *against the State*, the Legislative Branch may not assign original jurisdiction over such common law and equitable claims to any entity other than the courts.

**A. This Court’s *Carolina Glass* Decision Controls in Favor of Appellants.**

In *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910), on similar facts, this Court conducted a thorough Separation of Powers Clause analysis and held: “We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the **claim of the State against the plaintiff, it is unconstitutional**, null and void.” *Id.* at 293. (emphasis added).

*Carolina Glass* holds that Separation of Powers prohibits the Legislature from enacting a law that permits a body or officer outside the Judicial Branch to hear and decide a common law claim *by the State* against a contractor and establishes that no such body or officer can have jurisdiction over such a claim.

**1. Carolina Glass Involved Claims Asserted By the State Against a Contractor, as Here.**

*Carolina Glass* involved the South Carolina Dispensary, a state-run monopoly on liquor sales in South Carolina, which operated state-wide from 1893 to 1907 and in some counties until 1916. It originated from Governor “Pitchfork Ben” Tillman’s experiment requiring all liquor sold in South Carolina to be bottled and dispensed through state-run facilities. (<https://dc.statelibrary.sc.gov/handle/10827/6646>). The system ultimately failed because it was administered by corrupt politicians who used it to strengthen their political machines and enrich their own private fortunes. (<https://southcarolina1670.wordpress.com/2012/08/21/ben-tillman-bad-governor-bad-economist/>).

The Carolina Glass Company, a private business, brought a claim *against the State* before a “State Dispensary Commission,” which the Legislature had set up to handle claims against the

State arising out of agreements with the dispensary, a state agency. The Dispensary's Board of Directors allegedly had colluded with Carolina Glass to monopolize the market and defraud the State. Thus, the appointed Commission was hearing claims that a state agency had colluded with a private contractor to cheat the State. The statute appointing the Commission gave every claimant the right of appeal to the South Carolina Supreme Court, "as in cases at law."

Carolina Glass initiated its claim before the Commission against the State for \$23,013.75 for unpaid glassware deliveries. The State counterclaimed for breach of the same contract by Carolina Glass.

The Commission found that Carolina Glass was underpaid by \$23,013.75, but it also found that Carolina Glass overcharged the State by \$51,432.99, which the Commission "set off" from the amounts due Carolina Glass. The Commission decided that *Carolina Glass owed the State* \$28,419.24.

On appeal, Carolina Glass asked the Supreme Court to enjoin the State from collecting on its "judgment" or asserting a lien on company real estate. This Court agreed with Carolina Glass.

This Court noted that the Commission had been set up initially to hear claims *against* the State, not claims *by the State*. But the Legislature soon after enacted a law that purported to grant the Commission power to hear claims asserted *by the State* in Dispensary as well. Section 7 also provided enforcement power:

The State Dispensary Commission is hereby empowered to pass all orders and judgments and do any and all things necessary to carry out the purposes of this act; and **all judgments rendered by them for any claim due the State shall be a lien on the property of the judgment debtor** situated within this State, and a transcript of said judgment shall be filed in the office of the clerk of the Court of Common Pleas in each county where any property of such judgment debtor is situated.

*Id.* at 286 (emphasis added). Carolina Glass argued that entering a judgment in favor of the State exceeded the power of the Commission under the Separation of Powers Clause. *Carolina Glass* thus addressed the same Separation of Powers issue presented in the instant case.

The Supreme Court upheld the Commission’s decision on the company’s claim *against the State* in *Carolina Glass*. But it enjoined the State from asserting or claiming any lien on the company’s property on claims *by the State* against Carolina Glass, due to the Separation of Powers Clause.

2. **The Separation of Powers Analysis in *Carolina Glass* Invalidated the Provisions of Law Allowing the Commission to Hear and Decide Claims By the State.**

The *Carolina Glass* Court noted that the State Dispensary Commission was not a court within the meaning of S.C. Const. art. V, § I, but rather a special tribunal created under the power of the Legislature and held that the Legislature cannot reserve for itself the exercise of *judicial powers*, nor can it confer “judicial powers” upon any body other than the courts provided for in art. V, § I. *Id.* at 290. It further noted that the few instances in which judicial power is vested elsewhere are provided for in the Constitution and include claims *against the State*, not claims *by the State*. The Court ruled that judicial power was vested by the people in their courts, and that any person exercising the functions of either of the other departments is forbidden to discharge those vested in the courts. *Id.* at 290-291.

The Court’s analysis below is central to the issue presented here:

The Constitution ordains (Art. I, Sec. 14) that “the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” This language is as strong as it is simple and clear. The Legislature therefore cannot assume to itself the exercise of judicial powers. *Segars v. Parrott*, 54 S.C. 1. Nor can it confer “judicial powers,” in the sense in which those words are used in the Constitution, upon any other body than the Courts mentioned and provided for in Section I, Article V, of the

Constitution, which provides that “the judicial power of this State shall be vested in” the Courts therein specifically mentioned and provided for. The few instances in which judicial power is vested elsewhere are provided for in the Constitution itself, and with these few exceptions, the whole of the element of sovereignty known as judicial power was vested by the people in their Courts, and none of it was left to be lodged elsewhere. In fact, every person exercising the functions of either of the other departments of the government are forbidden to assume or discharge those vested in the Courts. We have already seen that the Dispensary Commission is not a Court within the meaning of the judicial article of the Constitution, but is a special tribunal, created under the power of the Legislature to investigate the financial affairs of the State, and that provision of the Constitution which authorizes the Legislature to direct by law how claims *against the State* shall be established and adjusted.

It follows that **any attempt to confer upon the Commission judicial powers, except in so far as the exercise of such powers may be necessarily incident to the duty of investigating and ascertaining the truth with respect to the management of the dispensary, and the just liabilities of the State growing out of dealings with the dispensary, is violative of the Constitution.**

*Carolina Glass* at 290-91 (emphasis added). The Court elaborated:

It would not be contended for a moment that the Legislature could, even upon the fullest, fairest and most deliberate investigation, after due notice, pass a valid act declaring that a particular individual is indebted to the State in a given amount, and by legislative fiat create a lien upon his property. Such an act would not only be an unwarranted usurpation of judicial power, but would also be an infringement of the constitutional guaranty that no person shall be deprived of his property without due process of law or be denied the equal protection of the law. If, then, the Legislature itself could not pass such a judgment, it cannot confer upon a commission the power to do so. The creature cannot be greater than the creator.

*Carolina Glass* at 292.

The Court’s holding demonstrates that the Contract Controversy Statute granting an Executive Branch officer (the CPO) the power to hear and decide claims brought *by the State* is impermissible under the Separation of Powers Clause:

So long, therefore, as the action of the Commission was confined to the investigation of all dealings, past and present, with the dispensary, and the determination of the just liabilities of the State growing out of them, it was, as we have seen, based upon constitutional authority, and was valid and binding. **But we find no authority in the Constitution for the Legislature to provide by law how**

**claims of the State against others shall be established or adjusted, except through the Courts.**

*Carolina Glass* at 293 (emphasis added).<sup>4</sup>

The *Carolina Glass* Court held that “in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the claim of the State against the plaintiff, it is unconstitutional, null and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void.” *Id.*<sup>5</sup>

*Carolina Glass* controls the issue of Separation of Powers presented here – the purported creation of an administrative body to hear claims made *by the State*. It has been cited with approval in numerous decisions over the years regarding the Separation of Powers Clause, *see, e.g., Williams v. Bordon’s, Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980) (“As stated in *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391, the foregoing language ‘is as strong as it is simple and clear. The Legislature therefore cannot assume to itself the exercise of judicial powers.’”); *In re Circuit Court Rule 102*, 1982 S.C. LEXIS 483 (the Legislature cannot assume to itself exercise of judicial powers); *Blease v. Charleston & W. C. R. Co.*, 146 S.C. 496, 144 S.E. 233 (1928), and has been more recently cited in *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012) (cited

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<sup>4</sup> *Carolina Glass* also cited *Segars v. Parrott*, 54 S.C. 1, 31 S.E. 677 (1898), which held that the General Assembly could not usurp the Judicial Branch’s power to review evidence and decide whether the legal requirements to form a new county had been met: “That this was an exercise of judicial power on the part of the General Assembly is obvious, and it is equally obvious that it is in open violation of the section of the Constitution last cited.”

<sup>5</sup> Years later, the United States Supreme Court observed: “Manifestly, we think, the [South Carolina] Supreme Court affirmed the Commission’s action only in so far as it declined to approve the glass company’s claim -- there was no final determination of the State’s right to recover over against the company.” *Carolina Glass Co. v. South Carolina*, 240 U.S. 305, 311, 36 S. Ct. 293 (1916).

incorrectly as “*Carolina Glass v. Murray*” in the dissent). *Carolina Glass* has never been rejected or overruled on the point.<sup>6</sup>

The Legislature may not establish an executive agency or body to hear and decide claims for breach of contract, fraud, or in equity for recovery of damages asserted *by the State*. Any statute that purports to do so is unconstitutional, null and void. The disposition of such claims is within the exclusive province and original jurisdiction of the Judicial Branch under the South Carolina Constitution. This exclusive power of the Judicial Branch over the disposition of common law and equitable claims is sacrosanct and may not be usurped.

**3. The Availability of Limited Judicial Review Does Not Satisfy Separation of Powers Issues.**

The court below suggested that the availability of limited judicial review of CPO and Panel decisions, in an appellate capacity, for claims brought *by the State* was adequate to satisfy the Separation of Powers Clause issues. This argument fails for several reasons. First, the argument ignores S.C. Const. art. V, § 11 and art. I, § 14 in the context of claims *by the State*, instead of claims *against the State*, as discussed at 5-12, *supra*. Also, the fact that a private party is constitutionally entitled to a jury trial for common law claims asserted against it (art. I, § 14)<sup>7</sup> and that the courts have original jurisdiction<sup>8</sup> over claims at law against private parties who have never enjoyed sovereign immunity (art. V, § 11) cannot be ignored. *See infra* at 16-18. The CPO cannot

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<sup>6</sup> *Carolina Glass* has only been overruled in part on an unrelated point by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), when the Court abolished sovereign immunity, as among a long list of prior decisions that were overruled only “to the extent that they hold that an action may not be maintained against the State without its consent.” Sovereign immunity is not an issue here, in the context of claims asserted *by the State*.

<sup>7</sup> *See* discussion of the Right to a Jury Trial for claims *by the State* as it applies to this case at 17-18, *infra*.

<sup>8</sup> *See* discussion of the Original Jurisdiction Clause as it applies to this case at 16-17, *infra*.

provide a jury trial and lacks *original* jurisdiction over *claims by the State*, which is a problem that cannot be resolved by making the courts mere appellate review bodies.

Second, the Separation of Powers Clause provides that no governmental branch shall exercise the powers of another; not that each branch may usurp core powers of another branch as long as it does not fully remove all core powers of another branch. This Court's decisions on a court's management of its calendar so conclude. *See, e.g., Williams v. Bordon's, Inc.*, 274 S.C. 275, 262 S.E. 2d 881 (1980); *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012).

And as has been noted, the statute at issue in *Carolina Glass* itself contained a mechanism for appellate review by the courts that did not remedy the constitutional defect in that law. The *original* jurisdiction power of the courts provided by the South Carolina Constitution is stripped by the statute at issue with respect to the handling of claims *by the State*. The lower court's analysis would render meaningless the constitutional exception to the court's inviolate power over common law claims for "claims *by the State*." Such a reading is contrary to accepted rules of construction. The Constitution does not permit the General Assembly to remove the power of courts to hear and decide any class of traditional common law claims between any set of parties in the first instance – e.g. all torts, all contracts, all property disputes – and assign them to some "commission" to decide, so long as there is limited judicial review. There is no doubt that the framers of the Constitution maintained that the exclusive power of the Judicial Branch over the disposition of common law and equitable claims is sacrosanct and may not be usurped by another branch of the government.

**B. Unisys Failed to Consider the Separation of Powers Clause.**

The lower court denied Appellants' Motions for Reconsideration relying on *Unisys, supra*. However, *Unisys* is irrelevant to the cases before the Court.<sup>9</sup>

*Unisys* was a claim *against* the State filed in the circuit court. The statute's constitutionality as it pertains to claims *by the State* in light of the Separation of Powers Clause was never briefed, argued, or even acknowledged by the parties in that case. The *Unisys* decision similarly overlooked the Separation of Powers Clause when it stated:

The State Constitution is a limitation upon and not a grant of power to the General Assembly. "The legislative power of the General Assembly is not dependent upon specific constitutional authorization. The State Constitution only limits the legislature's plenary powers. Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitutions." **There is no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State and the legislature may provide for such actions as it sees fit.**

*Unisys* at 270 (citations omitted) (emphasis added).

However, the language on which the circuit court apparently relied is mere *dicta*. The *Unisys* Court failed to consider that the Separation of Powers Clause is, by design, the "constitutional provision limiting the Legislature's power to establish jurisdiction for actions

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<sup>9</sup> Respondents argued that Appellants had consented by contract to the jurisdiction of the CPO. (Def. South Carolina Workers' Compensation Commission's Motion to Dismiss); however, the very clause they relied on for such proposition expressly stated that "absence of jurisdiction" was reserved:

**DISPUTES (JAN 2006)**

(1) Choice-of-Forum. All disputes, claims, or controversies relating to the Agreement shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina...

The absence of jurisdiction based on the Separation of Powers Clause is exactly what is at issue here. Further, as a matter of law, subject matter jurisdiction cannot be waived. *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996).

brought *by the State*.” The words “Separation of Powers” appear nowhere in the *Unisys* Court’s opinion, and article I, § 8 is not cited.<sup>10</sup> Indeed, an examination of the Record on Appeal and the final briefs of each of the parties in *Unisys* reveals that the Separation of Powers Clause was never contemplated as a reason to invalidate S.C. Code § 11-35-4230. As a result, the Separation of Powers issue presented in the instant case was not decided by the Court in *Unisys*, and the lower court’s reliance on the *Unisys* decision was in error.<sup>11</sup>

### **III. The Contract Controversy Statute Violates Article V, Vesting Judicial Power in a Unified Judicial System, as to Claims *By the State* Against Private Parties.**

Article V specifies:

*The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.*

Article V, § 1.

The South Carolina Constitution in article V, § 11 establishes the Judicial Branch and the exclusive *original jurisdiction*<sup>12</sup> of its courts. The South Carolina Constitution explicitly bestows original jurisdiction over civil and criminal cases exclusively on the Judicial Branch:

The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts,<sup>13</sup> and shall have such appellate jurisdiction as provided by law.

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<sup>10</sup> It appears from the *headnotes* written by LEXIS and Westlaw employees that the “Separation of Powers Clause” is what should have been considered, but only their proprietary headnotes, and not the *Unisys* Court’s actual opinion, give that clause any notice. This Court has recognized that headnotes can be erroneous and misleading. *See, e.g., Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011).

<sup>11</sup> The Separation of Powers Clause, not argued by *Unisys*, prohibits the action at issue. If *Unisys* had raised Separation of Powers or cited the *Carolina Glass* decision, surely the Court would not have penned the *dicta* on which the court below erroneously relied.

<sup>12</sup> Original jurisdiction is a “court’s power to hear and decide a matter before any other court can review the matter.” *Original Jurisdiction*, Black’s Law Dictionary (11th ed. 2019).

<sup>13</sup> South Carolina’s Constitution does not allow the Legislative Branch by statute to vest exclusive or original jurisdiction in any body other than a court, with sole exception being for “claims *against the State*.” S.C. Const. art. X, § 10, art. XVII, § 2.

The singular exception to such exclusive jurisdiction pertains to “claims *against* the State” as set forth in the identical provisions of S.C. Const. art. X, § 10 and art. XVII, § 2, which provide: “The General Assembly may direct, by law, in what manner claims *against* the State may be established and adjusted.” *Id.* (Emphasis added).

The power of the Judicial Branch “can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power.” *Stern v. Marshall*, 564 U.S. 462, 483 (2011). The CPO is not an “inferior court” or even a part of the Judicial Branch. Rather, the CPO is an official of the State Fiscal Accountability Authority, a part of the Executive Branch. *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E.2d 406 (1977) (holding that the Budget and Control Board ((predecessor of the State Fiscal Accountability Authority)) under which the CPO operates, is an arm of the Executive Department of the government).

Assigning a judicial function to the CPO directly intrudes into the power of the Judicial Branch in violation of S.C. Const. art. V. For this reason, the statute in question is unconstitutional in part and must be invalidated on this basis.

#### **IV. S.C. Code Ann. § 11-35-4230 Violates S.C. Const. Art. I, § 14 (Right to Trial By Jury), on Common Law Claims Asserted *By the State Against Private Parties*.**

The South Carolina Constitution guarantees the right to a jury trial to private parties in the case of traditional common law breach of contract and tort claims seeking a monetary award:

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Const. art. I, § 14.

This constitutional guarantee “preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868. Under the common law,

legal actions for the recovery of money were triable by a jury.” *Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750 (1997) (internal citations omitted.) As a result, this Court has held that both parties are constitutionally entitled to a jury trial in actions for monetary damages in cases of breach of contract and tort. *See id*; *see also Givens v. North Augusta Electric & Improv. Co.*, 91 S.C. 417, 424, 74 S.E. 1067 (1912) (“As this is an action for damages for a breach of contract, the parties have a constitutional right to a trial by jury.”)

Because the State’s claims are common law claims of tort and breach of contract asserted against private parties, there is no issue of sovereign immunity. Private party defendants have always been subject to such suits at law with the attending right to a jury trial in such cases.

The CPO, as an officer of the Executive Branch of government, cannot provide Appellants a jury trial on the State’s claims against Appellants. Therefore, as to the claims *asserted by the State against Appellants*, the Contract Controversy Statute plainly deprives the Appellants of the constitutionally established right to a jury trial as to claims asserted *against them*, and it is therefore facially unconstitutional.

The *Unisys* Court did address the constitutional right to a jury trial, S.C. Const. art. I, § 14,<sup>14</sup> but *Unisys* is factually distinguishable: *Unisys* analyzed claims *against the State*, rather than *by the State*. It held that the right to trial by jury was inapplicable to claims *against the State, due to the State’s sovereign immunity*:

It is well-settled that art. I, § 14, secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868. **The right to a jury trial does not apply to actions against the sovereign that were not recognized in 1868.**

**At the time our constitution was adopted in 1868, the State was immune from suit on a contract. Accordingly, art. I, § 14, does not guarantee the right to a jury trial on a contract with the State.**

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<sup>14</sup> “The right of trial by jury shall be preserved inviolate....”

*Unisys* at 172 (emphasis added). This “sovereign immunity” analysis does not apply where the State is suing a private contractor.<sup>15</sup> Unlike in *Unisys*, claims brought *by the State* against private parties were matters within the original jurisdiction of the courts alone when the Constitution was adopted. The constitutional right to a jury trial in claims asserted *by the State* against a contractor must be preserved.

## CONCLUSION

The Separation of Powers Clause prohibits the Executive and Legislative Branches from exercising powers of the Judicial Branch. As recognized by this Court in *Carolina Glass*, the Constitution guarantees Appellants receive a trial of claims against them conducted before the Judicial Branch, not before an Executive Branch officer that is simultaneously the “claimant” in the case. Such a constitutionally infirm approach also deprives Appellants of their constitutional right to a jury trial. The rights of persons to have their claims adjudicated by a member of the Judicial Branch bestowed by the Constitution with original jurisdiction (rather than by an employee of the “claimant”) is sacrosanct and cannot be infringed.

Respondents rely on *dicta* from *Unisys*, a case that is easily distinguishable on the facts and legal analysis. *Unisys* did not hold that the Separation of Powers Clause allowed the CPO to hear and decide “claims *by the State*.” *Unisys* analyzed and decided different, factually distinguishable arguments and did not consider the Separation of Powers Clause. In *Unisys*, the Court made no decision on the constitutionality of S.C. Code Ann. § 11-35-4230 under S.C. Const.

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<sup>15</sup> While the *Unisys* court mentions that the statute at hand goes beyond “claims *against the State*” and includes “claims *by the State*,” its discussion lacks any analysis of the Separation of Powers Clause, as set forth *supra*.

art. V, § 11 (original jurisdiction of the courts) and art. I, § 14 (right to jury trial) in view of a claim *by the State*, again making *Unisys* distinguishable.

For the foregoing reasons, Appellants respectfully request that this Court affirm its holding in *Carolina Glass* and invalidate the Contract Controversy Statute to the extent it purports to allow the CPO to hear and decide claims at law and in equity asserted *by the State* for recovery of monetary damages against private parties. Such claims are within the sole province and original jurisdiction of the Judicial Branch.

For all these reasons, Appellants pray the Court for declaratory judgment.

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October 4, 2023