THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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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# BRIEF OF RESPONDENTS

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## PARTIES TO THIS APPEAL

This appeal consolidates two cases and involves eight separate parties. The issues involved in the appeal are common to both cases. For ease of identification, the brief uses "Appellants" and "Respondents" as much as possible for the sake of clarity. Where more precision is required, the brief identifies parties by their specific names. The parties are below.

*Appellants*

- Intellectual Capitol, Inc., Barry Newkirk, and Neil Richards (collectively "ICAP")
- JMI Sports and JMIS College, LLC (collectively "JMIS")

*Respondents*

- South Carolina Workers' Compensation Commission ("Commission")
- Clemson University ("Clemson")
- Chief Procurement Officer of the State Fiscal Accountability Authority ("CPO")

## RESPONDENTS' STATEMENT OF THE CASE

Appellants challenge the CPO's authority under S. C. Code Ann. § 11-35-4230 to resolve a governmental body's claim against a contractor arising out of a contract awarded pursuant to the South Carolina Consolidated Procurement Code. This appeal did not start in circuit court. Rather, it began when the Commission and Clemson submitted separate requests for resolution of "contract controversies" pursuant to § 11-35-4230 to the CPO.

First, the Commission filed its request for resolution against ICAP on December 16, 2020. (R. p. 19). That dispute arose out of problems with a contract to modernize the Commission's IT legacy system to allow for electronic filing, payment, and case management. ICAP moved to dismiss the case for lack of jurisdiction. After the CPO denied ICAP's motion to dismiss, he conducted a two-day hearing on the merits. As of December 4, 2023, the date Respondents filed their initial brief, the CPO had not issued a determination on the merits.

Clemson filed the second contract controversy against JMIS on November 8, 2021. (R. pp. 99-106). In that dispute, Clemson alleged that JMIS had breached a contract for marketing services. JMIS likewise moved to dismiss on the grounds that the CPO lacked jurisdiction. JMIS also filed its own request for resolution of a contract controversy on June 17, 2022, arising out of the same contract. (R. pp. 167-79). JMIS's request argued that, although the CPO lacked jurisdiction under § 11-35-4230 to hear claims by Clemson, a governmental body, he did have jurisdiction to hear claims *against* a governmental body. As of the date of Respondents' initial brief, the CPO had not held a hearing on the matter or decided the motion to dismiss.

While the above contract controversies were pending before the CPO, Appellants filed separate declaratory judgment actions in circuit court in May 2022, seeking an Order declaring that § 11-35-4230 is unconstitutional to the extent it authorizes the State to bring claims against contractors before the CPO. (R. pp. 57-73, 107-24). ICAP named the Commission and the CPO as defendants. JMIS named Clemson and the CPO as defendants. The Commission, Clemson, and the CPO moved to dismiss the circuit court actions, arguing primarily that the CPO had exclusive jurisdiction over the dispute, and that ICAP and JMIS had failed to exhaust their administrative remedies. (R. pp. 85-6, 75-82, 145-46, 147-52). Clemson also alleged that JMIS had contractually agreed to bring contract disputes before the CPO. (R. pp. 147-52). The Commission also alleged that ICAP contractually consented to the CPO's jurisdiction.

On January 31, 2023, the circuit court (the Honorable Alison Renee Lee) granted the motions to dismiss in both actions without prejudice, finding that ICAP and JMIS had failed to exhaust their administrative remedies. (R. pp. 1-6). The circuit court found that the CPO,

not the court, had exclusive jurisdiction over the dispute under § 11-35-4230. The court also found that the Court in *Unisys v. S.C. Budget & Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001) had upheld the exclusivity of the CPO's jurisdiction, noting that "the Court expressly held that '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.'" *Id.* (Emphasis added). Finally, the court found that ICAP and JMIS had the right to judicial review after they had first exhausted their administrative remedies. (R. pp. 1-6).

ICAP and JMIS moved the circuit court to reconsider, but the Court denied the motion on April 13, 2023. (R. pp. 13-18). This appeal followed on April 25. This Court consolidated the cases on June 8. The Respondents moved to dismiss the appeals, and this Court denied Respondents' motion on August 10, 2023.

## STATEMENT OF FACTS

Since this appeal contests the constitutionality of a statute, the facts are limited and not in dispute. ICAP contracted with the Commission under the State's small software applications development contract to provide services allowed thereunder.[1] The small software systems development contract is a "Statewide Term Contract" issued pursuant to the Procurement Code. Using agencies, such as the Commission, issue a statement of work

[1] Only excerpts, including the disputes clause, are in the record. The solicitation and the award, which are public records, can be found at https://procurement.sc.gov/doing-biz/bid-ops (last viewed Nov. 29, 2023). Go to the link at "Central Purchasing (SCEIS) Solicitations-Information Technology and Supplies & Services," select "all" on the drop-down menu for "Purchasing Agency," select "Both" on "Solicitation Status," and enter solicitation number 5400010665. The solicitation, with the standard contract terms including the disputes clause, are published in this public-facing database. The award to ICAP is likewise published there.

that can be performed by contractors that were issued awards under the contract. In July 2018, ICAP accepted the Commission's job order and statement of work to develop the Commission's IT legacy system modernization project. (R. p. 27). As discussed above in the Statement of the Case, the project failed and led to the Commission filing a request for resolution of a contract controversy.

JMIS is a contractor dealing primarily with sports and campus marketing. In early 2016, following a competitive procurement process conducted pursuant to the South Carolina Consolidated Procurement Code, JMIS entered into a contract with Clemson to provide "Total Campus Marketing Services." And as discussed above, contractual disputes led to both parties filing separate requests for resolution of contract controversies.

Both contracts[2] contain disputes clauses stating the following:

> **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 with the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. . . .

[2] Clemson's Request for Resolution of a Contract Controversy quotes this provision verbatim. (R. p. 99). JMIS's Complaint in the circuit court attaches this Request for Resolution and incorporates it by reference. (R. pp. 116, 125). Clemson and the Commission both quoted the clause in their motions filed with the circuit court when arguing that the Appellants had contractually agreed to bring their disputes before the CPO. In response to those motions, both Appellants acknowledge and quoted the clause but argued that it should not apply. (R. pp. 93, 161).

## STANDARD OF REVIEW

Statutes are presumed constitutional. *S.C. Dept. of Social Services v. Michell G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). "This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id.* "The duty of the Court is to so construe Acts of the Legislature as to uphold their constitutionality and validity if it can reasonably be done, and if their construction is doubtful the doubt will be resolved in favor of the law." *Townsend v. Richland County*, 190 S.C. 270, 275, 2 S.E.2d 777, 779 (1939).

"In construing a statute conferring power on an administrative agency, the court will assume that the legislature did not overlook the constitutional provisions with respect to separation of powers, and did not intend to transfer the jurisdiction of a court to such agency, but intended at most to confer quasi-judicial powers." 16 C.J.S., *Constitutional Law* § 372 (2005).

## THE RELEVANT STATUTORY LANGUAGE IN SECTION 11-35-4230
## (The Statute Appellants claim is Unconstitutional)

The procedure set forth in Section 11-35-4230 constitutes the exclusive means of resolving controversies between a governmental body and a contractor which arise under or by virtue of a contract governed by the provisions South Carolina's Consolidated Procurement Code. In relevant part, it states:

**§ 11-35-4230. Authority to resolve contract and breach of contract controversies.**

(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. . . .

* * *

(4) Administrative Review and Decision. If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the appropriate chief procurement officer or his designee promptly shall conduct an administrative review and issue a decision in writing within ten days of completion of the review. . . .

* * *

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests further administrative review by the Procurement Review Panel . . .

S.C. Code Ann. § 11-35-4230

If a contractor requests further administrative review by the Procurement Review Panel, the review is *de novo*, with further right to judicial review by the Court of Appeals.

S.C. Code Ann. § 11-35-4410.

## ARGUMENT

### I. IN *UNISYS v. S.C. BUDGET & CONTROL BD.* THIS COURT UPHELD THE CONSTITUTIONALITY OF SECTION 11-35-4230

This Court has already decided the issue presented in Appellant' appeal. In 2001, this Court faced a constitutional attack on § 11-35-4230 and upheld its constitutionality. *Unisys v. South Carolina Budget and Control Bd.*, 346 S.C. 158, 551 S.E.2d 263 (2001). In deciding *Unisys*, the Court concluded that "[t]here 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." *Id.* at 169, 551 S.E.2d at 270 (emphasis added). Appellants, however, now claim that *Unisys* is "irrelevant" to this appeal. (Appellant's Brief, p. 15). They assert that this Court, when it analyzed the scope of the legislature's power, failed to consider a fundamental tenet of constitutional law simply because the Court failed to include the words "separation of powers" in the decision.

The underlying facts in *Unisys* are almost identical to the facts here. There, Unisys contracted with several governmental bodies (collectively "the State") to implement an electronic child-support enforcement system. After four years the project failed. This failure prompted the State to submit a request for resolution of a contract controversy pursuant to § 11-35-4230, seeking administrative review before the Chief Procurement Officer (CPO). After moving to dismiss the contract controversy for lack of jurisdiction, Unisys filed a complaint in circuit court. Unisys argued that the General Assembly lacked the authority to enact § 11-35-4230 for claims brought **by the State**—the exact argument raised here by Appellants—and that the circuit court had exclusive jurisdiction over the dispute. The circuit court dismissed Unisys's complaint. *Id.* at 165, 551 S.E.2d at 267.

On appeal, this Court rejected Unisys's argument that Article V, § 11 of the South Carolina Constitution, vesting general civil-case jurisdiction in the circuit court, controlled the dispute. *Id.* at 166 n.3, 551 S.E.2d at 267 n.3. Instead, the Court held that § 11-35-4230 vests exclusive jurisdiction over state-contract claims, not with the courts, but with the CPO and the Procurement Review Panel. *Id.* at 170, 551 S.E.2d at 270.

This Court also rejected Unisys's argument that the General Assembly lacked the authority to enact § 11-35-4230. Unisys had argued that Article X, § 10 of the South Carolina Constitution—providing that "[t]he General Assembly may direct, by law, in what manner claims against the State may be established and adjusted"—limited the General Assembly's power to vest jurisdiction only to matters *against* the State. But the legislative power is plenary and not dependent upon a constitutional authorization. "Thus, the General Assembly may enact any law not prohibited, expressly or by clear implication, by the State or Federal Constitution." *Id.* at 169, 551 S.E.2d at 269 (quoting *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 350, 287 S.E.2d 476, 479 (1982)). The Court ultimately held that "[t]here is no constitutional provision" limiting the General Assembly's power to enact § 11-35-4230 for handling claims by the State.

*Unisys* is the rare case that is truly "on all fours." In that case, the State submitted a request for resolution to the CPO alleging various breaches of contract by the contractor. As in *Unisys*, Respondents here used the procedures in § 11-35-4230 and filed contract controversies with the CPO. The Commission filed against ICAP alleging breach of contract arising out of an IT legacy system upgrade. And Clemson filed against JMIS alleging breach of contract arising out of a market services contract. It is undisputed that both contracts are governed by the Procurement Code. The only material difference between Unisys's contract

and the contracts at issue here is that the latter contracts have disputes clauses where the parties expressly agreed to bring their disputes before the CPO. Respondents discuss this additional affirming ground in Part II below.

For the Appellants to prevail, they must convince this Court that this Court erred in *Unisys* when it held that there is "no constitutional provision limiting the legislature's power to establish jurisdiction for actions brought by the State." *Unisys* 346 S.C. at 169, 551 S.E.2d at 270. Appellants' argument rests on the idea that this Court simply failed to consider the "separation of powers" doctrine because it did not use those exact words. The opinion's analysis, however, suggests that this Court did consider the separation of judicial and executive powers. Specifically, the Court cited Article V of the South Carolina Constitution when it analyzed whether the CPO or the courts had jurisdiction over the dispute, which necessarily implies an analysis of which power—judicial or executive—would be exercised in deciding the dispute. It also analyzed the scope of legislative power to pass a law for the resolution of state-contract claims. And just as all statutes drafted by the legislature are presumed constitutional, it is presumed that this Court was aware of the distinction and separation between judicial and executive power when it interpreted § 11-35-4230. This Court should reject Appellants' attempt to reverse *Unisys* and affirm the decision of the lower court.

## II. THE PARTIES CONTRACTUALLY AGREED TO RESOLVE ANY DISPUTE BEFORE THE CHIEF PROCUREMENT OFFICER

While *Unisys*[3] applies here, the Court can resolve this matter without considering it. That is because the method of dispute resolution in the Procurement Code is written into the parties' respective contracts. As part of their contracts with the Commission and Clemson, ICAP and JMIS agreed that the CPO would resolve all disputes relating to their agreements. The disputes clauses state in relevant part:

> **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 with the Court of Common Pleas for, or a federal court located in, Richland County, State of South Carolina. . . .

It is black letter law that parties can agree how they will resolve disputes. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 354 (2001) ("Arbitration agreements, like other contracts, are enforceable according to their terms."). Further the Procurement Code and the contracts solicited thereunder inform a contractor wanting to do business with the State how contract disputes will be resolved.

"Contractual provisions such as these have long been used by the Government. No congressional enactment condemns their creation or enforcement." *U.S. v. Moorman*, 338 U.S. 457, 460 (1950) (upholding disputes clause authorizing final determination by the Secretary of War). Far from condemning, the United States Supreme Court has recognized

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[3] In *Unisys*, the Court rejected Unisys's argument that the dispute clause in that case—providing that actions should be brought in circuit court—controlled the dispute. 346 S.C. at 171, 551 S.E.2d at 270-71. The Court reasoned that, due to the important public interests served by the Procurement Code, any contract formed thereunder incorporated § 11-35-4230 and other applicable provisions. In this case, of course, not only is § 11-35-4230 incorporated by law, but the parties also expressly provided that the CPO would first decide their disputes.

that having an expert in government contracting resolve these disputes "will lead to greater uniformity in the important business of fairly interpreting government contracts." *U.S. v. Anthony Grace & Sons*, 384 U.S. 424, 429 (1966).

In *Anthony Grace & Sons*, the Department of the Air Force issued the respondent a letter of acceptability containing a disputes clause providing for resolution by the Department with appeal to the Board of Contract Appeals. After the Department dismissed respondent's claim for the return of a deposit, an issue arose about whether the appeal should be heard by the Board of Contract Appeals or the Court of Claims. The Supreme Court held that it was one "which should be heard and decided by the administrative process." *Id.* at 429. "Barring some compelling policy reason to disregard [the disputes] provision, *the contractor should be held to its contractual agreement even at this stage in the litigation.*" *Id.* (emphasis added); *see also U.S. v. Wunderlich*, 342 U.S. 98 (1951) (enforcing disputes clause in government contract—"they have contracted for the settlement of disputes in an arbitral manner"—and holding that, in the absence of allegations of fraud, the contracting officer's decision was final); *U.S. v. Ulvedal*, F.2d 131, 134 (8th Cir. 1967) ("We know of no rule of law preventing the government and a contractor, such as Ulvedal, from entering into an agreement which, by its terms, makes final a contracting officer's decision in a dispute involving a question of fact arising under their contract. The Supreme Court has consistently upheld this very kind of provision.").

In this case, Appellants voluntarily chose to do business with the government. With eyes wide open, they submitted offers in response to solicitations providing that the CPO will first resolve all disputes. These were not take-it-or-leave-it consumer transactions; they are contracts that were entered after a mandated statutory process and involved arms-length

transactions. Appellants willingly sought and accepted this business with full knowledge that they agreed for the CPO to handle any disputes.

When a contractor chooses to contract with the government, that contractor agrees to play by the rules. Both the Procurement Code and the contract informed the Appellants that claims by the government would be resolved by the CPO. Having accepted the benefits of contracting with the government, the Appellants should not be allowed to cry foul as soon as a dispute arises.[4] Appellants contracted for the CPO to resolve all disputes arising out of the Contract and, even in the absence of *Unisys*, this Court can affirm on this basis alone.

## III. SECTION 11-35-4230 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Appellants' theory is that the General Assembly cannot empower the executive branch to exercise judicial or quasi-judicial power over claims made by the State. In support, Appellants have reached back in time and based their theory on an anachronistic interpretation of *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910). Appellants' theory, however, has been shot down in the hundred-plus years of federal and state jurisprudence since *Carolina Glass*. Under Appellants' theory, the federal Contract Disputes

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[4] Footnote 9 of Appellants' Brief argues that the disputes clause is inapplicable because it provides that disputes shall be resolved by the CPO or "in the absence of jurisdiction" by the court. They argue that "[t]he absence of jurisdiction based on the Separation of Powers Clause is exactly what is at issue here." (Appellants Brief, p. 15 n.9). This argument is a red herring. First, the Appellants take that phrase out of context. Given that § 11-35-4230 expressly gives the CPO exclusive jurisdiction to hear claims by the State, a plain reading of the phrase shows it is merely a savings clause in the unlikely event the CPO is faced with an issue outside his jurisdiction under § 11-35-4230—for example, an action for a claim under federal law for which there is no concurrent jurisdiction. Second, at the time Appellants executed their contracts, *Unisys* made clear that the CPO had jurisdiction to hear claims *by the State.* Thus, even if *Unisys* were overruled today, the Appellants' consent at the time extended to claims brought by the State.

Act and similar state and federal statutes are unconstitutional. Further, Appellants' theory ignores that § 11-35-4230 is consistent with Article I, § 22 of the South Carolina Constitution, which acknowledges a role for judicial or quasi-judicial procedures before an administrative agency and the right to judicial review.

*A. The Separation of Powers Doctrine in South Carolina*

Article I, § 8 of the South Carolina Constitution mandates that "the legislative, executive, and judicial powers of the government shall forever be 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 primary purpose of the Separation of Powers Doctrine is to ensure that power is spread among the separate branches, providing a constitutional system of checks and balances. *State ex. rel. McCleod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). The legislature makes the laws; the executive branch carries them out; and the judiciary interprets and declares them. *Id.*

But "[s]eparation of powers does not require that the branches of government be hermetically sealed." *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank.*, 403 S.C. 640, 649, 744 S.E.2d 521, 525 (2013) (quoting 16A Am. Jur. 2d *Constitutional Law* § 244). Some degree of overlap has always been constitutionally permissible. *Id.* "[O]ur rich and unique constitutional history has resulted in a system of government that does not lend itself to a neat, compartmentalized, or 'cookie-cutter' approach." *Id.* at 651, 744 S.E.2d at 527. "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." *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636. The key focus is on whether one branch has attempted to usurp the functions of the other. *Id.*

In *Tall Tower, Inc. v. S.C. Procure. Rev. Panel*, the Court considered whether the appointment of legislators to sit on the Procurement Review Panel, an executive body, violated the separation of powers. 294 S.C. 225, 363 S.E.2d 683 (1987). The Court observed that the Procurement Code is complex, with an express goal, in part, to increase economy in state procurement activities and maximize the purchasing value of State funds. The Court, therefore, gave great weight to the legislative discretion in designating which members possessed special knowledge and skill, and held that the Panel's composition did not violate the separation of powers. *Id.* at 231-32, 363 S.E.2d at 686.[5] This type of overlap and encroachment in a complex area of government is permissible.

*Tall Tower* is relevant because, like *Unisys*, it involved a constitutional challenge to the Procurement Code's administrative dispute resolution process. In both decisions, the Court recognized the complex nature of the Procurement Code and its underlying goals that serve important public interests. In *Unisys* the Court expressly found that "no constitutional provision" limited the legislature's power to establish jurisdiction for actions brought by the State. 346 S.C. at 169, 551 S.E.2d at 270. And we must presume the Court meant what it said, and that "no constitutional provision" also meant the separation of powers. *Tall Tower*, of course, in a different context, directly addressed the separation of powers and found no violation.

*B. The Constitutionality of the Federal Contracts Disputes Act*

For persuasive support, cases interpreting the federal contract dispute process are helpful. Under that process, which is similar to South Carolina's, the U.S. government must

[5] The Procurement Code has since been amended to delete the provisions requiring several legislators to sit on the Panel. S.C. Code Ann. § 11-35-4410(2).

resolve its contract disputes by filing a claim pursuant to the Contracts Disputes Act, 41 U.S.C. §§ 7101-09. Like § 11-35-4230, the Act applies to all contract claims made by either the contractor or the federal government arising out of a procurement contract and is the exclusive means of resolving such disputes. *Id.* at §§ 7102-03. "The CDA exclusively governs Government contracts and Government contract disputes." *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052, 1055 (Fed. Cir. 1993). The process begins when the U.S. government submits a claim to the contracting officer. Like the CPO in South Carolina, the contracting officer considers the claim and issues a final decision. 41 U.S.C. § 7103. The contractor may then appeal to the Court of Federal Claims or the appropriate Board of Contract Appeals, with right to appeal to the Court of Appeals for the Federal Circuit. *Id.* at § 7104.

In *Seaboard Lumber Co. v. U.S.*, the Court of Appeals for the Federal Circuit upheld the constitutionally validity of the CDA's non-Article III review procedures. 903 F.2d 1560 (1990), *cert. denied* 499 U.S. 919 (1991). That case involved timber sale contracts. When the contractors submitted claims before the contracting officer, the government counterclaimed for breach of contract. The court sidestepped a direct analysis of the separation of powers because the contracts—like the contracts at issue here—contained disputes clauses providing that claims shall be decided by the contracting officer pursuant to the CDA. "The effect of such agreement is that at least Seaboard *prima facie* voluntarily and knowingly waived any right to dispute resolution except in accordance with the contract." *Id.* at 1565.

Although it did not involve the CDA, in *Commodity Futures Trading Comm'n v. Schor*, the Supreme Court held that the jurisdiction of the Commodity Futures Trading Commission to hear common law counterclaims did not violate the separation of powers. 478 U.S. 833 (1986). In determining whether a certain claim "impermissibly threatens the institutional

integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules." *Id.* at 851. To this end, the Court has focused on a few factors, one of which is the extent to which a non-Article III tribunal has usurped the "essential elements of judicial power." *Id.* The Court held that the Commission's "congressional scheme does not impermissibly intrude on the province of the judiciary." *Id.* at 851-52.

The Court based its holding on several factors. First, the Commission deals only with a "particularized area of the law." Second, the Commission's orders are enforceable only by an Article III court. Third, the Commission's rulings are subject to *de novo* review and the Commission cannot exercise all the ordinary powers of a district court, and "thus may not, for instance, preside over jury trials or issue writs of habeas corpus." Although the counterclaims at issue involved a "private" right under state law, the Court found "there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries." *Id.* at 853. Finally, the parties consented to the Commission's jurisdiction.

> In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

*Id.* at 855.

*C. Analysis*

Appellants argue that this case should be controlled by *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910). In that case, the General Assembly had created the State Dispensary Commission to investigate the State Dispensary and resolve claims arising out of

its dealings with contractors. The Dispensary Commission's powers were broad. It had the power, among other things, to enjoin county dispensers from paying contractors, and to pass judgment and place liens on the property of judgment debtors, with those liens having the same priority as court judgments. *Id.* at 39. These powers, the Court held, were judicial.

Section 11-35-4230, however, does not usurp "the essential elements of judicial power" and "impermissibly threaten the institutional integrity of the Judicial branch." *Schor*, 478 U.S. at 851. First, the CPO, at most, performs a quasi-judicial function as part of his role in administering the Procurement Code. The statute limits the CPO's jurisdiction to an administrative review of claims "which arise under or by virtue" of a contract governed by the Procurement Code. While the CPO can apply the law as written, he is not the arbiter of a statute's constitutionality. And much like the commission in *Schor*, he cannot exercise the ordinary powers of the court such as presiding over jury trials or issuing subpoenas to third parties. *Schor*, 478 U.S. at 853. Unlike the commission's powers in *Carolina Glass,* he cannot enjoin a third party, enforce a judgment, or place a lien on property. Only a court, pursuant to § 11-35-4425, can enforce a decision by the CPO.

Second, the CPO deals with a "particularized area of the law." *Schor*, 478 U.S. at 853. Some "overlap of authority and some encroachment to a limited degree" is tolerated out of necessity in complex areas of government. *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636. In both *Unisys* and *Tall Tower*, this Court observed the complex nature of the Procurement Code and the important public interests it serves. "Contractual relationships formed pursuant to the Procurement Code are highly regulated contracts." *Unisys*, 346 S.C. at 171, 551 S.E.2d at 270. Having an expert in government contracting resolve contract disputes "will lead to greater uniformity in the important business of fairly interpreting government contracts."

*Anthony Grace & Sons*, 384 U.S. at 429. The dispensary commission in *Carolina Glass*, on the other hand, was a special tribunal not dealing with a specialized area of the law. It was created solely to investigate and resolve disputes regarding a state-run alcohol dispensary.

Third, the CPO's decisions are subject to judicial review. Initially, an aggrieved party may appeal to the Procurement Review Panel, which conducts a *de novo* review. S.C. Code. §§ 11-35-4230(6) and -4410(1). From there, a party may appeal to the Court of Appeals pursuant to the Administrative Procedures Act. *Id.* at § 11-35-4410(6). This procedure is consistent with Article I, § 22 of the South Carolina Constitution, which sets forth the constitutional procedures required before a person can be bound "by a judicial or quasi-judicial decision of an administrative agency affecting private rights[.]"[6] This Section, added in 1970, did not exist at the time of *Carolina Glass*.

Finally, unlike the parties in *Carolina Glass*, the parties here contractually agreed to bring their contract disputes before the CPO. As observed in *Schor*, it is "self-evident" that the legislature's creation of a quasi-judicial mechanism through which parties may resolve claims by consent does not violate the separation of powers. 478 U.S. at 855. "Government contractors long have been held to be bound by a provision vesting dispute resolution in a

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[6] Article I, § 22 provides:

> **SECTION 22.** Procedure before administrative agencies; judicial review.
> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

nonjury/non-Article III forum." *Seaboard Lumber*, 903 F.2d at 1564 (citing Supreme Court precedent). Concerns about usurping the essential elements of judicial power evaporate when the parties consent to an alternative forum.

Over a hundred and ten years have passed since *Carolina Glass*. Since that time, the "administrative state" has grown exponentially, and modern jurisprudence has re-examined the limits of an administrative court's judicial and quasi-judicial power. And since that time, this State has passed the Consolidated Procurement Code—a unified and comprehensive scheme for handling state procurement—and the U.S. Government has passed the Federal Acquisition Regulations, the Contract Disputes Act, and many other laws and regulations governing procurement. Procurement is a core governmental function requiring a body of government contract law, administered by government contracting experts, to resolve the disputes arising thereunder. The Court in *Unisys* upheld the constitutional validity of this process, and nothing in *Carolina Glass* warrants its reversal.

## IV. APPELLANTS ARE NOT ENTITLED TO A JURY TRIAL

### *A. Appellants Waived Their Right to a Jury Trial for Claims Governed by Section 11-35-4230*

Appellants waived their right to a jury trial when they contractually consented to having the CPO resolve their dispute. "A party may waive the right to a jury trial by contract." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014), *overruled on other grounds by Deutsche Bank v. Houck*, 440 S.C. 409, 892 S.E.2d 280 (2023). This is the federal law as well. *Schor*, 478 U.S. at 849. "The Supreme Court has long recognized that a private litigant may waive its right to a jury and to an Article III court in civil cases." *Seaboard Lumber*, 903 F.2d at 1563 (citing cases).

Appellants signed contracts agreeing to have their disputes decided by the CPO, not a jury. These contracts expressly provide that they are governed by the Procurement Code and by its dispute-resolution process.

*B. By Law, Appellants Are Not Entitled to a Jury Trial on Claims by the State*

The Court held in *Unisys* that the contractor was not entitled to a jury trial, noting that the right to a jury trial is available only in cases existing at the time the State's constitution was adopted in 1868. *Unisys*, 346 S.C. at 171, 551 S.E.2d at 271. The Court reasoned that actions against the sovereign were not recognized in 1868. The Court explained that not only were jury trials not guaranteed on claims against the state, but also "art. 1, § 14, does not guarantee the right to a jury trial on a contract **with the State**." *Id.* at 173, 551 S.E.2d at 271 (emphasis added).

## V. THE RESPONDENTS AGREE THAT THE CHIEF PROCUREMENT OFFICER LACKS AUTHORITY TO FIND A STATUTE UNCONSITUTIONAL.

Appellants first argument is that the CPO lacks the authority to determine whether a statute is unconstitutional. The Respondents agree. The CPO, however, can apply the law as written. Like other administrative forums, the CPO "can still rule on whether a party's constitutional rights have been violated." *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000). "Merely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling." *Id.* In *Evans v. State*, this Court upheld the authority of the ALJ to determine the constitutional claims made by state retirees. 344 S.C. 60, 543 SE.2d 547 (2001). The retirees were "challenging Act 189 as it applies to a limited class of state employees, not the constitutionality of Act 189 as a whole." *Id.* at 66, 543 S.E.2d at 550.

In this case, the CPO is empowered to apply *Unisys* and find that it controls the dispute. While he cannot grant Appellants' request to reverse *Unisys* based on a case from 1910, he can deny the motion to dismiss and hear the rest of the dispute. The Appellants can then use the administrative process, exhaust their administrative remedies before the CPO and the Panel, and *then* challenge the statute on appeal before the court of appeals and this Court. Getting ahead of themselves, the Appellants have tried to run an end-around this process. But the end result is the same. *Unisys* controls and, even if it did not, the Appellants have contractually waived their right to have the Respondents' claims resolved in court before a jury.

## CONCLUSION

Section 11-35-4230 has been the exclusive means for resolving contract claims *by the State* since the Procurement Code was passed in 1981. Twenty years later, *Unisys* upheld the constitutional validity of that statute. Appellants knew this was the law when they entered contracts with the government. They knew their contracts had disputes clauses mandating that the CPO would resolve any disputes. But now that a dispute has arisen, they cry foul.

This Court should decline Appellants' invitation to reverse *Unisys* and should affirm the decision of the lower court.

[Signatures on following page]

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Columbia, South Carolina

February 21, 2024

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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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## CERTIFICATE OF COUNSEL

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The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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