

ORIGINAL

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, Respondents.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE CIRCUIT COURT ERR IN RULING THAT THE APPELLANTS LACKED STANDING?**
- II. **DID THE CIRCUIT COURT ERR IN RULING THAT *HARRELL* COLLATERALLY ESTOPS APPELLANTS FROM ASSERTING PUBLIC IMPORTANCE STANDING?**
- III. **DID THE CIRCUIT COURT ERR IN RULING THAT *LACHES* PREVENTS THE APPELLANTS FROM ASSERTING PUBLIC IMPORTANCE STANDING?**
- IV. **DID THE CIRCUIT COURT ERR IN FAILING TO RULE THAT ACT 130 WAS UNCONSTITUTIONAL?**

STATEMENT OF THE CASE

In 1970, the General Assembly enacted Act 1235 which established the Charleston County Airport District (“District”) (Howe Affidavit, Ex. A). “The corporate powers and duties of the Charleston County Airport District shall be exercised and performed by an authority to be known as Charleston County Aviation Authority.” *Id.*, § 3. Thirty-seven years later, Act 130 of 2007 added two members to the Charleston County Aviation Authority (“CCAA” or the “Authority”): the Chairman and Vice-Chairman of the Charleston County Legislative Delegation, or their designees (Howe Affidavit, Ex. D).

Act 130 applies only to Charleston County and the CCAA. The Governor vetoed Act 130 because the South Carolina Constitution Article III, § 34 and Article VIII, § 7 prohibit special legislation or legislation that applies to only one county (Howe Affidavit, Ex. E). The General Assembly voted to override the Governor’s veto of Act 130, but the vote to override did not carry two-thirds of a quorum in the House, as the Constitution requires (Howe Affidavit, Ex. F, G).

In 2008, the South Carolina Public Interest Foundation (“SCPIF” or “Foundation”) and Edward D. Sloan, Jr. brought an action in the Original Jurisdiction of the Supreme Court challenging eight new Acts, three bobtailed and five single county or special acts (one of which was Act 130). *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E. 2d 52 (2008). SCPIF is a not-for-profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution (Complaint, par. 1). The Supreme Court initially granted the Petition for

Original Jurisdiction on all eight claims, and the parties briefed and argued the constitutionality of all eight acts, but in its written opinion, the Court declined to rule as to five single county or special acts. In a footnote, the Court announced its decision declining to extend public importance standing to the Petitioners as to the five single county or special acts, and ruled that Petitioners did not otherwise possess standing as to those Acts.

We *decline to address* Petitioners' contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34. Petitioners lack standing to challenge those acts. *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Id., 378 S.C. 441, n.1, 663 S.E.2d 52 (2008).

In 2011, Appellants Waring S. Howe, Jr. ("Howe") and SCPIF petitioned the Supreme Court to take this action in its original jurisdiction (Petition for Original Jurisdiction). Plaintiffs alleged that Act 130 of 2007 was unconstitutional on five grounds:

- (1) The vote to override the veto lacked two-thirds of a quorum in the House as required by the South Carolina Constitution, Art. IV, § 21.
- (2) Act 130 was unconstitutional special legislation because it applies only to the CCAA.
- (3) Act 130 was unconstitutional single county legislation because it applies only to Charleston County.
- (4) Act 130 violates the Constitutional dual office holding prohibitions because it allows legislators to serve in a second "office."
- (5) Act 130 violates the Constitutional separation of powers requirement because it allows legislators to serve in an executive agency.

The Supreme Court denied the Petition without comment (Order entered February 8, 2012) Appellants filed this action in Circuit Court in Richland County February 27, 2012 (Complaint)

Howe served as a member of the CCAA 1989-2001, and as Chairman 1996-1999. He is a citizen, resident, taxpayer, and registered elector of Charleston County, who has used the Charleston County International Airport. Howe has paid fees and taxes to the District. He submitted an affidavit, testifying regarding many of the basic, undisputed facts (Howe Affidavit, par. 1).

Respondent Harrell is the Speaker of the South Carolina House of Representatives. Respondent McConnell is now the Lieutenant Governor. For many years, McConnell was vice-chairman of the Charleston County legislative delegation. When he became Lieutenant Governor, Respondent Campsen became Vice-Chairman of the Charleston County Legislative Delegation. Respondents McConnell and Campsen have used “designees” rather than serve personally on the CCAA.

For many years, Respondent Limehouse has served in the General Assembly. Also for several years, Limehouse was Chairman of the Charleston County Legislative Delegation, a member of the CCAA, and in recent years, its Chairman (Howe Affidavit, par. 15). The District owns and operates three airports in Charleston County, including the Charleston County International Airport. The District spends millions of dollars of public funds annually.

Appellants moved for summary judgment on all five causes of action (Motion for Summary Judgment dated July 12, 2012). Respondents moved for and received a change of venue to Charleston County (Order Granting Change of Venue entered July 26, 2012).

Upon the request of the Clerk of Court in Charleston County, Plaintiffs refiled their Motion for Summary Judgment in Charleston (Motion for Summary Judgment filed on or about August 14, 2012).

The Attorney General agreed with the Petitioners in *Harrell* that Act 130 violated S.C. Constitution Article III § 34 and Article VIII, § 7. The Attorney General continues to hold that opinion (Transcript of Oral Argument dated February 14, 2013, p. 32, ll. 12-22.) Defendants McConnell and Campsen agreed that service by a legislator on the CCAA violates the Dual Office Holding and Separation of Powers provisions of the South Carolina Constitution (Transcript of Oral Argument dated February 14, 2013, p. 34, ll. 7-18).

Defendants Harrell and Limehouse contend that Act 130 was not unconstitutional special legislation or single county legislation, that members of the General Assembly serving on the CCAA do not violate the Separation of Powers or Dual Office Holding provisions of the Constitution, and that the House properly overrode the veto (with only 12 votes). Respondents Moved to Dismiss or for Summary Judgment, arguing that Appellants lack standing. The Circuit Court in Charleston County granted summary judgment to the Respondents on the sole grounds that Appellants lacked standing. The Circuit Court ruled that *Harrell* collaterally estops Appellants from asserting public importance standing (Order entered May 13, 2013.)

Appellants gave Notice of Appeal May 24, 2013 (Notice of Appeal).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RULING THAT THE APPELLANTS LACKED STANDING.

The Circuit Court ruled that Appellants possessed neither taxpayer standing nor public importance standing in this case. Appellants contend that this was error.

A. Appellants Possess Public Importance Standing Because They Have Presented Five Claims That the Authority Is Unconstitutionally Comprised, Which Could Marginalize the Important Decisions of the Authority.

The Supreme Court recently granted public importance standing to Petitioners in *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013). The statute creating the South Carolina Transportation Infrastructure Bank Board allowed legislators to sit on the Infrastructure Bank Board, an executive body. Petitioners alleged that the statute violated the Separation of Powers and Dual Office Holding provisions of the Constitution. In granting Mr. Sloan and the Foundation public importance standing the Court reasoned as follows:

Sloan presents a colorable claim that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board. We find resolution of this question is certainly of importance and concern to the public and therefore hold Sloan has standing to bring this challenge.

Id. 744 S.E.2d at 524. This holding is the most recent authoritative statement of the standard for public importance standing. Under this standard, the Circuit Court erred in failing to grant the Appellants public importance standing.

Appellants have presented not one, but five “colorable claim[s] that the [Authority] is unconstitutionally comprised, casting a cloud of illegitimacy which could

marginalize the important decisions of the [Authority].” *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521, 524 (2013).

First, the House voted 12 to 0 to override the veto of Act 130, thereby lacking the necessary two-thirds of a quorum in the House. *See* Section II. A. *infra*.

Second, Act 130 is an unconstitutional special law enacted when a general law applies. *See* Section II. B. *infra*.

Third, Act 130 is an unconstitutional single county act. The Supreme Court ruled that legislation related solely to this District violates the Constitution. *Torgerson v. Craver*, 267 S.C. 558, 562, 230 S.E.2d 228, 229 (1976). *See* Section II. C. *infra*.

Fourth, the simultaneous holding of offices both in the General Assembly and on the CCAA violates the Dual Office Holding provisions of the South Carolina Constitution. *See* Section II. D. *infra*.

Fifth, Act 130 allows members of the General Assembly to serve in executive functions on the CCAA, in violation of the Separation of Powers provision of the South Carolina Constitution. *See* Section II. E. *infra*.

These five Constitutional violations require judicial guidance.

1. The Appellants properly pled and requested public importance standing.

The Circuit Court also ruled that Appellants lack public importance standing for failure to plead standing with specificity in the Complaint (Order, p. 8). This ruling is clear error. The Complaint cites a long list of cases recognizing public importance standing and alleges that this Court possesses jurisdiction as established in those cases (Complaint, par. 6). The issue of jurisdiction of the Court includes the granting of public

importance standing to the Appellants. Accordingly, the Appellants did specifically plead public importance standing in this case.

2. The Supreme Court has granted public importance standing to SCPIF for cases when joined with a local co-plaintiff.

On several occasions, the South Carolina Supreme Court has granted public importance standing to SCPIF when it brought an action with a citizen, resident, taxpayer, and registered elector from the county where the claim arose. *McSherry v. Spartanburg County*, 371 S.C. 586, 641 S.E.2d 431 (2007); *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n.*, 369 S.C. 139, 632 S.E.2d 277 (2006); *Colleton County Taxpayers Ass'n. v. School Dist. of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006). Accordingly, the Circuit Court erred in refusing to grant public importance standing to the Foundation and to Mr. Howe, a Charleston County citizen, resident, taxpayer, and registered elector, in order to address the issues of great public importance in this case.

3. The Speaker of the House requested guidance.

On January 10, 2012, on the floor of the House, Speaker Harrell was discussing the *Fairfield County* case and the number of votes necessary to override vetoes (Journal of the House of Representatives of the State of South Carolina, Regular Session Beginning Tuesday, January 10, 2012 (Statewide Session)). He lamented that he did not know what the Supreme Court's decision in *Fairfield County* meant. *Id.* He had asked many lawyers what the *Fairfield County* decision means, and they did not know either. *Id.* Finally, he had asked the Supreme Court for clarification, but stated that the Supreme Court had refused his request. *Id.* Accordingly, the Speaker himself has publicly voiced

a need for judicial “guidance.” This action is an opportunity to provide the guidance that the Speaker requested on that point and several others.

4. Respondents’ constitutional violations should not be “immune from review.”

The Circuit Court ruled that the Supreme Court’s decision in *Harrell* collaterally estops SCPIF from *even asserting* standing based on the important public issues that this case raises (Order, p. 5). The Circuit Court also reasoned that Howe lacked standing. Under the Circuit’s Court’s reasoning, no one will be able to challenge Act 130 in any circumstance on any basis whatsoever. Such a ruling effectively grants the Respondents a prescriptive right to violate the Constitution, without answering for it. This ruling overstates collateral estoppel, and fails to recognize the exceptions to collateral estoppel that apply to this exceptional case.

Chief Justice Toal, in her dissent in *Newman v. Richland County Historic Preservation Commission*, warned against closing the courthouse doors to citizens.

If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse. . . . A moderate balance is achieved by **granting citizens standing when they bring actions alleging ultra vires acts by a governmental agency**, while denying citizens standing to challenge discretionary actions.

* * *

If this were not the rule . . . , then governmental abuse by the executive and legislative branches of government would be nearly completely **immune from review**.

* * *

In determining when it is permissible to conduct such review, it is important to distinguish between matters of policy and matters of law. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, **our role is confined to determining whether a particular action is legal**.

Id. at 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, J., dissenting) (emphasis added).

Appellants respectfully suggest that the Supreme Court has since adopted the rule set out in Justice Toal's dissent in *Newman v. Richland County Historic Preservation Commission*. The multiple Constitutional violations alleged in this action meet the standard that Justice Toal set out; they are "matters of law;" they are clearly "*ultra vires*;" and they should not be "immune from review." *Id.*

5. *Freemantle v. Preston* does not preclude public importance standing.

The Circuit Court ruled that the Appellants lack public importance standing and relied upon *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012). In *Freemantle*, a citizen sought to invalidate a severance agreement between a county and its former county administrator. *Id.* at 193, 728 S.E.2d at 43 (2012). The Supreme Court affirmed the Circuit Court's refusal to grant public importance standing.

This case is distinguishable from *Freemantle*. First, in *Freemantle*, the citizen sought *monetary damages for himself*. The Supreme Court ruled, "That Appellant *sought monetary damages* for himself . . . , while claiming to represent the taxpayers of Anderson County, *directly conflicts* with the purpose and spirit of the public importance exception." *Id.* 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012). The Foundation and Howe do not seek money damages for themselves. They seek declaratory and injunctive relief. Accordingly, their action fulfills "the purpose and spirit of the public importance exception."

Second, the citizen in *Freemantle* sued current and former members of the County Council in their *individual* capacities, as well as their official capacities. *Id.*, 398 S.C. 186, 190, 728 S.E.2d 40, 42 (2012). An action against council members in their individual capacities would not support injunctive relief, the traditional remedy for cases

for which courts have granted appellants public importance standing. In contrast, in this case, Appellants name Respondents only in their official capacities.

Third, the plaintiff in *Freemantle* brought his action under the common law, but he did *not* allege a Constitutional violation or an *ultra vires* act on the part of the defendants. An allegation of an unconstitutional or *ultra vires* act is ordinarily necessary for public importance standing. See *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, CJ, *dissenting*). SCPIF and Howe allege five separate Constitutional violations.

Fourth, the Court in *Freemantle* ruled that the personnel decisions of the county did not raise issues of great public importance and did not require judicial guidance. “[T]he personnel choices of Anderson County, even in the face of a seemingly excessive severance package, do not necessitate further guidance.” *Id.*, 398 S.C. 186, 190, 728 S.E.2d 40, 42 (2012). Five Constitutional violations are far more important to the citizens of South Carolina than a county’s termination of an employment contract. The citizens of this State have a strong public interest in ensuring that State government abides by the Constitution.

This Court has the authority and responsibility to interpret the South Carolina Constitution. “*The construction of a statute is a judicial function and responsibility.*” *Anderson v. South Carolina Election Commission*, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012) (emphasis added). As “the construction of a statute is a judicial function and responsibility,” even more so is the construction of five sections of the South Carolina Constitution. *Id.* 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012). This Court should interpret and apply the five sections of the Constitution that the Respondents violated.

B. Howe Possesses Individual Standing as a Former Member of the CCAA.

The Circuit Court also ruled that Howe does not possess constitutional standing to address the Respondents' unconstitutional actions related to the CCAA (Order, p. 10). However, South Carolina courts have long recognized the right of a former member of a government body to bring an action against that entity for illegal actions. Howe alleged many personal and taxpayer connections to the CCAA. He served as a member of the CCAA 1989-2001, and as Chairman 1996-1999" (Complaint, par. 2). He alleged that he "has used the Charleston County Airport and paid fees and taxes to the District. These facts as alleged in the Complaint provide a sound, legal basis for Mr. Howe's standing to bring this action. The Court's finding that the Appellants failed to plead a basis for standing is clear error.

In *Davis v. Richland County Council*, the General Assembly had enacted Act 207 of 2005, which transferred the power to appoint members of the Richland County Recreation Commission from the legislative delegation to the Richland County Council. *Id.*, 372 S.C. 497, 642 S.E.2d 740 (2007). After Act 207 took effect, the members of the Recreation Commission were no longer serving. They filed suit alleging that Act 207 was unconstitutional because it was an unconstitutional single county act and special legislation. The Circuit Court ruled that the plaintiffs lacked standing, in part because they were no longer on the Recreation Commission when they filed suit. The Supreme Court reversed, finding that the *former* Commissioners had standing to challenge the constitutionality of the Act. The Supreme Court further found that Act 207 was unconstitutional special legislation.

The Supreme Court issued a similar ruling in *Evins v. Richland County Historic District*, 341 S.C. 15, 532 S.E.2d 876 (2000). The commissioners of the Richland County Historic District had transferred away certain historic properties. In an earlier action, Newman, one of the then-current commissioners, had brought a declaratory judgment action to declare the property transfers void. The Supreme Court ruled that a **current** member of the Commission did not possess standing to bring such an action. *Newman v. Richland County Historic Preservation Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997) (but see Toal, J, dissenting).

Four months after the decision denying standing to Newman, a **former** commissioner, Ms. Evins, brought a similar action to avoid the property conveyances. Defendants again moved to dismiss for lack of standing. The Circuit Court ruled that Ms. Evins possessed standing, and the Supreme Court affirmed. The Court ruled that the case raised issues of great public importance and “the actions of RCHPC were *ultra vires* as discussed above. Thus, the trial court correctly held Evins has standing.” *Id.*, 341 S.C. 15, 21, 532 S.E.2d 876, 879. Thus, the Supreme Court has ruled that a **former member** of a governmental body possesses standing to raise issues related to illegal or *ultra vires* acts of the body on which he or she had served, even though a current member of the government body does not possess such standing. *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007); *Newman v. Richland County Historic Preservation Comm'n.*, 325 S.C. 79, 480 S.E.2d 72 (1997). Accordingly, Mr. Howe, a former member of the CCAA, possesses a personal standing beyond his taxpayer and public importance standing.

C. **Howe Possesses Taxpayer Standing.**

The Circuit Court ruled that Howe did not possess taxpayer standing. Howe specifically pled that he was “a citizen, resident, taxpayer, and registered elector of Charleston County,” thereby pleading and alleging he had standing under each of those designations (Complaint, par. 2). Howe’s affidavit supports his allegations in the Complaint and demonstrates that he has paid tax money to the County of Charleston, and that the County has used taxpayer money to support many expenditures of the CCAA. Furthermore, Howe’s affidavit establishes that on many occasions he has paid user fees, which the CCAA spends to support and provide money for its operations. Thus, he is both a taxpayer and a payer of user fees and has contributed to the funding of the Authority.

The Circuit Court’s ruling is directly contrary to a finding of the South Carolina Supreme Court regarding *this very airport district*.

Taxes for operation and/or to repay bonds *are raised by a levy on the district, which* for all practical purposes *is the county*.

The 1975 act pledges for the payment of the \$12,600,000.00 to be borrowed, “the full faith, credit and taxing power of Charleston County Airport District.” It further directs that there be *levied annually* “by the Auditor of Charleston County and collected by the Treasurer of Charleston County, in the same manner as county taxes are levied and collected, *a tax without limit on all taxable property in the district* sufficient to pay the principal and interest on such bonds.”

Torgerson v. Craver, 267 S.C. 558, 562-63, 230 S.E.2d 228, 229-30 (1976) (emphasis added). Just as Howe does here, the appellant in *Torgerson* brought the action as a county *taxpayer*.

Appellant brings this suit pursuant to the Declaratory Judgment Act, § 10—2001 et seq., 1962 South Carolina Code of Laws, *on behalf of herself and all taxpayers and property owners* in the Charleston County Airport District

Id. 267 S.C. 558, 560, 230 S.E.2d 228, (1976) (emphasis added). Just as the *Torgerson* Court granted the plaintiff taxpayer standing “on behalf of herself and all taxpayers,” so also, this Court should grant Howe standing as “a citizen, resident, taxpayer, and registered elector of Charleston County” who “brings this action individually on his behalf and on behalf of all others similarly situated” (Complaint, par. 2).

Taxpayers are a distinct subset of residents. In *Myers v. Patterson*, the Court acknowledged that a taxpayer had standing different from the public generally. *Id.* at 350 S.C. 248, 433 S.E.2d 841 (1993)

In such cases, *a taxpayer* who may be compelled to pay the assessment, or *who has contributed to the sum jeopardized*, is considered to have sufficient interest to enjoin the illegal act. [*Shillito v. City of Spartanburg*, 214 S.C. 11, 22, 51 S.E.2d 95, 97 (1948)]. See also *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that *a taxpayer may maintain an action in equity*, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law).

Id. (emphasis added). In the case at bar, Howe has contributed to the general tax funds of the County. Accordingly, Howe possesses standing as a taxpayer to contest expenditures of tax funds under illegal statutes.

South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (S.C. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993). In South Carolina, taxpayers particularly possess standing to bring such actions and request such judicial relief.

II. THE CIRCUIT COURT ERRED IN RULING THAT *HARRELL* COLLATERALLY ESTOPS APPELLANTS FROM ASSERTING PUBLIC IMPORTANCE STANDING.

The Circuit Court ruled the following:

First this Court holds that the Foundation is collaterally estopped from asserting that it has standing to maintain this current challenge Act 130 [sic].” bringing this action, due to collateral estoppel. Second, this Court holds that Plaintiff Howe also fails to establish the necessary standing to maintain this action. Thus, summary judgment is proper and this action should be dismissed in its entirety.

* * *

Collateral estoppel bars the Foundation from maintaining any challenge to the constitutionality of Act 130. This Court holds that our Supreme Court adjudicated this very standing issue in 2008 and unequivocally held that the Foundation lacked standing to challenge Act 130. As a result, this Court concludes that the Foundation is estopped from relitigating the issue of its standing to challenge the Act in this case. Therefore, summary judgment is proper as a matter of law.

Order, p. 5.

However, properly understood, the *Harrell* decision does not collaterally estop either the Foundation or Howe from bringing this action. In a footnote, the *Harrell* Court announced its decision on standing as to the five single county or special acts:

We *decline to address* Petitioners’ contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34. Petitioners lack standing to challenge those acts. *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Id., 378 S.C. 441, n.1, 663 S.E.2d 52 (2008). In *Harrell*, the Court found that the Petitioners did not possess a *right to personal* standing, but that finding does not preclude a different court from granting *public importance* standing, based upon the

considerations that govern public importance standing, especially in a different action, brought by different Plaintiffs, raising different legal theories, and when the legal context has changed.

Although the Court declined to address the five single county or special acts in 2008, when neither Petitioner was a resident of any of the five counties affected by the five single county acts, the present action is distinguishable, and requires a different resolution.

A. The Supreme Court’s Discretionary Denial of Original Jurisdiction Does Not Collaterally Estop Another Court from Granting Public Importance Standing.

The discretionary granting of original jurisdiction is limited to those extraordinary writs, “when the matter [cannot] be determined in a lower court in the first instance, without material prejudice to the rights of the parties.” SCACR 245(a). It is granted in the discretion of the Court, “if the public interest is involved, or if special grounds of emergency or other good reasons exist.” *Id.* Like the granting of original jurisdiction, the Supreme Court’s denial of original jurisdiction was also discretionary, but that discretionary denial does not preclude another court, in other circumstances from granting public importance standing.

B. Several Factors Distinguish This Action from *Harrell*.

Unlike Sloan or SCPIF in *Harrell*, Howe is a citizen, resident, taxpayer, and registered elector of Charleston County. He is also a former member of and Chairman of the CCAA. He has paid user fees to the CCAA (Howe Affidavit, par. 1). Howe’s involvement with Charleston County and the CCAA distinguishes this case from *Harrell*.

Second, in *Harrell*, Petitioners challenged *eight separate Acts* of the General Assembly. The Supreme Court ruled on three Acts with bobtailed provisions. In contrast, this action focuses on only Act 130 and the actions of only *one body*: the CCAA. This action does not challenge a multitude of Acts, relating to multiple counties.

Third, this action alleges five distinct Constitutional arguments, three of which were *not* raised in *Harrell*: improper veto override, dual office holding, and separation of powers. For these reasons, *Harrell* is distinguishable from the present action, and collateral estoppel does not preclude this action.

C. Intervening Changes in the Legal Context Create an Exception to the Doctrine of Collateral Estoppel.

Even if collateral estoppel were otherwise applicable, intervening changes in the legal context create an exception to the doctrine of collateral estoppel. The Restatement (2nd) of Judgments, § 28 recognizes this exception to the doctrine of collateral estoppel, among others.

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, *relitigation* of the issue in a subsequent action between the parties *is not precluded* in the following circumstances:

* * *

(2) *The issue is one of law and* (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of *an intervening change in the applicable legal context* or otherwise to avoid inequitable administration of the laws; or

* * *

(5) There is a clear and convincing *need for a new determination* of the issue (a) because of the *potential adverse impact* of the determination *on the public interest*

Id. (emphasis added).

The South Carolina Supreme Court has recognized these exceptions to the doctrine of collateral estoppel by quoting this section in *Pye v. Aycock*. *Id.* at 325 S.C. at 437-38, 480 S.E.2d at 460-61. *See also, Nelson v. QHG of South Carolina, Inc.*: “There are numerous exceptions to the application of res judicata and collateral estoppel. In *Pye*, the court adopted the Restatement (Second) of Judgments section 28.” *Id.* at 354 S.C. 290, 306, 580 S.E.2d 171, 179 (2003), *aff’d. in part, rev. in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005). This case meets both of the exceptions quoted above: Since the ruling in *Harrell* in 2008, the legal context has changed. The Supreme Court has issued two significant decisions that the Circuit Court should have applied.

The first decision that changed the legal context is *Board of Trustees of School District of Fairfield County v. State*. *Id.* at 395 S.C. 276, 718 S.E.2d 210 (2011). The Supreme Court ruled that a vote to override a veto requires a two-thirds vote *of a quorum* of each house of the General Assembly. *Fairfield County* reinstated and reemphasized the General Assembly practice back to what it had been some years before, constitutionally requiring the two-thirds vote of a quorum of both houses.

The second decision is *Charleston County School District v. Harrell*. *Id.* at 393 S.C. 552, 713 S.E.2d 604 (2011). The Plaintiffs alleged that an act that dealt only with the Charleston County School District was a special law. Like the Aviation District, the geographic boundaries of the School District were coterminous with those of Charleston County. The Circuit Court dismissed the claim, but the Supreme Court reversed and ruled that the Plaintiffs had stated a valid claim when they asserted that the act was a single county act and therefore unconstitutional. *Id.* These cases created an “intervening

change in the applicable legal context,” because they pointed to clear violations of the Constitution in the facts of this case.

D. Constitutional Claims of Public Importance Warrant an Exception to Application of Collateral Estoppel.

The United States Supreme Court found an exception to the doctrine of collateral estoppel for *constitutional* claims and issues of *public importance*.

Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. *This exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.*

Montana v. United States 440 U.S. 147, 162-163, 99 S.Ct. 970, 978, 59 L.Ed.2d 210 (1979) (citations omitted) (emphasis added). Similarly, the Constitutional issues in this case require adjudication. Allowing governmental entities, including the General Assembly, to ignore or violate their Constitutional limits inflicts an “adverse impact . . . on the public interest.” Indeed, one could hardly imagine a more “adverse impact . . . on the public interest” than insistent and flagrant lawbreaking by the public officials charged with upholding the Constitution.

This Court should not engage in “unreflective invocation of collateral estoppel” in such constitutional cases of public importance as the case at bar, but rather this Court should follow the reasoning of *Montana v. United States* and acknowledge this exception for Constitutional claims and issues of great public importance.

E. Harrell Did Not Address Petitioners’ Claims on Their Merits.

The *Harrell* Court did not address Petitioners’ single county and special legislation claims on their merits; it “declined to address” those matters. Collateral

estoppel requires that the particular issue must have been actually determined on the merits. Having issued no ruling on the merits of those claims, *Harrell* does not bar this action.

Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues “*actually and necessarily litigated and determined in the first suit.*”

Beall, 281 S.C. at 369 n. 1, 315 S.E.2d at 189 n. 1. This Court further held: In order, however, to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was *actually litigated and directly determined* in the prior action and that the matter or fact directly in issue was *necessary to support the first judgment*.

Pye v. Aycock, 325 S.C. 426, 435-436, 480 S.E.2d 455, 459-460 (Ct. App. 1997) (emphasis added). Accordingly, *Harrell* does not collaterally estop this action.

III. THE CIRCUIT COURT ERRED IN RULING THAT THE DOCTRINE OF LACHES PREVENTS THE APPELLANTS FROM ASSERTING PUBLIC IMPORTANCE STANDING.

The Circuit Court implies that *laches* or undue delay bars the Appellants from bringing this action (Order, p. 16-17). The Circuit Court did not find a violation of any statute of limitations for constitutional violations. The public interest runs counter to such a statute of limitations, or the application of *laches*.

Laches is an equitable doctrine and applicable to actions in equity. This action seeks declaratory judgment that Act 130 is unconstitutional. Declaratory judgment actions are neither strictly legal nor equitable; but they take the characteristics of the underlying cause of action. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). In this case, all the causes of action call for the interpretation and application of five provisions of the South Carolina Constitution. A request for interpretation and application of the Constitution is an action at law, not equity. Accordingly, all of

Appellants' causes of action are legal. Therefore, the doctrine of *laches* does not apply to bar these actions.

Second, Respondents have failed to establish the elements of *laches*.

Laches is an equitable doctrine defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a party must show that the complaining party ***unreasonably delayed*** its assertion of a right, ***resulting in prejudice*** to the party asserting the defense of laches. See *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007).

Historic Charleston Holdings v. Mallon, 381 S.C. 417, 617 S.E.2d 388 (2009) (emphasis added). The Circuit Court did not articulate any unreasonable delay. The Foundation initially brought an action challenging Act 130 within a few months of the Governor's veto in 2007. Ultimately, the Supreme Court in *Harrell* declined to extend public importance standing to the Foundation's challenge to Act 130 or the other four single county or special legislation acts that the Foundation challenged.

In 2011, the Supreme Court issued two decisions that significantly encouraged Appellants' decision to challenge Act 130 again. In *Board of Trustees of School District of Fairfield County v. State*, the Supreme Court ruled that a veto override requires a two-thirds vote of a quorum of each house of the General Assembly. *Id.* at 395 S.C. 276, 718 S.E.2d 210 (2011). Appellants realized that the rule from *Fairfield County* should apply to Act 130, and filed this action in the Supreme Court just 11 days after the Supreme Court denied rehearing in *Fairfield County*. Appellants respectfully suggest that 11 days is not an ***unreasonable*** delay.

The Supreme Court issued a second influential opinion in *Charleston County School District v. Harrell*. *Id.* at 393 S.C. 552, 713 S.E.2d 604 (2011). The General

Assembly had enacted a law that applied only to the Charleston County School District. The plaintiffs alleged that the act was an unconstitutional special or single county law. The Circuit Court dismissed the claim, but the Supreme Court reversed and ruled that the plaintiffs had stated a valid claim. Accordingly, the passing of three months between July 25, 2011 and October 31, 2011, following the decision in *Harrell*, when Appellants filed this action was not an unreasonable delay.

Second, the Circuit Court did not articulate any prejudice to the Respondents due to the alleged delay. Respondents have no prescriptive right to violate the Constitution. All Respondents took an oath to support and defend the Constitution, but they have violated the Constitution five different ways. Addressing their Constitutional violations does not produce legal prejudice.

Third, the Circuit Court erred in ruling that the “delay in taking action establishes that the plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance.” A slight delay in calling public officials to account does not diminish the public importance of their constitutional violations.

Finally, when Respondents seek to assert any *laches* defense, they must establish that they come with clean hands.

Laches is a defense in equity, and one who comes to the court seeking equity must come with clean hands. *See Precision Instrument Mfg. Co. v. Automotive Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) (“He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.”)

Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004). Respondents have violated five provisions of the South Carolina Constitution. Their Constitutional violations, their persistence in defending this action, and their seeking to avoid

accountability demonstrate their unclean hands. This Court should rule that the doctrine of *laches* does not enable them to continue to violate the Constitution.

IV. THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT ACT 130 WAS UNCONSTITUTIONAL.

The Circuit Court did not reach the merits of the case. “The Court declines to rule on any other issues presented in this action” (Order, p. 17). Appellants respectfully suggest that the Circuit Court’s failure to address the merits of the case was erroneous.

A. The General Assembly Did Not Properly Override the Veto of Act 130.

The Governor vetoed Act 130 of 2007 on June 4, 2007(Howe Affidavit, Ex. E). On June 5, 2001, the House voted to override the veto 12 to 0 (Howe Affidavit, Ex. F). This vote was insufficient to override the veto. South Carolina Constitution, Art. IV, § 21. In *Board of Trustees of School District of Fairfield County v. State*, the Court found that the Constitution requires a vote of two thirds of a quorum in each house.

This Court’s precedent and a plain reading of this unambiguous constitutional provision combine to compel a construction that the two-thirds requirement means *two-thirds of a quorum “shall agree.”* Indeed, that has been the General Assembly’s longstanding understanding and application of its veto override authority, until relatively recently.

395 S.C. 276, 718 S.E.2d 210 (2011). Act 130 likewise lacked a majority of a quorum of both Houses. *Fairfield County* relied on more than 100 years of precedent and hundreds of veto overrides that had routinely required two-thirds of a quorum of each house, “until relatively recently.” Accordingly, the holding in *Fairfield County* and the South Carolina precedents going back more than 100 years compel the conclusion that the vote to override Act 130 failed to meet the standard of the South Carolina Constitution.

Therefore, this Court should declare Act 130 and the offices created thereby null and void.

The Court need not go beyond this issue, but when the Supreme Court faced a similar circumstance in *Ashmore v. Greater Greenville Sewer District*, the Court chose to address matters of great public importance, reasoning as follows:

If this were an ordinary case, our opinion might well stop here. The Board of Trustees of the projected Auditorium District has been held invalid in toto. The district is a headless body and cannot function under the present legislation. But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are earnestly argued public *questions of importance*. The last stated factor brings into play the principle, now generally established, that *questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest*. 3 Am.Jur. 310, Annotation, 132 A.L.R. 1185.

Id., 211 S.C. 77, 96, 44 S.E.2d 88, 96-97 (1947) (emphasis added). Similarly, this Court should decide in this case these additional “earnestly argued public questions of importance.”

B. Act 130 Is An Unconstitutional Single County Act.

“No laws for a specific county shall be enacted,” S.C. Constitution, Art. VIII, § 7. “Article VIII, §7, of the South Carolina Constitution prohibits the enactment of legislation after March 7, 1973 that affects a specific county. *Knight v. Salisbury*, 262 S.C. 565, 206 S.E.2d 875 (1974)” [note omitted]; *Pickens County v. Pickens County Water and Sewer Authority*, 312 S.C. 218, 439 S.E.2d 840, 842 (1994).

The boundaries of the District are the same as those of Charleston County. “*The territory embraced by the County of Charleston* is hereby constituted as an airport district.” Act 1235 of 1970 § 2 (Howe Affidavit, Ex. A) (emphasis added).

The Supreme Court ruled in *Torgerson v. Craver* that another act related *to this same District* was single county legislation, in violation of the Constitution. The Supreme Court quoted Art. VIII, § 7 and reasoned:

In our opinion, the act violates both the letter and the spirit of the constitutional directive quoted above. One of the purposes of Article VIII and of Home Rule is to relieve the General Assembly of the burdens of local governments. The Charleston County Airport District is a Charleston County political subdivision. . . .

Article VIII, § 7, prohibits legislation by the General Assembly for a specific county. *Involved here is a matter which the county governing authority can and should deal with instead of the General Assembly.*

267 S.C. 558, 562-63, 230 S.E.2d 228, 229-30 (1976).

Several times, the General Assembly has sought to meddle in the affairs of a commission, authority, or entity contained wholly within the boundaries of one county. *Cooper River Park and Playground Commission v. City of North Charleston*, 273 S.C. 639, 259 S.E.2d 107 (1979); *Richardson v. McCutchen*, 278 S.C. 117, 292 S.E.2d 787 (1982); *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). Each time, the Court found the actions of the General Assembly unconstitutional. The same rule applies to this case.

The legislative history of Act 130 reveals that the General Assembly tacitly recognized that Act 130 was single county legislation. It was introduced in the House on January 31, 2007, and referred to the *Charleston County Delegation* (Act 130 of 2007 (Howe Affidavit, Ex. D)). The next day the Charleston Delegation favorably reported it out (*Id.*). On February 6 and 7, the bill received its second and third readings and was sent to the Senate (*Id.*). On February 7, the Senate placed the bill on its “local & uncontested calendar” (*Id.*). In May 2007, the bill received second and third readings and

was ratified (*Id.*). The General Assembly's conduct indicates this legislation is single-county legislation.

C. Act 130 Is An Unconstitutional Special Law.

"The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted" S.C. Constitution Article III § 34. Act 130 violates Art. III, § 34's restriction on special legislation. Act 130 fails to state any reason why a general law could not address those matters. The Supreme Court has discussed the effect of Art. III, § 34.

Article III, § 34(IX) prohibits the enactment of a special law "where a general law can be made applicable." This provision not only limits special legislation where existing general law is already applicable, but also where it is possible to create general law which would be applicable. *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Seaborne v. Hartsville Rescue Squad*, 269 S.C. 386, 237 S.E.2d 496 (1977).

Article III, § 34 (IX), however, does not prohibit all special legislation.

The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation. There must, however, be a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.

Duke Power Co., 284 S.C. at 90, 326 S.E.2d at 400-401 (1985) [quoting *Shillito v. City of Spartanburg*, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948)]. In other words, the General Assembly must have a "logical basis and sound reason" for resorting to special legislation. *Gillespie v. Pickens County*, 197 S.C. 217, 14 S.E.2d 900 (1941).

Horry County v. Horry County Higher Educ. Com 'n, 306 S.C. 416, 418-19, 412 S.E.2d 421, 423 (1991).

S.C. Code Ann. § 55-1-80 governs county aviation commissions in general. For any county aviation authority in the State, that section authorized the following:

1. Any county aviation authority may be increased by two members:
2. One appointed by the county House Delegation.
3. One appointed by the county Senate Delegation.
4. Any County governing body may add two members to the Authority.
5. In Counties having two cities with populations in excess of 50,000, the mayors of such cities may serve *ex officio*.

(Howe Affidavit, Ex. C). This statute is the “general law.”

In 2007, the General Assembly enacted Act 130, which changes the rules *only* for the CCAA (Howe Affidavit, Ex. D). “The Charleston County Aviation Authority shall be increased by two members who shall be the Chairman and Vice Chairman of the Charleston County Legislative Delegation, or their designees.” Because Act 130 applies *only* to the CCAA, it is an unconstitutional “special law.”

In his veto message, the Governor wrote,

The state Constitution clearly prohibits the enactment of special legislation where a “general law can be made applicable.” S.C. Const. Art. III, Section 34(IX). The General Assembly has established a general statute addressing the appointment of additional members to county aviation commissions. *See* S.C. Code § 55-1-80, as amended. It is unconstitutional for the General Assembly to pass special legislation, like H. 3409, R-69, in contravention of a general law. Each county’s aviation board or commission should be subject to the same general law, whether that includes the Chair and Vice-Chair of the legislative delegation as additional members or not.

Additionally, this bill affects only Charleston County and is, therefore, clearly an act for a specific county. Such acts are in violation of Article VIII, Section 7 of the Constitution of the State of South Carolina, which provides that “[n]o laws for a specific county shall be enacted.”

For these reasons, I am vetoing H. 3409, R-69.

(Howe Affidavit, Ex. E). The veto was appropriate. S.C. Code § 55-1-80 sets out a general, standard method for appointing additional members to county aviation commissions, but Act 130 makes a special exception for Charleston County.

The Attorney General agreed that Act 130 violates the S.C. Constitution, Art. III, § 34, and Art. VIII, § 7 (*South Carolina Public Interest Foundation v. Harrell*, Brief of Respondent State of South Carolina, pp. 7, 14-17).

South Carolina recognizes a limited exception to Art. III, § 34 when the legislation furthers the purposes of Home Rule by devolving the power away from the legislature to a county. “The Charleston County Airport District is a Charleston County political subdivision.” *Torgerson v. Craver*, 267 S.C. 558, 562, 230 S.E.2d 228, 229 (1976). However, if the power is to be devolved from the legislature to the county, it should be devolved statewide and not on a county-by-county, piecemeal basis. *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). Act 130 does not qualify for this exception. It injects the General Assembly and its members into the governance of the local District. Act 130 of 2007 should be declared unconstitutional.

D. Act 130 Violates the Constitutional Dual Office Holding Prohibitions.

Act 130 violates the Dual Office Holding provisions of the South Carolina Constitution (Art. III, § 24, Art. VI, § 3, and Art. XVII, § 1A). The members of the legislative department who serve as members of the Authority are violating three sections of the S.C. Constitution that prohibit dual office holding. These office holders must vacate one or both of their offices.

No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them, or under any other power, except officers in the

militia, members of lawfully and regularly organized fire departments, constables, and notaries public. If any member accepts or exercises any of the disqualifying offices or positions *he shall vacate his seat*.

S.C. Constitution, Art. III, § 24 (emphasis added). *See also*, S.C. Constitution, Art. VI, § 3 (“No person may hold two offices of honor or profit at the same time”), and S.C. Constitution, Art. XVII, § 1A (“No person may hold two offices of honor or profit at the same time”). There is no question that a member of the General Assembly holds an “office.”

1. A director of CCAA holds “an office or position of profit or trust.”

The Supreme Court explained the criteria for determining whether the additional position is an “office in the Constitutional sense.”

“One who is charged by law with duties involving *an exercise of some part of the sovereign power*, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he *power of appointment comes from the state*, the authority is derived from the law, and the *duties are exercised for the benefit of the public*.” *Willis v. Aiken County*, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “*The powers* conferred and the duties to be discharged with regard to a public office *must be defined*, directly or impliedly, by the legislature or *through legislative authority*. The *duties must be performed independently* and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer of body.” 63C Am Jur.2d *Public Officers and Employees* § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Com’n., 387 S.C. 109, 124, 691 S.E.2d 453, 461 (2010). *Segars-Andrews* was a judicial candidate for reelection who had been found not qualified by the Judicial Merit Selection Commission (“JMSC”).

CCAA membership involves the exercise of the sovereign power of the State. As in *Segars-Andrews*, “the power of appointment comes from the State” and “the duties are

exercised for the benefit of the public.” See Act 1235 of 1970, § 5 (Howe Affidavit Ex. A). Furthermore, the powers of the Authority are “defined, directly or impliedly, by the legislature or through legislative authority.” *Id.* Finally, the powers of the CCAA are “performed independently and without control of a superior officer.” Thus, the CCAA meets all the criteria established in *Segars-Andrews* for application of the dual office holding prohibition. Accordingly, Act 130 of 2007, which allows members of the General Assembly to serve on the CCAA, violates the Constitutional prohibitions of dual office holding, South Carolina Constitution, Art. III, § 24, Art. VI, § 3, and Art. XVII, § 1A.

2. Members of the General Assembly do not possess a Constitutional nexus with the CCAA that would qualify them under the *ex officio* exception to the dual office holding prohibition.

The Supreme Court has recognized a limited exception to the dual office holding prohibition: when an office holder also serves *ex officio* in an office arising out of and related to the main office.

The Court discussed this rule in *Ashmore*.

The rule here enforced with respect to double or dual officeholding in violation of the constitution is not applicable to those officers upon whom other duties *relating to their respective offices* are placed by law. A common example is *ex officio* membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. *State ex rel. Ray v. Blease*, 95 S.C. 403, 79 S.E. 247, 249, 46 C.J. 934, 42 Am.Jur. 929.

Ex officio means ‘by virtue of his office.’ 1 Bouv., Law Dict. Rawles’ Third Revision, page 1103. Similar observation may be made with respect to *ex officio* membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the officer has only a *part of joint ownership or management*. In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment *ex officio*

of officers of the separate governmental units *whose duties of their respective officers have reasonable relation to their functions ex officio*.

Ashmore, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947).

Ashmore is the case most similar to this case. The General Assembly had established a board to oversee the construction and operation of the Greenville Memorial Auditorium. The Board included members of the General Assembly, the Mayor of Greenville, and the Chairman of County Council. A taxpayer challenged the composition of the Board. The Supreme Court explained the Constitutional basis for its ruling:

The qualifications of members of the General Assembly are carefully set out in Article III of the constitution. Section 24 thereof forbids the holding of other public office or position, and provides that upon the acceptance of any such by a member he shall vacate his seat. *The proposition seems to us to prove itself, that a member cannot sit upon the board* of auditorium trustees established in the act under review *and* at the same time *retain his membership in the General Assembly*. The language of the fundamental law is *plain* and *unambiguous*. It admits of *no doubt* of its meaning.

Id. 211 S.C. 77, 90, 44 S.E.2d 88, 94 (1947) (emphasis added).

In *Segars-Andrews*, the Supreme Court recently reaffirmed its holdings from *Ashmore*. *Segars-Andrews* argued that a legislator's service on the JMSC violated the dual office holding provisions of the Constitution. The Court disagreed, finding that the *ex officio* exception applied.

Our jurisprudence has a narrow, yet firmly established, exception which provides that "double or dual office holding in violation of the constitution is *not applicable to those officers upon whom other duties relating to their respective offices are placed by law*." *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) (emphasis added). This exception is commonly referred to as the "ex officio" or "incidental duties" exception.

As applied here, service on the JMSC by members of the General Assembly is properly characterized as incidental to their legislative duties. This is so because the *Legislature* is impressed by our constitution with sole responsibility for the election and re-election of judges. Conversely,

service on the JMSC by one who holds an office in the *executive or judicial branch would violate the constitutional ban on dual-office holding*.

Segars-Andrews, 387 S.C. 109, 125, 691 S.E.2d 453, 462 (2010) (second emphasis added). The situation in *Segars-Andrews* above is the converse of the circumstances in the case at bar. A member of the *legislative* department violates the dual office holding ban by serving as a member of CCAA, a part of the *executive* department.

The Court further explained the *ex officio* exception.

“Service by members of the *legislative* branch in an office charged with the *execution* of the law *violates separation of powers and dual-office holding*. *That was the case in Ashmore*. *Ashmore* referenced the “*ex officio*” or “*incidental duties*” exception: “A common example is *ex officio* membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office.” *Id.* at 92, 44 S.E.2d at 95.

387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010) (emphasis in original).

Recently the South Carolina Supreme Court issued a ruling on dual office holding and separation of powers. *SCPIF v. SC Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013). The Foundation and Mr. Sloan challenged the constitutionality of an Act that allowed two members of the General Assembly to serve as directors of the South Carolina Transportation Infrastructure Bank Board. The Court said,

The South Carolina Constitution prohibits members of the General Assembly from holding another office during their service in the legislature, both expressly and by virtue of the repeated general prohibitions against dual office holding. *See* S.C. Const. Art. III, § 24 (“No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State....”); S.C. Const. art. VI, § 3 (“No person may hold two offices of honor or profit at the same time.”); S.C. Const. art. XVII, § 1A (“No person may hold two offices of honor or profit at the same time....”). This Court, however, has recognized an “*ex officio*” or “*incidental duties*” exception where “there is a *constitutional nexus* in terms of power and responsibilities between the first office and the ‘*ex officio*’ office.” *Segars-Andrews*, 387 S.C. at 126,

691 S.E.2d at 462. Ex officio is defined as “[b]y virtue or because of an office; by virtue of the authority implied by office.” *Black’s Law Dictionary* 267 (3d pocket ed.2006).

Id. 744 S.E.2d at 524 (emphasis added).

Although the Court upheld the service of the legislators on the Bank Board as constitutional, the Court also *distinguished* the Bank Board from the Memorial Auditorium Board in *Ashmore*.

Moreover, this case is also *distinguishable from Ashmore* because like service on the JMSC in *Segars–Andrews*, service by legislators on the [Bank] Board is “reasonably incidental to the full and effective exercise of their legislative powers.” *Segars–Andrews*, 387 at 127, 691 S.E.2d at 463.

Id. 744 S.E.2d at 525 (emphasis added). In other words, the service in *Ashmore* involved no constitutional nexus because it was service on a local auditorium board. Similarly, there is no constitutional nexus between the General Assembly and the CCAA, a local airport commission.

A legislator’s service on the CCAA fails to qualify for an “ex officio” or “incidental duties” exception to the dual office holding prohibition. *Id.*

The “ex officio” or “incidental duties” exception may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the “ex officio” office. This narrow construction of the “ex officio” or “incidental duties” exception preserves inviolate the central feature of separation of powers in our constitution. S.C. Const. Art. I, § 8.

Segars-Andrews, 387 S.C. 109, 126, 691 S.E.2d 453, 462 (2010).

In this case, there is no Constitutional nexus between the service in the legislative department and service on the CCAA to justify *ex officio* status. *Unlike* the JMSC in *Segars-Andrews*, the duties of the CCAA are *not* “relating to” or “reasonably incidental” to the duties of the members of the legislative department. There is no “constitutional nexus.” The General Assembly does not have the “sole responsibility” of operating the

CCAA, as it did the election of judges in *Segars-Andrews*. Service on the CCAA does not “arise out of” service as a legislator. Accordingly, members of the legislative department who serve on the CCAA violate the dual office holding provisions of the South Carolina Constitution, Article III, § 24, Article VI, § 3, and Article XVII, § 1A. (Pursuant to *Ashmore*, they also violate the Separation of Powers provision of Article I, § 8 the South Carolina Constitution.)

The General Assembly is not “impressed by our Constitution with sole responsibility for the” administration of CCAA and its oversight of selection of and management of construction projects. *Segars-Andrews*. Service as members of CCAA does not meet the criteria that the Supreme Court has established for *ex officio* service. In this action, two members of the General Assembly have charged themselves to execute a law they passed, Act 130.

Ashmore acknowledged the plainly worded remedy set out in the Constitution for a legislator serving in a second office.

The qualifications of members of the General Assembly are carefully set out in Article III of the constitution. Section 24 thereof forbids the holding of other public office or position, and provides that upon the acceptance of any such by a member *he shall vacate his seat*. The proposition seems to us to prove itself, that a member cannot sit upon the board of auditorium trustees established in the act under review and at the same time retain his membership in the General Assembly. ***The language of the fundamental law is plain and unambiguous. It admits of no doubt of its meaning.***

Id., 211 S.C. 77, 90, 44 S.E.2d 88, 94 (1947) (emphasis added). Under the Supreme Court’s rule in *Ashmore*, the members of the legislative department who serve on the CCAA must vacate their seats in the General Assembly, or they must not serve on the CCAA.

“Indeed, this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional. . . . [W]hen the unconstitutionality of an act is clear to this court, beyond a reasonable doubt, then it is its plain duty to say so.” *Segars-Andrews*, 387 S.C. 109, 123, 691 S.E.2d 453, 461-2 (2010) (quoting *Elliott v. Sligh*, 233 S.C. 161, 103 S.E.2d 923 (1958)). The unconstitutionality of service by members of the General Assembly and their appointees is also a clear act of unconstitutionality beyond a reasonable doubt.

E. Act 130 Violates the Constitutional Separation of Powers Provision.

S.C. Constitution, Art. I, § 8 requires the separation of powers in South Carolina State government:

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*.

Id. (emphasis added).

The Supreme Court has explained the reasons for the Separation of Powers rule.

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 legislature makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.*

State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982)

(emphasis added). Instead of “spreading out the Authority for the operation of government,” by placing legislators and legislative appointees on the CCAA, authority is further “concentrate[ed] . . . in the hands of too few.” *Id.*

Respondent Limehouse has held office in the General Assembly since 1995. Since 2007, he has simultaneously held office as a member of the CCAA, and recently as

Chairman (Howe Affidavit, par. 15). A member of the General Assembly also serving as a member of the CCAA violates the separation of powers provision of S.C. Constitution Article I, § 8.

1. Legislators may not serve in this local executive agency.

Article I, § 8 prohibits the General Assembly from both passing laws to achieve certain purposes and assigning its own members to the commissions discharging those duties. Members of the General Assembly were elected for the purpose of making laws, not administering them. In *Ashmore v. Greater Greenville Sewer District*, the Supreme Court ruled, the “Board of the projected auditorium . . . is an executive body, charged with executive duties and functions.” *Id.* 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947). The Court ruled that the Constitution’s dual office holding provisions prohibited members of the General Assembly from serving on that Board.

“As a general rule the *Legislature of the state may not, consistently with the constitutional requirement here involved, undertake both to pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their offices as legislators, would seem to be self-evident.* The principle, as we apprehend, upon the correct application of which depends the solution of any such problem as to the exercise by the Legislature of nonlegislative functions, is that *the Legislature may properly engage in the discharge of such functions to the extent, and to the extent only, that their performance is reasonably incidental to the full and effective exercise of its legislative powers.*”
The members of the Legislature from Greenville County were elected for the purpose of making laws, not administering them.

Ashmore, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947) quoting *Spartanburg County v. Miller*, 135 S.C. 348, 132 S.E. 673, 677 (emphasis added).

“[T]he Legislature does not have the power to create a law then execute it. The power to execute a law is not incidental to the power to appropriate, but is a separate executive power.” *Knotts v. SCDNR*, 348 S.C. 1, 8, 558 S.E.2d 511, 515 (2002). CCAA

executes this law by approving contracts, selecting construction projects, and selecting and administering methods of project delivery.

Members of the legislative department may legislate *only in that body*. In *Knotts*, the Supreme Court “ruled the statute could not ‘authorize the members of the delegation to participate in this determination as legislators, for they may exercise legislative power *only as members of the General Assembly*.’” *Knotts*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002) (emphasis added) (*analyzing Gunter v. Blanton*, 259 S.C. 436, 192 S.E.2d 473, 475 (1972)). In *Blanton*, the Supreme Court ruled that the legislative delegation’s power of approval over the expenditures of DNR “undermines the doctrine of separation of powers.” *Id.*

Act 130 of 2007 violates Article I, § 8, because it allows members of the legislative department to serve as members of CCAA, a local executive body. It allows a “person or persons exercising the functions of [the legislative department] . . . [to] assume or discharge the duties of [the executive department],” in violation of the South Carolina Constitution, Article I, § 8. Members of the legislative department were elected for the purpose of enacting laws, not administering them. *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947).

2. The statutes establishing the CCAA demonstrate that it is an executive body that performs executive functions.

The General Assembly gave the Authority many enumerated executive powers to administer and govern the airports of Charleston County, including the following:

1. perpetual succession,
2. a corporate seal,
3. the power to make bylaws,
4. the power to make rules and regulations that govern the airport facilities,
5. the power to construct and operate facilities,

6. the power to restrict the height of nearby buildings or obstructions,
7. the power to make rates and charges, the power of eminent domain,
8. the power to hire and appoint officers and agents,
9. the power to employ professionals, the power to make contracts for construction and repair, the power to apply for and receive federal, state, county, or municipal grants and loans,
10. the power to issue general obligation bonds,
11. the power issue revenue bonds, the power to tax the property in the District,
12. the power to purchase existing airport facilities, and finally,
13. the power to “[d]o all other acts and things necessary or convenient to carry out any function in power competitor granted to the District.”

Act 1235 of 1970 § 5 (**Howe Affidavit, Ex. A**). This enumeration of powers demonstrates that the function of the CCAA is executive in nature.

In *Ashmore*, a Board of Trustees composed of legislators and their appointees was to oversee the financing of the construction of Greenville Memorial Auditorium by overseeing the issuance of bonds. The Court found this task to be executive, and not legislative.

The case of *Ashmore v. Greater Greenville Sewer District* is instructive. In *Ashmore*, the General Assembly passed legislation calling for the building of an “Auditorium.” The legislation provided for a “Board of Trustees” to *oversee the issuance of bonds to finance the project*. . . . Membership on the Board by legislators was successfully challenged as a violation of *separation of powers and dual-office holding*.

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 125-26, 691 S.E.2d 453, 462 (2010) (emphasis added). Likewise the power of the CCAA to “issue general obligation bonds” and the power to “issue revenue bond” is an executive power and function.

Other cases have likewise held that a statute violates the Separation of Powers doctrine when the powers that legislators attempted to exercise were executive or administrative activities related to the issuance of bonds and selection of roads for

improvement. *Knotts v. SCDNR*, 348 S.C. 1, 6, 558 S.E.2d 511, 514 (2002) (citing *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E. 257 (1938)).

The CCAA's minutes demonstrate that the CCAA selects the sources of procurement of goods and services, approves contracts, approves work orders for projects, and the modifications of the contracts. Similar activities by the defendants in *Bramlett*, were deemed to be executive branch activities, forbidden to legislators. The CCAA also selects the construction projects, as demonstrated in the Airport Authority's Minutes, just as the defendants in *Bramlette*. Pursuant to *Knotts v. SCDNR* and *Bramlette v. Stringer*, these functions are executive functions.

Furthermore, entering into contracts is executive activity, prohibited for members of the legislative department.

In *Tucker [v. South Carolina Dep't. of Highways & Pub. Transp.]*, 309 S.C. 395, 424 S.E.2d 468 (1992)], this Court held ***a legislative delegation could not approve highway fund expenditures or enter into contracts*** for highway improvements on behalf of the county. We adopted the *Gunter* and *Aiken* rationale that ***separation of powers*** mandates the Legislature "may not undertake both to pass laws and to execute them by bestowing upon its own members ***functions that belong to other branches*** of government." *Tucker I*, 309 S.C. at 396, 424 S.E.2d at 469.

. . . The Legislature is constitutionally forbidden from undertaking to pass laws and then to execute them by bestowing upon its own members powers belonging to the executive branch.

See *Knotts*, 348 S.C. 1, 8-9, 558 S.E.2d 511, 514 (2002) (emphasis added). The Court reasoned that adopting or executing contracts was executive activity.

In *Knotts*, the Supreme Court reasoned:

Separation of powers is not predicated on differentiating between who actually spends the money, but on ***whether the legislative branch assumes powers belonging to another branch of government***. Once the legislature enacts a law all that remains is the efficient enforcement and execution of that law. *Bramlette*, 186 S.C. at 134, 195 S.E. at 258. Regardless of who

spends the money, § 12-28-2730 is unconstitutional because a legislative delegation may not execute or enforce a law.

Id. The Court held the statute unconstitutional. Accordingly, Act 130 of 2007 is also unconstitutional because legislators may not execute or enforce a law.

3. The minutes of the CCAA demonstrate its executive nature.

The Minutes of the CCAA demonstrate that its work is executive in nature (Howe Affidavit, Ex. J). The first Minutes record a meeting of the Terminal Redevelopment and Improvement Program Committee including Defendant Limehouse. This Committee recommended that the Board chose the Contractor Manager at Risk method of delivery (Howe Affidavit, Ex. J, Minutes, p. 1). The choice of procurement selection method is an executive decision. The second Minutes record a CCAA Special Board Meeting on August 18, 2011 (Howe Affidavit, Ex. J, Minutes p. 3). The Board made many executive decisions.¹

The Minutes of the Authority from September 13, 2011 to March 22, 2012 (Howe Affidavit, Ex. J, Minutes pp. 20-130), demonstrate the executive nature of their work. The Authority chose a contractor for a \$150 million terminal expansion project. The

¹ They voted on the “operations” matters such as “ratification of Amendment No. 1 to Ground Lease Agreement with Boeing Commercial Airplane” “to add additional parcels of leased space totaling 3.658 acres, at a rental of \$3,658 per month” and “Amendment No. 2” to the same agreement: “Compass Rose” “to add additional parcels of leased space totaling 7.531 acres, at a rental of \$7,531 per month” (Howe Affidavit, Ex. J, Minutes, p. 10). They voted to renew subscriptions and amend other operating agreements and leases, and even to approve “Change Order No. 1 and Final Payment to Southland Landscape Management Corporation” (Minutes p. 11). They voted to approve a “Request for Qualifications (RFQ) from General Contractors” for additional Concourse Restrooms and a FY 2012 Budget Amendment of \$750,000 to add additional restrooms in the passenger boarding area” (Howe Affidavit, Ex. J, Minutes, p. 12). They also voted to issue “Work Authorization No. 35 with ADC Engineering, Inc” to “expand the public parking lot” “in the amount of \$87,165.50” and to “authorize the use of a Request of Qualifications from general contractors” (Howe Affidavit, Ex. J, Minutes, p. 12). Selection of engineering firms is an executive function rather than the job of members of the General Assembly. The Board approved other RFQs and Work Authorizations in that same meeting and amended other service agreements as well as ratifying a sublease (Howe Affidavit, Ex. J, Minutes pp. 13-14). The Board also purchased a police vehicle and a message board (Howe Affidavit, Ex. J., Minutes p. 13-14). Finally, they voted on the health insurance policy and other “personnel matters” of CCAA (Howe Affidavit, Ex. J, Minutes p. 15).

Authority issued change orders, ratified lease amendments, approved leases and subleases and subscriptions and service contracts. It approved use of the Requests for Proposals method for construction, recommended work authorizations and purchases, and approved operating agreements, among many other executive functions (Howe Affidavit, Ex. J, Minutes pp. 20-130).

Building and overseeing the Greenville Memorial Auditorium was executive in nature in *Ashmore*. Therefore, the oversight and construction management of the \$150 million renovation of the Charleston International Airport, and the oversight of two other Charleston County airports is executive in nature. Therefore, a legislator who serves as on the CCAA violates of the S.C. Constitution Article I, § 8, the Separation of Powers provision.

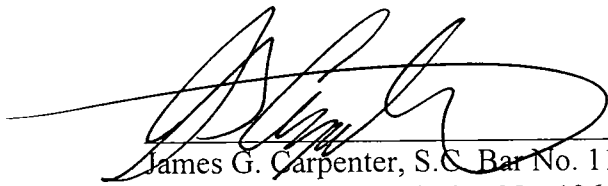
CONCLUSION

Appellants possess both public importance and taxpayer standing.

Act 130 of 2007 is unconstitutional. The override of the veto of Act 130 failed for lack of sufficient votes. Act 130 is single county, special legislation. Act 130 violates the dual office holding and separation of powers provisions of the South Carolina Constitution. The members of the General Assembly who serve as members of CCAA also violate the dual office holding and separation of powers provisions of the South Carolina Constitution.

Appellants pray the Court to reverse the judgment of the Circuit Court, and to grant Summary Judgment to the Appellants.

Respectfully submitted,
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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

RECEIVED

AUG 29 2013

SC COURT OF APPEALS

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, Respondents.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent designates the following be included in the Record on Appeal:

1. Order filed May 13, 2013.
2. Form 4 Judgment filed March 11, 2013.
3. Order entered July 26, 2012.
4. Motion and Consent Order Substituting Parties Defendant.
5. Complaint filed February 27, 2012.
6. Answer of Limehouse served March 21, 2012.
7. Answer of the State of South Carolina served April 26, 2012.
8. Answer of Ard and McConnell served April 27, 2012.

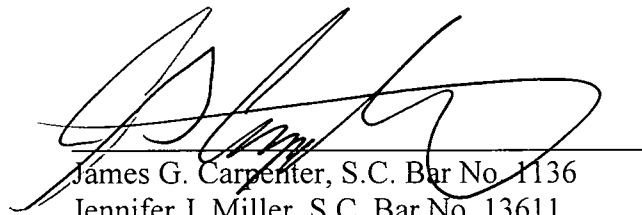
9. Answer of Harrell served April 30, 2012.
10. Amended Answer of McConnell and Campsen, filed in February, 2013.
11. Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment with Exhibits served July 3, 2012.
12. Plaintiffs Motion for Summary Judgment filed July 18, 2012
13. Plaintiffs' Motion for Summary Judgment, filed August 17, 2012.
14. Plaintiff's Reply Memorandum of Law in Support of Plaintiffs Motion for Summary Judgment filed February 22, 2013, with exhibit.
15. Transcript of Oral Argument dated February 14, 2013.
16. Petition for Original Jurisdiction at the Supreme Court.
17. Supreme Court Order entered February 8, 2012.

CERTIFICATE OF COUNSEL

Pursuant to Appellate Rule 209(c), the undersigned hereby certifies that this Designation of Matter to be Included in the Record on Appeal contains no matter which is irrelevant to the appeal.

THE CARPENTER LAW FIRM, P.C

August 27, 2013



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Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing Appellants' Initial Brief and Designation of Matter to Be Included in the Record on Appeal on counsel for Defendants by email and US Mail, postage prepaid on Tuesday, August 27, 2013 to the following persons:

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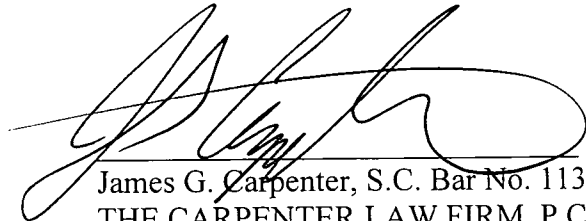
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