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Exhibit 1

(Order Granting Defendants' Motion for Summary Judgment, filed October 20, 2023)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated,	)	Civil Action No. 2020-CP-40-04603
Plaintiffs,	)	
vs.	)	**ORDER**
Alan Wilson, Attorney General for the State of South Carolina, Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A..	)	
Defendants.	)	

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Before this Court are Defendants' Motions for Summary Judgment. Oral argument was heard virtually on October 11, 2023. After considering the arguments of both parties, this Court hereby **GRANTS** the Defendants' Motions for Summary Judgment. In the matter before this Court, there are no genuine issues of material fact. The only disputed issue is a question of law.

Introduction

In *South Carolina Public Interest Foundation v. Alan Wilson*, the South Carolina Supreme Court remanded this case to this Court to answer the threshold question of "whether subsection 1-7-150(B) authorizes the Attorney General to enter into contingency fee agreements." 437 S.C. 334, 342 (2022). This Court answers that question in the affirmative. Based on the plain meaning of the statute, prior case law, and the Constitution, this Court holds that the Attorney General acted within his authority to enter into this fee agreement for several reasons. First, the plain meaning of the statute is clear – the Attorney General may enter into contingency fee agreements with private law firms. Second, the history, case law, and original intent and meaning of the statute decidedly hold that S.C. Code Ann. § 1-7-150 allows for these settlement agreements. Finally,

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and most importantly, the Constitution and the separation of powers doctrine requires this Court to exercise judicial restraint and not read into a law a judicial power which does not exist.

Summary Judgment Standard

The granting of a summary judgment motion "is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493–94 (2002). This Court will look to see if there is a genuine issue of material fact when considering the motion. *Kitchen Planners, LLC v. Friedman*, No. 2020-001669, 2023 WL 5420401, at *3 (S.C. Aug. 23, 2023) ("We now clarify that the 'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule.").

This Court agrees with Defendants' arguments that the threshold question before this Court is whether or not the Attorney General has the authority to enter into contingency fee agreements with private law firms as stated by the South Carolina Supreme Court. Based on the parties' arguments at the hearing and written briefs, this Court holds the answer to that question is yes.

Background[1]

This case challenges the authority of the Office of the Attorney General to pay attorney fees to the two law firm Defendants pursuant to a retainer agreement (*see* Comp. Ex. 7) for representation of the State in federal litigation over plutonium at the Savannah River Site. That federal case was settled in August, 2020. The settlement agreement provides for the payment of the $600 million to the State of South Carolina with each party to pay its own costs and attorney fees. The Agreement for Voluntary Dismissal filed on September 29 states that the settlement agreement required payment by the United States which is inclusive of amounts for interest, attorney fees and costs. The statute under which the settlement was reached provides for payment of funds to the State of South Carolina.

[1] These facts have been largely adopted from *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 338 (2022).

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In 2002, the State brokered an agreement with the DOE concerning the storage of weapons-grade plutonium at the Savannah River Site in Aiken, South Carolina. *See* 50 U.S.C. § 2566. The agreement required the DOE to achieve a certain mixed-oxide fuel production objective by January 1, 2016. § 2566(d)(1). When the DOE failed to meet this objective, Wilson retained the Law Firms to pursue recovery of statutory damages.

Wilson's litigation retention agreement (Fee Agreement) with the Law Firms contains three provisions relevant to this case. The first provision states the Law Firms will be reimbursed for certain costs and expenses. The second provision sets forth varied contingency percentages based on the State's gross recovery, the type of representation provided, and the court in which the matter was heard. The third provision requires Wilson to seek judicial approval of attorney fees and costs "[w]hen possible[.]"

The Law Firms continued to litigate on the State's behalf for more than four years. On August 28, 2020, litigation ended with the execution of a settlement agreement (the Settlement Agreement). The Settlement Agreement required the DOE to immediately pay the State $600 million, "inclusive of interest, with each party to bear its own costs, attorney fees, and expenses." Three days later, Wilson announced he would pay the Law Firms $75 million in attorney fees pursuant to the Fee Agreement. This amount included costs and expenses and represented 12.5% of the State's gross recovery.

All that is needed to be known in this case, is known. This Court believes further discovery is not needed to decide the legal issue in this case.

I. Plain Meaning

This Court will ascertain the plain meaning of the statute in question, and not attempt to expand or contract the true intent of the law. *State v. Jacobs*, 393 S.C. 584, 587 (2011) ("As such, a court must abide by the plain meaning of the words of a statute. *Id.* When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation."). A plain reading of the statute allows for the Attorney General to collect costs or costs of litigation by court order or settlement. Further, this plain reading of the statute taken in conjunction with the authority of the Attorney General as the chief legal officer of the state, clearly shows that he has the authority to enter into these contingency fee agreements.

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The Attorney General's authority to represent State interests is rooted in the Constitution, statutes, and the common law. Our courts have repeatedly emphasized that the Attorney General of South Carolina is the State's chief legal officer with broad authority to direct and control the State's legal affairs. The Supreme Court noted in *Cooley, et al. v. South Carolina Tax Comm'n*, 28 S.E.2d 445, 450 (1943), "[t]he office of Attorney General is created by the Constitution." According to the Supreme Court, the various statutes relating to the Office of the Attorney General demonstrate the "wide scope of authority and duties of the Attorney General as the legal representative of the state and of its several administrative departments." *Id*. at 451. The Supreme Court, in *Cooley*, recognizing the creation of the Office of Attorney General by the state Constitution, as well as the broad powers of the Office, concluded the Attorney General had the authority to settle that case.

Moreover, in *Condon v. State*, 354 S.C. 634, 641 (2003), the Supreme Court reiterated that "[t]his Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens, including vindication of wrongs committed collectively against the citizens of the State." *See also State v. Southern Ry. Co.*, 82 S.C. 12 (1908) (the Supreme Court expressing disbelief that it was the Legislature's intent to deny the Attorney General the power and responsibility of conducting the litigation according to his judgment.").

Accordingly, the Attorney General is the State's chief legal officer, and he properly exercised his authority to contract with the Law Firms to represent the State in its actions against the United States and to pay them pursuant to that contract from the settlement proceeds. As Judge Cooper stated in *Cephalon v. Wilson*, Civil Action No. 2012-CP-4007317 (June 6, 2014), "[t]he Attorney General possesses the authority to associate outside attorneys to assist with enforcement actions … and to pay those outside attorneys on a contingency fee basis with money received in any settlement or judgment obtained in the case."

Judge Roger Couch, in *State v. Eli Lilly*, 2007-CP-42-1855 (Sept. 22, 2009), also concluded S.C. Code § 1-7-150 "expressly authorizes payment of 'the costs of litigation' out of litigation proceeds and a 'cost of litigation' is certainly what legal fees are." He added, "Section 1-7-150 gives the Attorney General the right to withhold certain funds (investigative costs and costs of litigation) from the proceeds of litigation such as this." *Id*. Similarly, in *Cephalon*, *supra,* Judge

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Cooper concluded that "the costs of litigation include attorney fees, [§1-7-150(B)] expressly provides the Attorney General the authority to pay attorney fees to outside counsel and other costs of litigation from the proceeds of any judgment or settlement without those funds being first deposited in the general fund."

Further, S.C. Code Ann. § 1-7-85 expressly provides that "the Attorney General may obtain reimbursement for its costs in representing the State in … civil and administrative proceedings. These costs may include, but are not limited to, attorney fees.…" And S.C. Code Ann. § 1-7-170, titled, "Engaging attorney on fee basis," provides that "[a] department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him." The authority of the Attorney General to enter into contingency fee agreements has been exercised for decades. *See Cephalon*, Civil Action No. 2012-CP-4007317; *Eli Lilly*, 2007-CP-42-1855.

II. History of the Act is Clear

When interpreting the statute in question, this Court will look to the original meaning and intent by the legislatures who drafted and passed the law. *Reese v. Talbert*, 237 S.C. 356, 358 (1960) ("When the language of a constitutional amendment is of doubtful import, the object of judicial inquiry as to its meaning is to ascertain the intent of its framers and of the people who adopted it."); *In re Hosp. Pricing Litig., King v. AnMed Health*, 377 S.C. 48, 54 (2008) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. The history of the period in which the statute was passed may be considered in interpreting the statute.") (citations omitted).

S.C. Code Ann. § 1-7-150 was enacted in 1998 as a permanent provision (Section 18) of the Appropriations Act (Act 419 of 1998). Press coverage from the time makes it clear that the overarching purpose of the statute was to determine the disposition of the proceeds from the settlement of the Reedy River oil spill—and not to impose a restriction upon the powers of the Attorney General with respect to the payment of contingency fees. The statute sought to ensure that such proceeds would benefit the Reedy River and would not be deposited in the general fund, as would normally have occurred.

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As chronicled by an editorial in *The Greenville News*, following the announcement of the settlement from the Reedy River oil spill, there was some confusion and legal uncertainty as to where the proceeds from the settlement would be sent. *See* "Fighting for Reedy funds," *The Greenville News* (Apr. 22, 1998) ("This apparent good news was quickly followed by confusion over the ultimate destination of the money from the settlement. The attorney general indicated the money might go into the state's general fund, where it likely would be distributed for legislators' pet projects all over the state."). To address these concerns, the General Assembly acted to ensure that the settlement funds would go towards the cleanup of the Ready River. *See id* ("Last week the House of Representatives passed a joint resolution directing the settlement to the trust fund and tagging it for restoring the Reedy. It appears there's also strong support in the Senate for ensuring any money recovered from Colonial Pipeline goes to the area where the environmental devastation occurred."). The General Assembly's efforts ultimately culminated in the enactment of S.C. Code Ann. § 1-7-150. None of this history indicates that the General Assembly intended for that section to affect the Attorney General's authority to enter into contingency fee agreements. Indeed, the Reedy River settlement was obtained by virtue of a contingency fee agreement.

It is also important to point out that a separate proposal which would have required the Budget and Control Board to approve contingency fee agreements between the Attorney General and private law firms was considered as a part of the bill but was included in a *different section*. *See* Section 18, 1997–98 General Appropriations Bill 4700, as passed by the House, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/hp2p18.htm (adding Section 1-7-85 to require written approval from the State Budget and Control Board before the Attorney General may contract on a contingent or other basis for legal representation). And even that section was ultimately removed. *See* Section 18, 1997–98 General Appropriations Bill 4700, as reported by the Senate Finance Committee, https://www.scstatehouse.gov/sess112_1997-1998/appropriations1998/sf2p18.htm.

The fact that the General Assembly removed a provision requiring oversight over the Attorney General's contingency fee contracts surely is strong evidence that his existing authority remained in place unchecked. In other words, such action by the General Assembly in removing any statutory oversight over the Attorney General's authority was a recognition that the Attorney General, as the State's chief legal officer, must possess the power to "institute, conduct and

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maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the States, the preservation of order, and the protection of public rights." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 239 (2002).

Thus, nothing surrounding the history of S.C. Code Ann. § 1-7-150 suggests that the General Assembly intended for that section to constrain the Attorney General's authority to enter into contingency fee agreements or to limit his authority to pay attorney fees under those agreements. This Court interprets S.C. Code Ann. § 1-7-150 in light of this intent and concludes that the section in no way limits the authority of the attorney general to enter into contingency fee contracts. *See Greenville Baseball v. Bearden*, 200 S.C. 363 (1942) ("It is a familiar canon of construction that a thing which is in the intention of the makers of a statute is as much within the statute as if it were within the letter. It is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words."); *see also Ingram v. Bearden*, 212 S.C. 399, 410 (1948) (noting that the "paramount consideration and controlling factor in the interpretation of a statute is the intent of the Legislature, and each enactment of the Legislature is to be construed in light of its own context.").

And as a matter of practice and custom, the Attorney General's office has long used contingency fee contracts. A blue ribbon 1990 study described the Attorney General's use of contingency fee contracts. The study found, "[s]ince at least the 1880's, the State of South Carolina has used private attorneys for a portion of the State's legal services ... and that [i]n appropriate cases, the Attorney General should consider contingent fee arrangements instead of an hourly rate." *Report to the Attorney General of the Advisory Committee on Associate Counsel* (1990), at 3, 11. According to the study, the need for outside counsel is essential to the function of the Attorney General in protecting the public interest and that "[t]he Attorney General has authority to make such decisions as well as the obligation to monitor the cost and effectiveness of services provided by associate counsel." *Id*. at 13.

The General Assembly has specifically not expanded the judicial authority over the settlement agreements. Judicial power is both inherent based on our Constitution, as well as delegated by statute in other circumstances. If this Court were to agree with Plaintiffs' reading of S.C. Code Ann. § 1-7-150(B), then this Court would have to hold that its authority either came directly from the statute or by some other constitutional authority. Whether or not a statutory

granting of judicial review under S.C. Code Ann. § 1-7-150(B) would be constitutional is not before this Court. *See Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232 (1978) ("The doctrine, which is based on the constitutional requirement that the branches of government 'be forever separate and distinct from each other', South Carolina Constitution, art. I, s 8, states simply that the Legislature may not delegate its power to make laws.").

III. Separation of Powers

But importantly, this Court believes that the most pressing issue in deciding whether or not the Attorney General possesses this authority stems from the separation of powers doctrine and the refusal of this Court to exercise powers that fall outside of its judicial purview. *See* S.C. Const. art. I, § 8 ("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."). First, creating a judicial power that contravenes the plain meaning of the law would commandeer power from the other branches of government. And second, the actual application of Plaintiffs' reading of the statute would force a judicial remedy which is likely unworkable within its constitutional authority.

A.

The separation of powers doctrine allows for checks and balances throughout our government. *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312 (1982) ("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 judiciary is required to exercise those powers which fall under its authority. *Id*. ("The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws."). Obviously, it is necessary and proper for some branches to occasionally overlap in their actions, but this does not allow for usurpation of one branch by another. *Id*. at 313. ("This is true because there is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree.").

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The plain reading of S.C. Code Ann. § 1-7-150(B) mandates that all monies awarded to the State on actions brought on behalf of the Attorney General must be deposited into the general fund of the State, except for costs of litigation. S.C. Code Ann. § 1-7-150 ("All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments **must** be deposited in the general fund of the State…") (emphasis added).

Plaintiffs' reading of S.C. Code Ann. § 1-7-150(B) would require court approval for payments of all settlement proceeds – past, present, and future. Because a settlement figure is a finite number, that would mean that this Court would have the ability to increase or decrease the monies that are rightly due to the General Assembly by statute. Thus, this Court could reject a contingency fee percentage as too low, and require the Attorney General to increase the fee paid to the private attorneys and which in turn would reduce money for the general fund. While there is no doubt that this Court has the capability of determining what a fair and reasonable settlement is, Plaintiffs provided ample examples of how courts do this on a regular basis, the stark difference is that this determination would inherently and by its nature exercise a legislative function. This Court would not be examining settlements between private actors, but would be using its discretion on general fund monies. *See State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317 (1982) ("We hold that the powers assigned to JARC by the sections quoted hereinabove are executive in nature and are not reasonably incidental to the performance of any legislative duty."); *Gregory v. Rollins*, 230 S.C. 269, 275 (1956) ("But they may not, by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass upon the legislative domain.").

The statute's history and plain meaning clearly place the authority of settlement contracts and litigation strategies with the executive branch, the Attorney General specifically. The General Assembly has given the Attorney General limited authority over handling of the money collected, not the judiciary. Twisting the reading of the statute to create a judicial power that does not exist would violate the basic tenants of separation of powers.

B.

Another separation of powers issue that arises is the political question doctrine. This principle, "which derives from the separation of powers doctrine, excludes from judicial review

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those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch." *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142 (2006). The South Carolina Supreme Court has held many times that courts must avoid political and non-justiciable questions. *See S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142 (2006) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

In determining whether or not a matter is a nonjusticiable "political question," our Supreme Court has held, "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142–43 (2006). This Court will have to ask if the question presents a bona fide legal challenge that is proper for judicial resolution. *Alexander v. Houston*, 403 S.C. 615, 619 (2013) ("This question presents a bona fide legal challenge which is proper for judicial resolution."). The answer to the first question is yes: our Supreme Court has remanded the case to this Court to determine the legal issue of contingency fees and private law firms. This Court believes that the answer to the second question is no: the judicial remedy would likely result in a separation of powers issue. As discussed below, the judicial remedy, while it is well within the means and capability of this Court, would still result in a potential usurpation of the legislative branch's prerogative. As held in *Bailey v. S.C. State Election Comm'n*, the judiciary will not put its own political act over that of the legislature's:

> Statutory interpretation is certainly a judicial question, but when the Legislature considers the very same question—knowing it is doing so at the very same time the Court considers the question—and answers the question with clarity, we cannot give a different answer through the judicial act of statutory interpretation. We may do so only by the political act of simply disagreeing. This Court will not do it.
>
> Plaintiffs are left, therefore, only with their implicit argument as to what the law should be, that is, that this Court should change the law.

430 S.C. 268, 275 (2020).

The United States Supreme Court in *Baker v. Carr* explained the formulaic approach for a court to use when determining if a political question is actually nonjusticiable and should be avoided by the judiciary:

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> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted **can be judicially molded**.
>
> …
>
> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, **or whether the action of that branch exceeds whatever authority has been committed**, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

369 U.S. 186-198 (1962) (emphasis added). This Court must determine if Plaintiffs' remedy is a specific and concrete resolution that can be carried out in future cases. Or if the remedy presents a quandary for the judiciary which is outside of its constitutional authority. *Alexander v. Houston*, 403 S.C. 615, 619 (2013) ("A court must conduct a limited examination of the matter when it is argued a non-justiciable political question is presented.").

In his dissenting opinion in *Abbeville Cnty. Sch. Dist. v. State*, Justice Kittredge examined the impact of the judiciary violating the separation of powers and the potential negative effects of one branch encroaching on the other, particularly when it comes to the legislative responsibility of funding:

> I also think it important to note that the impact of today's decision is not limited to the funding of public education, for this Court's order that resources be devoted in one area necessarily diminishes the range of the General Assembly's discretion in other areas. The General Assembly deals with many matters of great public interest, and it must make difficult decisions in allocating limited resources among a wide-ranging array of needs. Those needs include infrastructure, law enforcement, social services, the yet to be determined expanse and state liability of the Affordable Care Act, and the list goes on. Such funding decisions and priorities are complex and are a function of policy decisions and choices in the Legislative Branch, which demands comity and respect from the Judicial Branch. By boldly encroaching into the constitutional prerogative of the General Assembly in the funding and policy decisions regarding public education, the Court's overreach today has a corresponding negative impact on the General Assembly's ability to make policy and funding decisions in other areas.

410 S.C. 619, 684 (2014), *amended*, 414 S.C. 166 (2015), *order superseded*, 415 S.C. 19 (2015), and *amended*, 415 S.C. 19 (2015).

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It is not difficult to predict the same problem arising in this case as Justice Kittredge forewarned in *Abbeville*. Imagine a scenario in which the Attorney General, acting on behalf of the State, has secured a large settlement against an entity. As stated earlier, this Court believes that the statute is clear that the monies won by the Attorney General (minus litigation costs) are under the ownership of the general fund and thus belong to the people of this State. However, months, or even years later, a challenge could be brought claiming that the contingency fee was unreasonably high and that a trial court should reexamine the settlement structure and determine the appropriate fees based on reasonableness. While this may be a just and understandable request, Plaintiffs must also examine the flipside of what a trial court would be able to do, and frankly required to consider, as well: make a determination that the contingency fee was too low. A trial court would possibly be in the position of taking money that has already been designated to the general fund and ordering the legislature to give some of that money back. Taking this scenario even further, imagine if the money had already been appropriated in the previous year's budget. Would a trial court then be forced to order the legislature to re-appropriate additional funds in order to satisfy a contingency fee that was too low? As stated in *Edwards v. State*,

> The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation).

383 S.C. 82, 90 (2009). It is the province of the legislature to appropriate, not the courts.

Plaintiffs state this position even better than this Court can in their reply brief:

> Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's General Fund. *See State ex rel. Condon v. Hodges*, 349 S.C. at 245, 562 S.E.2d at 630 (2002) ("[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money"). Expenditures of public funds cannot be controlled "by administration rather than by legislation." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a "veto" over the General Assembly. *Id*. Wilson's payment of $75 million from the

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> State's $600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Const. art. I, § 8.

Plaintiffs' Response in Opposition to Motions for Summary Judgment p. 29. From the above paragraph, one could simply replace the words "executive officers" and "executive branch" with that of "judicial officers" and "judicial branch" and the point is made that there is a clear separation of powers issue. However, the key distinction is that there is a law written by the General Assembly that has allowed for the executive to control these settlements and how they are allocated. *See* S.C. Code Ann. § 1-7-150(B). The General Assembly has not given this authority to the courts.

This is not to say that this Court does not have the ability to review cases and controversies surrounding improper funding actions by the legislature. *Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 123 (2010) (noting that the judiciary is still "duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional[.]"). That would result in an absurd reading of this Order and allow for one branch to run freely without checks. The Attorney General is not without checks and balances of his power. The General Assembly is a party to these settlements by way of being the recipient of the funds; and thus, they have clear power, legislative authority, and incentive to ensure that the executive is acting in a proper fashion.

C.

The understandable question that then arises is what to do with these delicate situations which are fraught with political, economic, and legal issues? Is the answer to run to the courts to solve problems that Plaintiffs allege were created by the executive branch when it created a contract that is not reasonable? This Court refuses to become a "super-court" and place itself in the untenable situation of saving the executive branch from itself. *See Abbeville Cnty. Sch. Dist. v. State*, at 663 (Kittredge dissenting) ("I view the Court's decision as a policy opinion on the state of public education in South Carolina, in direct contravention of what this Court said it would not do in *Abbeville I*—act as a 'super-legislature.'"). The Attorney General is accountable to the people, and thus, as long as the Attorney General is following the statute procedurally – as it is

written on its face – and his actions are open to the public as required by law, the people will ultimately be able to determine the reasonableness of these contingency fee settlements.[2]

With Plaintiffs' reading of the statute, this Court would control not just the case and controversy before it in the courtroom, but it would potentially have dominion and control over a purely legislative function going forward. Plaintiffs ask this Court to read into the law a requirement of judicial review of these settlements that the legislature has not created. The legislature has the ability to do this if it chooses as evidenced by the death and minor settlement statutes which require the courts to examine the deal, which includes attorney fees. *See* S.C. Code Ann. § 15-51-42 ("…the terms and provisions of the agreement with respect to attorney fees and costs."); *see also* S.C. Code Ann. § 62-5-433 ("The petitioner must file with the court a verified petition setting forth all of the pertinent facts concerning the claim, payment, attorney fees, and expenses, if any, and the reasons why, in the opinion of the petitioner, the proposed settlement should be approved."). The legislature has not done this here. *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 276 (2020) (holding that "if the will of the people as expressed through their legislative representatives" want a law changed, then "the Legislature may change the law.")

While Plaintiffs would ask this Court to use its own personal values and policy preferences when determining the actions of the Attorney General, this Court will not place itself in the stead of the people or the legislature. The law is the law. *Id*. at 684 (Kittredge dissenting) ("We live in a different era, where a disgruntled citizen can seek out a friendly court which shares the same values and then have those personal preferences judicially decreed into law."); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (quoting *The Federalist Papers, No. 47* at 303 (James Madison)) ("Consequently, we refrain from scaling the walls that separate law making from

[2] As noted by the South Carolina Supreme Court in *South Carolina Public Interest Foundation v. Wilson* as well as Defendants during oral argument, these contracts are open to the public and available on the Attorney General's website. *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895–96 (2022) ("This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are currently listed on the Attorney General's website, and five contain contingency fee provisions. Although the agreements differ in some respects, all contingency fee provisions persist. For example, Wilson recently announced a $300 million settlement with opioid distributors. The litigation retention agreement in that case contains a contingency fee provision identical to the one here."); *Litigation Retention Agreements*, S.C. Att'y Gen., https://www.scag.gov/litigation-retention-agreements/ (last visited October 14, 2023); *see also* S.C. Code Ann. § 1-7-150 ("The Attorney General shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office.").

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judging, for '[w]ere the power of judging joined with the legislative *the judge* would then be *the legislator*.'").

Plaintiffs understandably fear that without judicial approval of these settlements then an unchecked governmental branch has the ability to abuse the process. However, this Court believes that these fears are unfounded for two reasons. First, the South Carolina Supreme Court has already said that Plaintiffs in this case had standing to challenge the settlement agreement. While this standing applies to a specific question (i.e., the threshold question stated previously), this standing would also likely apply to future cases that would give citizens the ability to challenge actions by the Attorney General that do not conform with the statute or case law. For example, FOIA requires the government to provide public access to these documents. Additionally, S.C. Code Ann. § 1-7-150(A) specifically requires that the Attorney General "shall account to the State Treasurer for all fees, bills of costs, and monies received by him by virtue of his office." Secondly, because these court cases and contingency fees are public, the Attorney General, as an elected official, is still accountable for any actions that are seen as reasonable or unreasonable.

The fee agreement with the private law firms and the settlement agreement are both open to the public for their viewing. The people have given the Attorney General the authority to act on their behalf. If his actions are unreasonable or not in the best interests of the people, then they may act. *State v. Long*, 406 S.C. 511, 514 (2014) ("When this Court is called to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law.").

IV. Plaintiffs' Additional Arguments

This Court commends Plaintiffs for their well-written briefs and excellent oral argument; however, this Court simply disagrees with their interpretation of the statute in question.

A.

Additionally, Plaintiffs' argument that many other courts have overturned perceived unreasonable attorney fees is without merit for this case. In *Layman v. State*, a case cited by Plaintiffs, the South Carolina Supreme Court looked to the reasonableness of attorney fees based on two doctrines. 376 S.C. 434 (2008). First, actual statutory creation of an award of attorney fees. And second, the common fund doctrine, which "allows a court in its equitable jurisdiction

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to award reasonable attorney fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Id.* at 452. However, this case is not *Layman* and neither of those issues apply in this case. The statute in question does not concern the awarding of attorney fees, but rather the authority of the Attorney General to create contingency fee agreements. The Supreme Court was clear in their remand: the trial court should look to the actions of the Attorney General and not to the actions of the attorneys.[3]

Similarly, Plaintiffs cited a federal case from New Jersey where the court there struck down a settlement agreement based on the unreasonableness of the attorney fees. But again, the issue before the Third Circuit Court of Appeals was not the authority of the South Carolina Attorney General, but rather a statute regulating class action lawsuits. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 732 (3d Cir. 2001) ("Because of the possible injury to the Trust as well as other class members from the fee award in this case and, more importantly, **because of our overarching interest in class fee awards**, we therefore hold that the Trust has standing to appeal the fee award.") (emphasis added).

B.

Plaintiffs' argument that the Attorney General is not the executive, but rather only the Governor is the true executive is not persuasive. First, Plaintiffs points out that the Governor has objected to this settlement agreement and therefore this is not a separation of powers issue. But rather than illustrate Plaintiffs' point, it undermines it. The Governor has not officially objected to this settlement agreement, one need only look at the caption of the case to see that. But by bringing up political statements by the Governor to his objection to the settlement, Plaintiffs make this Court's point that this case and controversy is likely a political question that courts tend to avoid. *Plaintiffs' Response in Opposition to Motions for Summary Judgment* p. 33 ("The Settlement Agreement **was a political resolution** brokered by elected leaders, including Governor McMaster and Senator Graham.") (emphasis added). Furthermore, the first problem with the settlement that the Governor decries is not with the attorney fees, but rather with the terms of the settlement regarding plutonium storage. Second, our State's form of government is not the same as the federal government. While our Constitution does make the Governor the chief executive, it

[3] This is why Plaintiffs' argument regarding the Rules of Professional Conduct also fails. The issue before this Court is not the actions of the private law firms, but the actions of the Attorney General.

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also makes the Attorney General the chief legal officer of the state and a separate elected official. The Governor does not, by constitutional or statutory authority, have dominion and control over the Office of the Attorney General. Since the Office of the Attorney General was founded in 1698, with the appointment of Nicholas Trott as the state's first Attorney General, case law and statutory authority have made clear the role that this attorney plays in the legal system. While the Attorney General is the attorney for the Governor, his Office plays a dual role in protecting the rights of the citizens as well:

> The Attorney General has a dual role. He is an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the State.
>
> …
>
> Furthermore, the Attorney General, as noted above, has a dual role of serving the sovereign of the State and the general public. Thus, the Attorney General is not violating the ethical rule against conflicts of interest by bringing an action against the Governor.
>
> While the Attorney General is required by the Constitution to "assist and represent" the Governor, the Attorney General also has other duties given to him by the General Assembly, and elaborated on by the Court,

State ex rel. Condon v. Hodges, 349 S.C. 232, 240-242 (2002).

Again, the Attorney General is not without checks and balances with the authority given to him under S.C. Code Ann. § 1-7-150(B). The law still requires procedures that must be followed and public documents that must remain open.

Conclusion

The statute is clear on its face that the Attorney General may enter into contingency fee agreements with private law firms. Further, the history and original intent and meaning of the statute show that the Attorney General was given the ultimate responsibility to handle litigation settlements of these kinds. And finally, assuming that Plaintiffs' interpretation of the statute is correct and requires court intervention, the result would create a separation of powers issue and ultimately result in this branch appropriating the power of another.

Judicial independence is key to our form of constitutional structure. Without the independence of the judiciary, the other branches can pose a threat to the liberty and the will of

the people. That independence is also a key factor to give the people confidence that the judiciary is acting as a third and separate branch as opposed to an extension of another.

The authority given to the courts must also be treated as sacrosanct. The power to overrule another branch of government that has been duly elected by the people should be a rare and restrained move. This Court believes that for it to interpret the plain reading and meaning of the statute and its history in a fashion that increases the power of the judiciary would be a violation of the Constitution. As Professor James Underwood stated, "The political world would not long tolerate a small, nonpopularly elected group of specialists who promiscuously interfered with the functions of other branches and arrogated to themselves broad policy making power." Underwood, James L. (1986) "Judicial Review in a Legislative State: The South Carolina Experience," *South Carolina Law Review*: Vol. 37: Iss. 2, Article 5, at 33.

Judicial restraint is the cornerstone of this State's tripartite system of government. The General Assembly shall exercise the duties of the legislative branch; the Attorney General shall exercise the duties of the executive branch; and this Court shall exercise the duties of the judicial branch.

For the reasons set forth above, this Court **GRANTS** Defendants' Motions for Summary Judgment.

AND IT IS SO ORDERED.

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The Honorable Daniel McLeod Coble

October 20, 2023.

[ELECTRONIC SIGNATURE TO FOLLOW.]

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Richland Common Pleas

Case Caption: South Carolina Public Interest Foundation , plaintiff, et al vs Alan Wilson , defendant, et al

Case Number: 2020CP4004603

Type: Order/Other

So Ordered

s/ Daniel Coble, 2774