

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Nov 21 2023**

**S.C. SUPREME COURT**

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-001657

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman,  
Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson,  
Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman,  
Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all  
others similarly situated ..... Petitioners,

v.

South Carolina Education Lottery Commission d/b/a South Carolina  
Education Lottery, and Intralot, Inc. .... Respondents.

**RESPONDENT SOUTH CAROLINA EDUCATION LOTTERY COMMISSION’S  
RETURN TO THE PETITION FOR CERTIORARI**

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TABLE OF CONTENTS

**INTRODUCTION** .....1

**COUNTER-STATEMENT OF THE CASE** .....2

**STANDARD OF REVIEW** .....6

**ARGUMENT**.....6

**I. The Court of Appeals Properly Applied the Law In Affirming the Trial Court’s Judgment.**.....6

**A. Petitioners Have Not and Cannot Demonstrate That the Trial Court Improperly Relied on Facts Not Contained Within the Pleadings.**.....6

**B. The Court of Appeals Followed the Law in Rejecting Petitioners’ Arguments that the Administrative Procedures Do Not Apply to Their Equitable and Tort Claims.**.....8

**C. The Court of Appeals Did Not Err in Finding That Petitioners’ Putative Class Action Claims Do Not Preclude Them from Exhausting Their Administrative Remedies.** .....9

**D. The Court of Appeals Correctly Found the Administrative Grievance Procedure Applied to Petitioners’ Claims.** .....12

**E. Petitioners’ Contention that There Was No Board Decision Prior To the Filing of The Complaint Does Not Excuse the Exhaustion Requirement.**.....14

**F. The Court of Appeals Correctly Concluded the Administrative Process Would Not be Futile.** .....15

**G. The Commission’s Administrative Finding that Tickets Were Issued in Error Does Not Moot the Requirements for Exhaustion of Administrative Remedies.** .....16

**II. The Court of Appeals Correctly Found Petitioners’ Argument Regarding the Submission of Materials Outside the Pleadings Was Not Preserved.** .....17

**CONCLUSION** .....20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bautista v. Cnty. of Yolo</i> , No. C039340, 2003 WL 22969353 (Cal. Ct. App.—3d Dist. 2003) .....	11
<i>Brackenbrook N. Charleston, LP v. Cnty. of Charleston</i> , 360 S.C. 390, 602 S.E.2d 39 (2004) .....	9, 10
<i>Brown v. James</i> , 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010).....	15
<i>Catawba Indian Tribe of S.C. v. State</i> , 372 S.C. 519, 642 S.E.2d 751 (2007) .....	11
<i>Cox v. Cox</i> , 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986).....	19
<i>Holman v. S.C. Educ. Lottery Comm'n</i> , 441 S.C. 18, 891 S.E.2d 701 (Ct. App. 2023).....	6
<i>Hyde v. South Carolina Dept. of Mental Health</i> , 314 S.C. 207, 442 S.E.2d 582 (1994) .....	14
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E. 2d 716 (2000) .....	18
<i>Law v. S.C. Dep't of Corr.</i> , 368 S.C. 424, 629 S.E.2d 642 (2006) .....	16
<i>Lopez v. Civil Serv. Comm'n</i> , 232 Cal. App.3d 307 (Cal. Ct. App.—1st Div. 1991).....	11
<i>Morton v. Superior Court</i> , 9 Cal. App. 3d 977 .....	11
<i>Roche v. South Carolina Alcoholic Beverage Control Comm'n</i> , 263 S.C. 451, 211 S.E.2d 243 (1975) .....	18
<i>Rose v. City of Hayward</i> , 126 Cal. App. 3d 926 (Cal. App. 1981).....	11
<i>Stanton v. Town of Pawleys Island</i> , 309 S.C. 126, 420 S.E.2d 502 (1992) .....	16

<i>Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. Of Trs,</i> 400 S.C. 478, 735 S.E.2d 492 (2012) .....	14
<i>Thomas Sand Co. v. Colonial Pipeline Co.,</i> 349 S.C. , 632 S.E.2d 864 (2007) .....	8
<i>Thorn v. Jefferson County,</i> 375 So.2d 780 (Ala. 1979) .....	12
<i>Toussaint v. Knight,</i> 2021 WL 2635887 (D.S.C. June 4, 2021).....	17
<i>Video Gaming Consultants, Inc. v. S.C. Dept. of Rev.,</i> 342 S.C. 34, 535 S.E.2d 624 (2000) .....	15
<i>Ward v. State,</i> 343 S.C. 14, 538 S.E.2d 245 (2000) .....	14
<i>Wilder Corp.,</i> 330 S.C., 497 S.E.2d.....	8, 9, 17, 18

**Rules**

S.C. R. Civ. P. 12(b)(1).....	4
S.C. R. Civ. P. 12(b)(3).....	4
S.C. R. Civ. P. 12(b)(6).....	4
S.C. R. Civ. P. 23 .....	9
S.C. App. Ct. R 242 .....	6

**Statutes**

S.C. Code Ann. § 59-150-10 to -410 .....	4
S.C. Code Ann. § 59-150-60.....	4, 11
S.C. Code Ann. § 59-150-70(D) .....	4, 11
S.C. Code Ann. § 59-150-90(A) .....	4, 11
S.C. Code Ann. § 59-150-230.....	4, 8, 11, 13
S.C. Code Ann. §§ 59-150-240(C) .....	4, 11, 13
S.C. Code Ann. § 59-150-300.....	4, 8, 11

S.C. Code of Reg. § 44-70(E)–(F) ..... 4

S.C. Code of Reg. § 44-70(F) ..... 4, 13

**Other Authorities**

Jean H. Toal *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA  
75 (2d ed. 2002) .....6

## **INTRODUCTION**

This Court should deny the Petition for a Writ of Certiorari as none of the factors exist from Rule 242, SCACR to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no constitutional issues, no conflict with the United States Supreme Court on any question of federal law, and contrary to Petitioners' assertion, there is no conflict with this Court's precedents. In an attempt to make this matter appear worthy of certiorari, Petitioners assert two erroneous arguments. First, they argue that procedural objections they never made to the trial court (regarding the Lottery Commission's submission of material outside the pleadings) were, in fact, somehow preserved for appellate review, and that the Court of Appeals erred by concluding otherwise. Second, they contend that the Court of Appeals wrongly concluded that their claims are subject to the settled principle that a grieved party must first exhaust its administrative remedies before filing a lawsuit.

Both of Petitioners' arguments are incorrect. The Court of Appeals correctly affirmed the lower court in ruling that Petitioners were required to exhaust their administrative remedies before their claims could properly be heard in the courts, and correctly determined that Petitioners failed to preserve the arguments they now assert in their Petition. Petitioners have failed to demonstrate (or even plausibly argue) that the Court of Appeals ruled contrary to this Court's precedents, and this Court should deny the Petition for Certiorari.

## **COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW**

1. Is the Court of Appeals' opinion consistent with and did it correctly apply this Court's precedents that where there is an adequate administrative remedy, a grieved party must exhaust their administrative remedy before the lawsuit is ripe for judicial disposition?
2. Is the Court of Appeals' opinion consistent with the settled principles that for an issue to be considered on appeal, it must first be raised to and ruled upon by the trial judge?

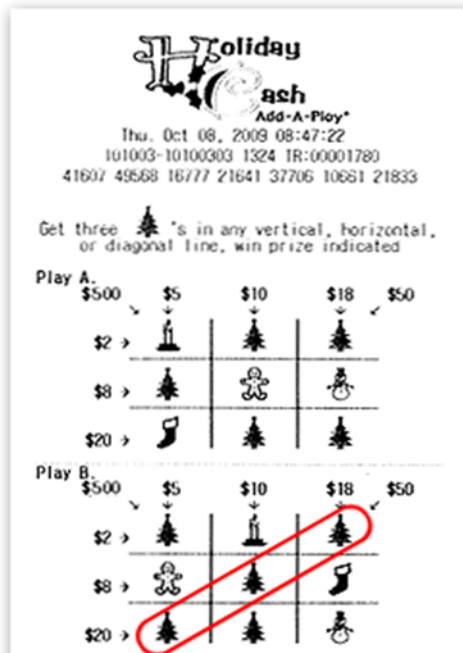
## COUNTER-STATEMENT OF THE CASE

Petitioners commenced this action on February 1, 2018 by filing their Summons and Putative Class Action Complaint against Respondent South Carolina Education Lottery Commission (the “Commission” or “SCELC”) alleging Unjust Enrichment, Breach of Contract, Breach of Implied Contract, Promissory Estoppel, and violations of South Carolina Unfair Trade Practices Act.<sup>1</sup> *See generally* Compl. (R. pp. 031–040). Petitioners’ claims all arise from their allegation that they were not issued cash prizes that they argue should be paid from a \$1-per-play Holiday Cash Add-A-Play terminal-generated instant game (the “Holiday Cash Add-A-Play Game”). *Id.* at 20–23 (R. pp. 35–36 ¶ 20–23).

Specifically, in the Holiday Cash Add-A-Play Game, when a player purchased a Pick 3, Pick 4, or Palmetto Cash 5 ticket, he or she had the option to also purchase up to five Add-A-Play® plays for \$1 each. *Id.* The lottery terminal would then generate and dispense the Add-A-Play® ticket(s) to the player, who would know instantly whether he or she won. Each play consisted of a three-by-three grid printed on the ticket in which a different holiday-themed symbol—*i.e.*, a candle, Christmas tree, snowman, etc.—appeared in each of the nine spaces on the grid. *Id.* On a properly issued ticket, a player would win if three Christmas tree images appeared on the ticket in a vertical, horizontal, or diagonal line (similar to the classic children’s game of tic-tac-toe):

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<sup>1</sup> Petitioners later conceded the claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq., against both Respondents failed and consented to dismissal of those claims. *See* Hearing Tr. at 16:15–16 (R. p. 205, lines 15–16).



*Id.* at 6 (R. p. 069).

The odds of winning ranged from 1-in-6 (for a ticket winning \$2) to 1-in-4,800 (for a ticket winning \$500). *Id.* Those odds were dramatically altered for a two-hour period on Christmas Day 2017, when tickets were printed by the system with all nine symbols as Christmas tree images, a combination that should not exist under the game rules. The Commission suspended the Holiday Cash Add-A-Play Game about two hours later, after receiving reports of unusual activity regarding the game.<sup>2</sup> *Id.* at 21 (R. p. 036).

Petitioners later amended their Complaint on May 29, 2018 to add the terminal generated ticket vendor, Intralot, Inc (“Intralot”), as a party-defendant. *See generally* Am. Compl. (R. pp. 043–053). The Amended Complaint also asserted additional Negligence and Gross Negligence claims against Intralot. *See* Am. Compl. at ¶ 55-58 (R. pp. 051–052 ¶¶ 55–58).

<sup>2</sup> As part of the Commission’s investigation into the wrongfully issued tickets, it engaged a forensic consulting firm—Gaming Laboratories International—to investigate the incident. *See* SCCL’s Mot. for Reconsideration at 2 and Ex. B (R. p. 110, pp. 124 - 173).

Prior to Petitioners amending their Complaint, the Commission moved to dismiss the ticket holders' suit pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6), SCRCF, because their claims (and those of the putative class) were barred by their failure to exhaust administrative remedies, failure to assert claims upon which relief could be granted, filing suit in the wrong venue, and the doctrines of ripeness and sovereign immunity. *See* SCEL's Mot. to Dismiss (filed April 10, 2018) (R. pp. 061–062); SCEL's Memo. in Supp. (R. pp. 064–082). The Commission contended that under the South Carolina Education Lottery Act (the "Lottery Act"), Petitioners were obligated to submit a formal written complaint to the SCEL executive director prior to initiating their legal action.<sup>3</sup> *Id.* at 10-11. (R. pp. 073–074). The administrative process created pursuant to statute also provided that, in the event of an adverse decision, the claimant would pursue an appeal, first to the SCEL board, and if needed, escalate the appeal to the administrative law court ("ALC"). *Id.* Because Petitioners had failed to do so, or allege that they had done so, their lawsuit was premature.<sup>4</sup> *Id.* Intralot filed its Motion to Dismiss and supporting memorandum on July 17, 2018. *See* Intralot's Motion and Memo (R. pp. 084–097). Petitioners filed an opposition to the Commission's motion to dismiss, *see* Memo in Opp. (R. pp. 098–108), and the

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<sup>3</sup> The Lottery Act was enacted to establish and govern the operation of a state lottery. *See* S.C. Code Ann. §§ 59-150-10 to -410. The Commission and the Board are tasked with promulgating regulations and adopting policies and procedures to organize, operate, and regulate the conduct of lottery games. *Id.* §§ 59-150-50 and -60. The Lottery Act and the regulations and procedures of the Commission mandate in detail the process by which a person dissatisfied with the Commission's actions may challenge those acts. *See* S.C. Code Ann. § 59-150-300; S.C. Code of Regulations § 44-70(E)–(F); SCEL Ticket Holder Complaint Procedure, Dec. 29, 2004, available at <https://www.sceducationlottery.com/documents/ComplaintProcedures.pdf> (last visited November 21, 2023).

<sup>4</sup> Petitioners initiated an administrative grievance process by requesting payment of the Holiday Cash Add-A-Play Game tickets after Respondents filed their respective motions to dismiss. *See* Hearing Tr. at 5:6–8 and 13:19–14:1 (R. p. 194, lines 6–8 and R. pp. 202–203, lines 19–1); *see also* SCEL's Mot. for Reconsideration, Ex. A (R. pp. 121–123).

trial court heard arguments on the motions to dismiss on July 30, 2018. *See generally* Hearing Tr. (R. pp. 190–213).

At the hearing, Petitioners raised several new arguments, including that exhausting their administrative remedies would be futile. *See* Hearing Tr. 13-14 (R. pp. 202–203). To support its argument, Petitioners put forth information regarding Gaming Laboratories International’s investigation report and the letters between the ticket holders and the Commission seeking and declining payment of the tickets. *See id.*; Memo in Opp. 5-6 (R. pp. 102–103).

On January 4, 2019, the trial court filed orders denying Respondents’ motions to dismiss. *See* Order Den. SCCEL’s Mot. to Dismiss (R. pp. 015–021); Order Den. Intralot’s Mot. to Dismiss (R. pp. 022–030). On January 14, 2019, Respondents filed their motions to reconsider, alter, or amend the trial court’s ruling, including as exhibits the Gaming Laboratories International report and letters that Petitioners discussed and alluded to at the hearing as well as some letters discussed by Petitioner’s counsel at the hearing. *See* SCCEL’s Mot. to Reconsider, Alter, or Amend (R. pp. 109–119); Intralot’s Mot. to Reconsider, Alter, or Amend (R. pp. 182–189). On February 25, 2019, the trial court granted Respondents’ motion to alter or amend and granted their prior motion to dismiss, ruling the ticket holders had not exhausted their administrative remedies (the “Orders”). *See* Order (R. pp. 001–014). The ticket holders appealed the Orders. *See* Notice of Appeal (March 25, 2019).<sup>5</sup>

The South Carolina Court of Appeals affirmed the Orders, agreeing that Petitioners were not relieved of the requirement to exhaust their administrative remedies. *See Holman v. South Carolina Education Lottery Commission*, Op. No. 6013 at 13 (S.C. Ct. App. Filed August 9,

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<sup>5</sup> Petitioners failed to submit an Appendix with their Petition for Certiorari which would have included the materials filed with the Court of Appeals and subsequent filings. The Notice of Appeal may be found in the South Carolina Court of Appeals’ files or on C-Track, or the Commission can furnish a copy to the court upon request.

2023).<sup>6</sup> Petitioners filed their Petition for Rehearing on August 24, 2023, and the Commission subsequently filed its Return. *See* Pet. for Reh’g; Return to Pet. for Reh’g.<sup>7</sup> The Court of Appeals denied the Petition for Rehearing, finding that no material fact or principle of law had been overlooked or disregarded to justify a rehearing. *See* Order Den. Pet. for Reh’g. Petitioners filed their Petition for a Writ of Certiorari on October 25, 2023.

### **STANDARD OF REVIEW**

This Court reviews a Petition for a Writ of Certiorari under the standard established in Rule 242, SCACR. A Petition “will be granted only where there are special and important reasons” such as the five enumerated in the rule, *e.g.*, a novel question of law, a dissenting opinion at the Court of Appeals, where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, a substantial constitutional issue, or a conflict with the United States Supreme Court on any question of federal law. *See* Rule 242(b), SCACR. At the certiorari petition stage, the question before this Court is not whether the lower court erred but whether there is a “special and important reason” to grant the petition. *See* Rule 242, SCACR; *see also* Jean H. Toal et al., *Appellate Practice in South Carolina*, 12 (2d ed. 2002) (“The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.”).

### **ARGUMENT**

#### **I. The Court of Appeals Properly Applied the Law In Affirming the Trial Court’s Judgment.**

##### **A. Petitioners Have Not and Cannot Demonstrate That the Trial Court Improperly Relied on Facts Not Contained Within the Pleadings.**

Petitioners contend—without support—that the trial court improperly considered

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<sup>6</sup> The case is also available at *Holman v. S.C. Educ. Lottery Comm’n*, 441 S.C. 18, 26, 891 S.E.2d 701, 705 (Ct. App. 2023), *reh’g denied* (Sept. 22, 2023).

<sup>7</sup> *See* note 5, *supra* (regarding citations to materials filed to or by the Court of Appeals in this proceeding).

new evidence submitted by the Commission in its motion to alter or amend. In support of this argument, Petitioners cite only to the trial court's acknowledgment, in its initial order, that both parties referred to matters outside the pleadings in their respective memoranda. Petitioners fail to explain how that fact demonstrates error or how the fact that both parties referenced materials outside the pleadings converted the Commission's motion to dismiss into a motion for summary judgment.

More damning still, Petitioners fail to cite an instance where the trial court states it is adopting and relying on any such information to reach its ruling. The February 25, 2019 Order from which the appeal was taken references GLI's report only in the "Factual and Procedural Background" to note the Commission's reason for its decision not to pay the tickets. *See* Order at 2 (R. pp. 001–002). The trial court did not accept the truth of GLI's conclusion, nor did it make any finding that the tickets were issued or printed in error. At most, the trial court noted that the *Commission* had made such a determination, *see* Order at 2, 4 (R. pp. 002, 004), but the trial court did not itself make such a finding, nor was its ruling based on that fact. Instead, the Orders rested on (i) the trial court's conclusion that a ticket holder seeking payment of his ticket must exhaust his administrative remedies (including an appeal to the ALC) before seeking judicial relief, *see* Order at 2-3 (R. pp. 002–003), (ii) that Petitioners had not alleged they had exhausted administrative remedies, *see* Order at 2 (R. p. 2), and (iii) the conclusion that their failure was not excused, *see* Order at 3-6 (R. pp. 003–006). The justification the Commission gave for denying payment of a ticket (and the question of whether that justification was a good one) did not and does not affect whether exhaustion is required. The trial court's ruling rested on the exhaustion requirement, not the supposedly "new" evidence.

Petitioners' argument regarding the additional materials outside the pleadings is

unsupported and unconvincing. It fails to present a “special and important reason” to grant the petition.

**B. The Court of Appeals Followed the Law in Rejecting Petitioners’ Arguments that the Administrative Procedures Do Not Apply to Their Equitable and Tort Claims.**

Petitioners assert the trial court erred in finding that the administrative procedures applied to their equitable and tort claims. Most of Petitioners’ argument relies on *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 498, 632 S.E.2d 864 (2007), in which the holding is concerned specifically with actions against third parties. The Commission is not a third party and, thus, not impacted by the reasoning of the *Thomas Sand Co.* case.

Petitioners go on to argue that their equitable claims are not based on a statutory violation for which the legislature mandates the pursuit of administrative remedy. However, these claims seek payment of a challenge the Commission’s actions in exercising its obligations under S.C. Code Ann. § 59-150-230(C) to implement procedures to verify the validity of lottery tickets claimed to win a prize. This is exactly the type of ticket holder grievance encompassed by and envisioned in the scope of the administrative process created in S.C. Code Ann. § 59-150-300.

The Court of Appeals also correctly noted that Petitioners failed to raise argument regarding the application of the administrative process to these claims in their memorandum in opposition to the Commission’s motion to dismiss, nor did they subsequently file a Rule 59(e) motion raising these arguments. *See Op. No. 6013* at 8. Petitioners do not, nor can they, point to an instance in which this argument was raised and addressed by the circuit court. Thus, Petitioners’ argument is not preserved for appellate review, and the Petition for Writ should be denied. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (“It is axiomatic that an issue cannot be raised for the first time

on appeal but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.”).

**C. The Court of Appeals Did Not Err in Finding That Petitioners’ Putative Class Action Claims Do Not Preclude Them from Exhausting Their Administrative Remedies.**

Petitioners rely on out-of-state authority to argue that because they asserted putative class action claims, they are relieved or excused from the exhaustion requirement. Specifically, Petitioners argue that it would be both futile and counter to Rule 23, SCRPC, to require a claimed large number of ticketholders to exhaust their administrative remedies individually. Petitioners also argue that plaintiffs in a class action suit need not exhaust their administrative remedies prior to instituting judicial proceedings when the administrative remedies available to plaintiffs do not provide for class relief. The Court of Appeals concluded that Petitioners’ assertion that there are thousands of potential plaintiffs was speculative, and, further, that Petitioners’ argument was contrary to this Court’s precedent. The Court of Appeals was correct.

This Court has previously held that plaintiffs in a putative class action were required to exhaust their administrative remedies prior to filing suit. In *Brackenbrook N. Charleston, LP v. Cnty. of Charleston*, 360 S.C. 390, 602 S.E.2d 39 (2004), a group of taxpayers brought a putative class action seeking certain relief against the County. The trial court certified a class and held the members were not required to exhaust their administrative remedies. This Court reversed, holding the taxpayers—despite having asserted class claims—were nevertheless required to exhaust their administrative remedies. *Brackenbrook*, 360 S.C. at 401, 602 S.E.2d at 45 (“The circuit court orders are reversed. . . County shall, within thirty days of this opinion, give written notice to all taxpayers within the class certified by the circuit court, other than those who have already

initiated administrative refund requests, of their right to seek an administrative refund, and of the date by which the refund request must be initiated.”).

Moreover, Petitioners’ policy argument—that requiring potentially “tens of thousands” of individuals to exhaust their remedies would be unduly burdensome—is conjectural. Even assuming each of those hypothetical individuals initiated and exhausted his administrative remedies, Petitioners have provided no reason to think that their individual exhaustion of their remedies would overwhelm the process. And even if there were, that is an insufficient basis upon which to ignore or rewrite what the law requires. The statutes and regulations at issue require exhaustion and provide an adequate administrative process for ticketholders who dispute the Commission’s decisions. The statute provides no exception to this rule merely because multiple people dispute a decision. Neither this Court (nor the Court of Appeals) can infer a meaning different from that expressed by the legislature or imply exceptions where the General Assembly provided none:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. If a statute’s language is plain, unambiguous, and conveys a clear meaning, then “the rules of statutory interpretation are not needed, and ***the court has no right to impose another meaning.***” The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.

*Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 525–26, 642 S.E.2d 751, 754 (2007) (emphasis added; citations omitted).

The legislature’s intent is plainly and unequivocally expressed. Only after an aggrieved ticket holder exhausts the entirety of the administrative process—up to and including an appeal to the ALC—may they seek judicial relief. *See* S.C. Code Ann. § 59-150-300; *see also id.* at §§ 59-150-60, -70(D), -90(A), -230(A), and -240(C). Allowing a

plaintiff to circumvent this administrative process simply by asserting a class claim would ignore the legislature's judgment, flout the legislature's intent, and create an exception where the statute provides none.

Lastly, even the out-of-state cases on which Petitioners rely do not, in fact, support their argument. For example, they rely on *Rose v. City of Hayward*, 126 Cal. App. 3d 926 (Cal. App. 1981) for the proposition that plaintiffs in a class action need not exhaust their administrative remedies when those remedies do not provide for class relief. But not even California's courts apply *Rose* in actions that, like this one, seek damages. Rather, subsequent California appellate court decisions have limited *Rose* to its specific facts and held exhaustion was required before a class of plaintiffs could bring an action for damages. *See Lopez v. Civil Serv. Comm'n*, 232 Cal. App.3d 307, 312 (Cal. Ct. App.—1st Div. 1991) (“The mere bringing of a class action is not ipso facto an exception to the exhaustion requirement. . . . *Morton v. Superior Court*, 9 Cal. App. 3d 977 dispels any notion that class actions are *per se* exempt from the exhaustion requirement.”); *Bautista v. Cnty. of Yolo*, No. C039340, 2003 WL 22969353, at \*4 (Cal. Ct. App.—3d Dist. 2003) (affirming dismissal of suit and noting that “*Rose* is of no help to plaintiffs” because “*Rose* arose in the context of a writ challenge to a PERS ruling, not a complaint for damages”).

Petitioners' reliance on *Thorn v. Jefferson County*, 375 So.2d 780 (Ala. 1979) fares no better. The ruling in *Thorn* that the taxpayers could sue without first going through the process of requesting a tax refund was not based on the fact that the taxpayers filed a putative class action. Instead, the ruling in *Thorn* was based on the nature of the taxpayers' claim, namely that the County's collection of ad valorem taxes “was void and illegal.” *See Thorn*, 375 So.2d at 788 (“[T]axpayers contend they did not have to pursue that statutory remedy because they claimed that the assessment was void and illegal. We agree with the

taxpayers. . . . [T]he statutory procedure for refund of taxes does not apply where the assessment complained of is void and illegal.”). Accordingly, even if *Thorn* were controlling in South Carolina (and it is not), it addresses an entirely different question than the one before this Court. Petitioners have not alleged that the Lottery Act or the sale of Holiday Cash Add-A-Play Game tickets is “void and illegal,” and thus, the sole factor supporting the *Thorn* court’s ruling is not present here.

South Carolina law rejects Petitioners’ argument that they should be excused from the requirement that they exhaust their administrative remedies and none of the out-of-jurisdiction cases they cite compel or permit a different result. The Court of Appeals correctly affirmed the trial court’s ruling that Petitioners’ failure to exhaust was not excused and thus warranted dismissal. The Court of Appeals appropriately adhered to the precedent set by this Court, and as a result, the petition for a writ should be rejected.

**D. The Court of Appeals Correctly Found the Administrative Grievance Procedure Applied to Petitioners’ Claims.**

In their initial appeal, Petitioners argued (as they do here) that because they did not allege the tickets were “printed in error,”<sup>8</sup> they are not subject to the Lottery Act and the grievance procedures promulgated thereunder. Thus, Petitioners conclude, they cannot be required to exhaust the administrative procedures available to them. The Court of Appeals disagreed and correctly found that the Petitioners’ argument misconstrues the Lottery Act.

Section 59-150-230(C) of the Lottery Act provides that the Commission “shall promulgate regulations and adopt policies and procedures to establish a system of

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<sup>8</sup> The Lottery Act, in Section § 59-150-230(C)(3), specifies circumstances in which the Commission is statutorily prohibited from paying a prize, including that “a prize must not be paid if it arises from claimed lottery game tickets that are . . . produced or issued in error. . . .” S.C. Code Ann. § 59-150-230(C)(3)(a). The Petitioner’s argument essentially is that the administrative process only applies to a claim if the Petitioner expressly alleges that one of the statutory prohibitions applies.

verifying the validity of lottery games tickets or shares claimed to win prizes and to effect payment of prizes” and shall “supervise lottery game ticket or share validation and lottery drawings.” S.C. Code Ann. § 59-150-230(A)(3) and -240(C). The Lottery Act and the regulations and procedures of the Commission direct in detail the process by which a person dissatisfied with the Commission’s actions may challenge those acts. Specifically, a ticket holder aggrieved by a decision or action by the or its agents Commission (including but not limited to the decision of whether a ticketholder has a valid or winning ticket) and who was unable to resolve that dispute after discussions with Commission staff must formally seek redress from the Commission. *See* SCEL Complaint Procedure ¶ A. The Commission’s decision must be delivered to the player in writing, must explain the basis for the decision, and must inform the player of his right to an intra-agency appeal or an appeal to the ALC. *See id.* ¶¶ L–P; *see also* S.C. Code of Regulations § 44-70(F). If the player is unhappy with the Commission’s final resolution of the matter, the player may appeal that decision to the ALC, and, if unhappy with the ALC’s decision, may then—and only then—seek review by the Circuit Courts.

The procedure outlined above does not apply only to one narrow variety of grievances; it applies to any grievance a ticket holder may have related to or arising from the administration and operation of lottery games, including the issuance and payment (or nonpayment) of tickets. The Petitioner wants to pretend that the exhaustion requirement, can only to tickets printed or issued in error. The law does not state that; the Commission never argued that; the trial court did not conclude that; and the Court of Appeals correctly rejected such a reading of exhaustion doctrine.

This court has held that “the doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience, and discretion, rather than one of law,

and is not jurisdictional.” *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. Of Trs*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (quoting *Ward v. State*, 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000)). Where an adequate administrative remedy is available to determine a question of fact, a grieved party must pursue that remedy or be precluded from seeking relief in the courts. *Hyde v. South Carolina Dept. of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). This Court held, “[T]he circuit court must have a solid basis for excusing the failure to exhaust administrative relief.” *Id.*

There is no basis on which to excuse Petitioners’ failure to exhaust their administrative remedies. Despite Petitioners’ argument to the contrary, the grievance procedure encompasses any complaint pertaining to the administration and operations of the lottery games. Therefore, the grievance procedure applies to and is designed to address Petitioners’ complaints and any questions of fact. The trial court and Court of Appeals rightly reached the same conclusion.

**E. Petitioners’ Contention that There Was No Board Decision Prior To the Filing of The Complaint Does Not Excuse the Exhaustion Requirement.**

Petitioners acknowledge that the Lottery Act sets forth a statutory scheme for grieving a Board decision but argue no Board decision existed prior to filing their Complaint or Amended Complaint. Petitioners are correct that at the time of the filing of their Complaint and Amended Complaint, the Commission had not issued a final determination regarding the validity of the ticket. However, the Board had suspended the Holiday Cash Add-A-Play Game and withheld payments of disputed tickets until it could investigate the cause of the issues. The suspension of the Holiday Cash Add-A-Play Game and decision to withhold payments of disputed tickets are Board decisions that the Petitioners allege caused them harm. These are Board decisions that require resort to the

administrative process.

Petitioners posit that because there was no final Board decision on the validity of the tickets at the time the suit was filed, Petitioners were not required to exhaust the administrative process. Not only do Petitioners misunderstand the administrative process, but Petitioners' reasoning is illogical. The fact that there was no final Board decision on the validity of tickets at the time Petitioners filed their Complaint is because Petitioners failed to initiate the grievance procedure before filing their lawsuit. The argument that Petitioners failed to exhaust their administrative remedies bears directly on the prematurity of Petitioners' claims. *Video Gaming Consultants, Inc. v. S.C. Dept. of Rev.*, 342 S.C. 34, 38, 535 S.E.2d 624, 644-45 (2000). Thus, this argument was properly rejected, and Petitioners' petition for writ should be denied.

**F. The Court of Appeals Correctly Concluded the Administrative Process Would Not be Futile.**

The well-established general rule in South Carolina is that the administrative remedies must be exhausted before bringing suit. *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010). And although South Carolina recognizes an exception when exhaustion would be futile, the “[f]utility . . . must be demonstrated by a showing comparable to the administrative agency taking ‘a *hard and fast position* that makes an adverse ruling *a certainty*.’” *Id.* (quoting *Law v. S.C. Dep’t of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (emphasis added); see also *Stanton v. Town of Pawleys Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (holding the party seeking to avoid the exhaustion requirement has the burden of showing “that as a matter of law he was not required to exhaust administrative remedies or that the [circuit court]’s ruling was based upon facts for which there is no evidentiary support”).

Here, the Court of Appeals correctly concluded exhausting administrative remedies

would not be futile because the evidence fails to show the Commission had taken a hard and fast position on Petitioners' claims. Petitioners' argument relies only on the Commission's initial denial of their complaint and a press release stating relief would be limited to the purchase price of the Holiday Cash Add-A-Play Game ticket. Receiving an unfavorable decision at the outset of the grievance process does not demonstrate that engaging in the administrative process would be futile and that the administrative remedies would be inadequate. If it did, the exception would swallow the rule, since there is always the possibility (and often the actuality) of receiving an unfavorable result at the outset of the administrative process. That's the whole point of requiring "exhaustion," not mere "initiation" of administrative remedies. That's certainly true here, where Petitioners have not credibly alleged the entire process would be futile, have never challenged the impartiality of the Administrative Law Judge Division, and have not challenged the authority of the Administrative Law Judge to reverse the Commission's findings if they were in error. Therefore, Petitioners have not demonstrated as a matter of law that exhausting their administrative remedies would be futile.

**G. The Commission's Administrative Finding that Tickets Were Issued in Error Does Not Moot the Requirements for Exhaustion of Administrative Remedies.**

Petitioners argue that the Commission's administrative remedy argument is moot for three reasons: (1) the dispute is a matter of statutory construction and thus excepted from the exhaustion requirement; (2) Petitioners initiated the administrative review and received an adverse decision; and (3) the Commission has essentially taken a "hard and fast" position to only issue a refund of the purchase price of the Holiday Cash Add-A-Play Game ticket. The last two arguments merely repackage Petitioners' futility argument above, and for the reasons stated above, these arguments must fail. The Petitioners' failure

to complete the administrative process and appeal any initial adverse ruling renders Petitioners' action premature.

The first argument fares no better. The fact that the Commission follows the process outlined in the Lottery Act is not the same as engaging in "statutory construction." Petitioners do not identify any supposedly misinterpreted provision; they simply take issue with the Commission *carrying out* the procedures specified in the statute. *See Toussaint v. Knight*, 2021 WL 2635887, at \*4 (D.S.C. June 4, 2021), *report and recommendation adopted*, 2021 WL 2635479 (D.S.C. June 25, 2021) (rejecting plaintiff's argument that the failure to exhaust administrative remedies should be excused due to the "statutory construction" allegedly involved in the challenged procedure, and concluding that the argument was "without merit" because petitioner failed to identify any issue of statutory construction and, instead, simply asked the court to order he be awarded additional credit time to his imprisonment sentence).

Furthermore, in addition to the fact that Petitioners' "statutory construction" argument is substantively wrong, the Court of Appeals correctly held it is also unpreserved. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."). Petitioners have not cited anywhere in the record at which point Petitioners raised its statutory construction argument to the trial court judge, nor do Petitioners dispute the Court of Appeals finding that the argument is not preserved for appellate review. Accordingly, Petitioners have not demonstrated there is a special and important reason to grant their petition.

## **II. The Court of Appeals Correctly Found Petitioners' Argument Regarding the Submission of Materials Outside the Pleadings Was Not Preserved.**

It is axiomatic that for an issue to be considered on appeal, it "must have been

raised to and ruled upon by the trial judge.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The purpose of the “preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E. 2d 716, 724 (2000) (citing *Roche v. South Carolina Alcoholic Beverage Control Comm’n*, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975)) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant’s contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). Therefore, “[t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.” *I’On*, 338 S.C. at 422, 526 S.E.2d at 724. “This principle underlies the long-established preservation requirement that the losing party generally must **both** present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” *Id.* (emphasis added). Moreover, when the appellant presents any objection to raise the issue, it “must be sufficiently specific to inform the trial court of the point being urged by the objector.” *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

Petitioners argue that they have preserved their procedural argument regarding the submission of materials outside the pleadings. The Court of Appeals correctly found that Petitioners never raised this argument to the circuit court in response to Respondents’ motions to reconsider, alter or amend and failed to file a Rule 59(e) motion in response to the Order. *See* Op. No. 6013 at 8. Nothing in the Petition for Writ demonstrates, or even asserts, that Appellants made any objection related to the trial court’s review of information beyond the pleadings, much less an objection that meets the specificity requirements of the law. Petitioners do not present any record citation at which Petitioners objected or argued to the trial court that it should not

consider the information or materials regarding the Gaming Laboratories International report and the letters between the ticket holders and the Commission. In fact, these documents and information were first argued by *Petitioners themselves* in their filings as a basis to support their assertion that the administrative process would be futile. See Memorandum in Opp p. 5-6 (R. pp. 102-103); Hearing Tr. at 5:6-15, 7:21-24, 11:17-22, 13:19 to 14:1, 19:12-20 (R. p.194, lines 6-15, R. p. 196, lines 21-24, R. p. 200, lines 17-22, R. p. 202, line 19, R.p. 203, line 1, and R. p. 208, lines 12-20). Petitioners now improperly want to claim prejudicial error from the trial court's alleged consideration of information that they first presented to the trial court. A party cannot complain of a claimed error that their own conduct had induced. *Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93 (Ct. App. 1986).

Because the arguments and facts in the Commission's Motion to Reconsider had previously been raised to the trial court without objection and had been acknowledged and discussed by Plaintiff's counsel at that hearing and in briefing, there was no procedural impropriety to the Commission reiterating them, along with demonstrative support, in the Motion to Reconsider to show the status of the administrative review. After the Commission's Rule 59 motion was filed, Appellants could have objected in either a memorandum in opposition or their own Rule 59 motion. They made no such objection. Thus, in view of the aforementioned authority, the Court of Appeals' opinion clearly applied this Court's precedents correctly in determining that when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRPC, motion, the issue is not preserved for appellate review.

**CONCLUSION**

This Court should deny the Petition for Certiorari. The Court of Appeals' opinion is consistent with existing law, and the Petition does meet any of the conditions upon which certiorari is to be granted by this Court.

Respectfully submitted,

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