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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
The Honorable G.D. Morgan, Jr., Circuit Judge

Appellate Case No. 2024-001391
Case No. 2023-CP-39-00416

John Sloan, individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc.,
Plaintiffs,

of which John Sloan, individually, and on behalf of all others similarly situated is the Appellant,

v.

Clemson University, and its Life Trustees E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins,
Respondents

INITIAL JOINT BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the Probate Court correctly find, and did the Circuit Court properly affirm, that Appellant's Complaint failed to state facts sufficient to constitute a cause of action where the terms of Clemson University's Successor Trustees' positions do not violate the South Carolina Constitution?

2. Did Appellant fail to preserve his argument that equitable deviation should apply where this issue was not raised in Appellant's Complaint or in his briefing to the Probate Court?

3. Does the Record support a conclusion, as additional sustaining grounds, that dismissal was warranted for lack of subject matter jurisdiction where Appellant lacks standing and failed to raise a justiciable controversy?

Respondents Clemson University and E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins (the "Successor Trustees,"[1] and collectively with Clemson University, "Respondents") respectfully submit this Joint Brief of Respondents.[2]

This action concerns the Last Will and Testament of Thomas Green Clemson (the "Will") providing for the establishment of Clemson University and the General Assembly's Act of Acceptance in 1889 (the "Act of Acceptance") accepting the terms of the Will. Appellant's Complaint asserted that the Successor Trustees have been holding impermissible "lifetime" appointments in violation of the South Carolina Constitution and sought declaratory and injunctive relief to enjoin or terminate their service.

The Circuit Court correctly affirmed the Probate Court's dismissal of Appellant's Complaint for failure to state facts sufficient to constitute a cause of action because: (1) the Successor Trustees are not "elected or appointed" as contemplated by the South Carolina Constitution; (2) even if it they were "elected or appointed," the language in the Constitution of 1868 and 1895 is similar and therefore does not give Appellant relief; and (3) the United States and South Carolina Constitutions protect against any legislative impairment of contracts, which would result if Appellant was granted the requested relief.

[1] The Successor Trustees are incorrectly identified as Clemson University's "life trustees" in the Summons and Complaint and maintain that the proper descriptor is "Successor Trustees." The Circuit Court agreed with that based on the findings of the Probate Court, this was accurate. (Circuit Court Order p. 1 n.1; R. __.)

[2] David H. Wilkins stepped down from his role as a Successor Trustee upon reaching the age of 75 in accordance with requirements agreed upon by all Successor Trustees. Nikki R. Haley was named as his replacement on October 12, 2021. *See* Haley selected to Clemson Board of Trustees, Clemson University (Oct. 12, 2021), https://news.clemson.edu/haley-selected-to-clemson-board-of-trustees/.

Appellant's brief raises many of the same arguments that have already been rejected by both the Probate Court and the Circuit Court. However, it also raises new, unpreserved arguments about the definition of "public officer" and the applicability of the doctrine of equitable deviation. The Court should decline to consider these unpreserved grounds, but, regardless, neither of these issues warrants disturbing the correct analysis of the courts below.

Finally, Appellant's lack of standing and the lack of a justiciable controversy represent additional sustaining grounds for the dismissal. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). This Court should affirm.

COUNTER-STATEMENT OF THE CASE AND FACTS

I. Factual background.

Thomas Green Clemson ("Mr. Clemson") bequeathed his home, land, and much of his personal fortune to the State of South Carolina, in trust, through his Last Will and Testament to establish an educational institution that would teach scientific agriculture and the mechanical arts to South Carolinians. *See* S.C. Code Ann. § 59-119-10. Mr. Clemson executed his Will in 1886 and an accompanying Codicil in 1887.

The Will nominated seven individuals and provided that, if the State accepted the devise, they would constitute the initial Board of Trustees. *See* Last Will & Testament of Thomas Green Clemson, *reprinted in full at* Part III, Ch. 4, *Board of Trustees Manual*, Clemson University, *available at* https://clemsonpub.cfmnetwork.com/B.aspx?BookId=12632&PageId=465560 (last visited May 23, 2025).[3] These individuals and their successors are the Successor Trustees.

[3] The Will is a public record on file with the Probate Court. Appellant has not disputed the authenticity or accuracy of the reprinting of the Will on Clemson University's website cited by Respondents, and the Circuit and Probate Courts properly took judicial notice of its contents. *See Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984).

The Will further stated that the Legislature "may provide, as it sees proper, for the appointment or election of the other six trustees." *Id.* The Will explained that the State "shall never increase the Board of Trustees to a number greater than thirteen in all, nor shall the duties of said board be taken away or conferred upon any other man or body of men." *Id.* Item 2 of the Will provided that:

> The seven trustees appointed by me shall always have the right, and the ***power is hereby given them and their successors, which right the legislature shall never take away or abridge, to fill all vacancies which may occur in their number by death, resignation, refusal to act or otherwise***.

Id. (emphasis added).

Item 1 of the Will stated that the Chief Justice of South Carolina should review the State's acceptance of the devise to ensure it was in accordance with Thomas Green Clemson's wishes expressed in the Will. *Id.* The Will contemplated that, upon the Chief Justice's approval, the executor of Thomas Green Clemson's estate would execute a deed of the property to the State so long as the State holds the property "in good faith" and "devotes said property to the purposes of the donation." *Id.*

Mr. Clemson passed away on April 6, 1888, and his executor notified the General Assembly of the bequest. *See* History, *Board of Trustees Manual*, Clemson University, *available at* https://clemsonpub.cfmnetwork.com/B.aspx?BookId=12632&PageId=462228 (last visited May 23, 2025). In 1889, the General Assembly passed the Act of Acceptance. *Id.* Gov. John P. Richardson signed the Act into law on November 27, 1889. *Id.*

Through the Act, the General Assembly "expressly declare[d] that it accept[ed] the devise and bequest of Thomas G. Clemson subject to the terms and conditions set forth in his said last will and testament." 1889 S.C. Act No. 166. Importantly, the Act provided that Clemson would be

governed in the manner specified by the Will. *Id.* Regarding the Board, the Act stated that Clemson "shall be under the management and control of a Board of Trustees, ***composed of the seven members nominated by said will and their successors*** and six members elected by the Legislature in Joint Assembly every fourth year after the first election." *Id.* (emphasis added).

On December 6, 1889, and in accordance with the directives of Mr. Clemson's Will, the Chief Justice of South Carolina, R.W. Simpson, issued an opinion finding that, via the Act of Acceptance, "the State has accepted said devise and bequest of the said Thomas G. Clemson, deceased, subject to the terms and conditions set forth in his last will and testament, and I so declare"[4]

Clemson University has operated in accordance with the Will and Act of Acceptance since 1889.

II. Procedural history.

Appellant first petitioned the Supreme Court of South Carolina to accept this matter in its original jurisdiction, which declined to hear it. (*See* Pet. for Orig. Juris; R. __.) Appellant then filed his Complaint on July 1, 2020 in the Court of Common Pleas for Greenville County. (*See* Compl.; R. __.)

Appellant's Complaint did not dispute the contents and provisions of the Will, Act of Acceptance, or Chief Justice's Opinion. Rather, it posed the purely legal question of whether the terms of service of the Successor Trustees are unconstitutional. Specifically, Appellant alleges that the terms of service violate Articles VI and XVII of the South Carolina Constitution of 1895. (*See*

[4] The Chief Justice's Opinion is also reprinted on Clemson University's website. *See* Opinion of Chief Justice R.W. Simpson, *reprinted in full at* Part III, Ch. 4, *Board of Trustees Manual*, Clemson University, *available at* https://clemsonpub.cfmnetwork.com/B.aspx?BookId=12632&PageId=465560 (last visited May 8, 2025).

generally id.) Article VI, § 1 sets forth, in part, as follows: "No person may be elected or appointed to office in this State for life or during good behavior, but the terms of all officers must be for some specified period except officers in the militia." S.C. Const. art. VI, § 1. Similarly, Article XVII, § 1B states, in part, that: "No person shall be elected or appointed to office in this State for life or during good behavior, but the terms of all officers shall be for some specified period, except Notaries Public and officers in the Militia." S.C. Const. Art. XVII, § 1B.

As Appellant acknowledges, the Constitution of 1895 does not define "office" or "officer." (Br. of Appellant p. 10.) However, Appellant's Complaint asserted that the Successor Trustees are "officers" as defined by S.C. Code Ann. § 8-1-10, and are thus subject to these constitutional provisions. *See* S.C. Code Ann. § 8-1-10 (defining "public officers" to mean "all officers of the State that have heretofore been commissioned and trustees of the various colleges of the State, members of various State boards and other persons whose duties are defined by law").[5] Appellant contended that the Will and the Act of Acceptance are unconstitutional because the Successor Trustees are "elected or appointed" "public officers" whose term is not for "some specified period." (Compl. at ¶ 14; R. __.)

Appellant requested that the court: (1) declare that the parts of the Acceptance Act accepting and authorizing the Successor Trustees are incompatible with S.C. Constitution, Art. VI, § 1, and Art. XVII, §1B, and are invalid, null, and void; (2) declare that each individual defendant is holding office as a Clemson University "Life Trustee" in violation of S.C. Constitution, Art. VI, § 1 and Art. XVII, §1B; (3) enjoin or terminate the service of each individual Defendant as a

[5] The original version of this Statute was passed in 1901 and was part of a provision relating to oaths of office located in the criminal code. *See* 1901 S.C. Act No. 441 (making it "unlawful for any person to assume the duties of any public office until he has taken the oath provided by the Constitution, and been regularly commissioned by the Governor").

Clemson University "Life Trustee"; and (4) enjoin any election or appointment of any Clemson University Successor Trustees in violation of S.C. Constitution, Art. VI, § 1 and Art. XVII, § 1B, (*Id.* at WHEREFORE; R. __.) Appellant also sought to recover his attorney's fees and costs under S.C. Code Ann. § 15-77-300. (*Id.*)

Appellant's Complaint did not allege any connection between him and Clemson University or detail any specific harm that he supposedly suffered as a result of the purported actions of Respondents. Rather, he premised his entire suit on his status as "citizens, residents, and taxpayers" of this State. (*See* Compl. ¶¶ 1-2; R. __.) Appellant asserted that he is entitled to "public importance" standing due to the issues raised in his Complaint. (*Id.* at ¶ 8; R. __.)

In response to Appellant's Complaint, Respondents timely moved to dismiss or, in the alternative, to transfer venue to the Pickens County Probate Court. Respondents contended that Appellant: (1) lacked standing, (2) failed to present a justiciable controversy, and (3) failed to state facts sufficient to constitute a cause of action. (*See* Clemson's Univ. Mot. to Dismiss; Successor Trustees' Mot. to Dismiss; R. __.) Alternatively, Respondents contended that venue should be transferred because the Probate Court has exclusive original jurisdiction over subject matter related to the "contest of wills [and] construction of wills" as well as proceedings "concerning the internal affairs of trusts." S.C. Code Ann. §§ 62-1-302(a)(1), 62-7-201(a).

After Respondents had moved to dismiss, Appellant served interrogatories and requests for production.[6] Respondents then moved for a protective order staying discovery pending resolution

[6] Appellant's brief quotes Requests for Production #4-8 in full. These discovery requests are not part of the record on appeal and their contents should not be considered. The portions of Appellant's brief relying on them should be stricken or at minimum disregarded. (*See* Br. of Appellant pp. 3-4, 20.)

of their motions to dismiss. (*See* Clemson Univ. Mot. for Protective Order; Successor Trustees' Mot. for Protective Order; R. __.)

Respondents' motions to dismiss and for a protective order were initially heard by the Honorable Alex Kinlaw on July 27, 2021. On September 1, 2021, Judge Kinlaw entered an Order granting a protective order. (*See* Order; R. __.) Then, on September 28, 2021, Judge Kinlaw entered an Order continuing Respondents' motions to dismiss and granting their alternative request to transfer venue to the Pickens County Probate Court. (*See* Order; R. __)

After receiving the case, the Probate Court proceeded to consider the merits of Respondents' motions and held a hearing on September 30, 2022. (*See* 9/30/2022 Hearing Tr.; R. __.) After carefully evaluating the issues raised in the motions, the Probate Court entered an Order granting Respondents' motions pursuant to Rule 12(b)(6) on April 3, 2023. (*See* Probate Court Order; R. __.) The Probate Court found that Respondents did have public importance standing and that the Complaint raised a justiciable controversy. (*Id.* at 2; R. __.) However, the Probate Court agreed with Respondents that Appellant failed to state facts sufficient to constitute a cause of action because the constitutional provisions at issue are not applicable to the Successor Trustees and their terms of office do not violate South Carolina law as a matter of law. (*Id.*)

After the Probate Court entered the Order of Dismissal, Appellant appealed to the Circuit Court as provided by S.C. Code Ann. § 62-1-308. The matter was fully briefed, (*see* Br. of Appellant; Joint Br. of Respondents; Reply Br. of Appellant; R. __), and the Circuit Court held a hearing on June 14, 2024. (*See* 6/14/2024 Hrg. Tr.; R. __.)

On July 31, 2024, the Circuit Court issued an Order affirming the Probate Court. (*See* Circuit Court Order; R. __.) This appeal followed.

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), [SCRCP,] an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). A motion to dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure should be granted when a complaint fails to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. In considering a 12(b)(6) motion, a "court must base its ruling solely based upon allegations set forth on the face of the complaint." *Baird v. Charleston County*, 333 S.C. 519, 526, 511 S.E.2d 69, 73 (1999).

A motion to dismiss under Rule 12(b)(1) of the South Carolina Rules of Civil Procedure should be granted when a court lacks subject matter jurisdiction. Rule 12(b)(1), SCRCP. "Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997). Subject matter jurisdiction issues are reviewed de novo. *Seels v. Smalls*, 437 S.C. 167, 172, 877 S.E.2d 351, 354 (2022) (stating that de novo applies to issues of subject matter jurisdiction).

ARGUMENT

Over 135 years ago, Thomas Green Clemson made a proposal to the State via his Will. He would give the State much of his personal fortune, including his home and over 800 acres of real property, if the State agreed: (1) to use the real property to establish an institution of higher learning and (2) abide by the structure of the Board of Trustees set forth in the Will. The State accepted Mr. Clemson's gift via the Act of Acceptance, and the Chief Justice of South Carolina found that, via that Act, the State had "accepted said devise and bequest of the said Thomas G. Clemson, deceased, subject to the terms and conditions set forth in his last will and testament, and I so declare."

Clemson University and its Successor Trustees have served the State of South Carolina well and carried out the intent of Mr. Clemson's Will ever since. Well over a century and a quarter after Clemson University's inception, Appellant now seeks a declaration that the parts of the Act of Acceptance accepting and authorizing the Successor Trustees are unconstitutional because they are "officers" whose terms are for "life or good behavior."

As detailed above, Mr. Clemson passed away in 1888 and the State properly accepted the terms of his bequest in late 1889, as acknowledged by the Chief Justice. The State then began taking significant steps towards building the university over the next several years.[7] Appellant acknowledges the successor trustee position was constitutional under the Constitution of 1868. (*See* Br. of Appellants at 22 (noting that the Act of Acceptance "did not violate the Constitution of 1868 when it was enacted").) Despite this, Appellant advances the untenable position that less than six years after passing the Act of Acceptance and having made considerable efforts towards establishing the University, the State sought to repudiate its contract with Mr. Clemson and invalidate the fundamental structure of Clemson University's Board by making it unconstitutional through the adoption of the Constitution of 1895 and the statute defining "public officers," 1901 S.C. Act No. 441.

[7] The Supreme Court discussed some of these efforts in *Hopkins v. Clemson Agric. Coll.*, 77 S.C. 12, 57 S.E. 551, 559 (1907), *rev'd sub nom. on other grounds by Hopkins v. Clemson Agr. Coll. of S.C.*, 221 U.S. 636 (1911), *and overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). As the court explained, the State passed an Act providing for the building and maintenance of Clemson College on December 23, 1889. *See* 1889 S.C. Act No. 188. On January 4, 1894, the State then authorized the Board to acquire an additional 228 acres of land and for the South Carolina penitentiary to provide convict labor to the Board. *Hopkins*, 77 S.C. 12, 57 S.E.2d at 559.

The Probate Court rightly disagreed and dismissed Appellant's Complaint for failure to state a claim, and the Circuit Court correctly affirmed.[8] As those courts both found, the Successor Trustees are not "officers" appointed or elected by the State as the Appellant claims but instead are fiduciaries named in Mr. Clemson's Will. Moreover, even if the Successor Trustees are "officers," the provision of the 1895 Constitution that Appellant relies upon is similar to a provision found in the 1868 Constitution that was in effect when the State's General Assembly adopted the Act of Acceptance and the Chief Justice opined upon the same. Finally, the protections against impairment of contracts found in the Constitutions of the United States and South Carolina, as well as the protections of charitable trusts found in the South Carolina Probate Code, prohibit the relief that Appellant seeks in this lawsuit.

For each of these reasons, discussed more fully below, this Court should affirm the lower courts' Orders. Additionally, this Court may sustain the dismissal of this action based on the procedural deficiencies with standing and the lack of a justiciable controversy detailed below.

I. The Probate Court properly dismissed Appellant's Complaint under Rule 12(b)(6) and the Circuit Court appropriately affirmed because Appellant failed to allege facts sufficient to constitute a cause of action under the Declaratory Judgment Act.

As the lower courts explained, Appellant's case revolves around two constitutional provisions which state that "elected or appointed" officers must serve for "some specified period." These sections only reference a person "elected or appointed" to office. *See* S.C. Const. Art. VI, §

[8] In reaching their holdings, the lower courts acknowledged and considered that their rulings must be based solely on the allegations set forth in the Complaint and that a motion to dismiss should not be sustained if the Appellant was entitled to relief on any theory of the case. (*See* Probate Court Order pp. 8-9; Circuit Court Order pp. 9-10; R. __.) Moreover, they construed the pleadings liberally in favor of the Appellant. (*Id.*) Finally, they acknowledged that dismissal should not be granted merely because the court doubted Appellant would prevail in the action. (*Id.*) Applying these considerations, the Probate Court correctly found (and the Circuit Court affirmed) that although Appellant has raised a novel question of law, which is not ordinarily resolved on a 12(b)(6) motion, the dispute here is not as to the underlying facts but as to the interpretation of the law. (*Id.*)

1; S.C. Const. Art. XVII, § 1B. "Office" is not defined by the Constitution. Therefore, Appellant relies on a statute, S.C. Code Ann. § 8-1-10, which provides that "public officer" includes "trustees of the various colleges of the State." *Id.* Appellant asserts that the Successor Trustees are public officers and, as a result, their term must be for "some specified period." He contends that the term of office under the Will and Act of Acceptance does not meet this requirement.[9]

As the lower courts acknowledged, the starting point for the analysis is the principle that courts "will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation." *Hampton v. Haley*, 403 S.C. 395, 408, 743 S.E.2d 258, 265 (2013). Thus, as the Supreme Court has "long recognized," "legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." *Bailey v. State*, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). Moreover, "[r]epeal by implication is disfavored" and should only be found "when two statutes are incapable of any reasonable reconcilement." *State v. Taub*, 336 S.C. 310, 317, 519 S.E.2d 797, 801 (Ct. App. 1999).

A. The Successor Trustees are not "elected or appointed" as contemplated by the operative South Carolina Constitution of 1895.

First, a reasonable reading of the Act of Acceptance, the relevant constitutional provisions, and the South Carolina Code demonstrates that there is no constitutional defect. As the lower courts found, a reasonable reading of the constitutional provisions in this context is that "elected" means

[9] Appellant takes issue with the Probate Court's dismissal at the 12(b)(6) stage, contending they did not have the benefit of amending the complaint or conducting any discovery. (Br. of Appellant p.4.) As Respondents have detailed, however, the question raised by the Complaint is a pure legal question as to whether the Successor Trustee term as set forth by the Will and Act of Acceptance violates the Constitution. Respondents did not raise any arguments, and the lower courts did not make any findings, which would implicate the need for discovery. Appellant cites Respondents' reference to an agreement among the Successor Trustees to step down at the age of 75, (Br. of Appellant p. 20), but this agreement was not advanced by Respondents as a reason for dismissal under Rule 12(b)(6) and neither of the lower courts addressed this issue. (*See* Probate Court Order p. 10 n.7; Circuit Court Order p. 10 n.7; R. __.)

voted on either by the populace or General Assembly and "appointed" means by either the Governor, General Assembly, governmental body, or other body to whom the foregoing officials have delegated authority.[10] Other types of trustees (including the legislatively appointed trustees at Clemson) would also be subject to the provisions. The Successor Trustees, however, are not "elected or appointed" as contemplated by the Constitution. Rather, Mr. Clemson's Will named the original seven Successor Trustees, and that group of trustees has been self-perpetuating ever since, choosing new Successor Trustees as Mr. Clemson's Will provides. The Act of Acceptance expressly describes the Successor Trustees as those persons "nominated" by the Will "and their successors." *See* 1889 S.C. Act No. 166 § 3; S.C. Code Ann. § 59-119-40.

As the Supreme Court explained in dicta in *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 518, 59 S.E.2d 132, 139 (1950), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), Clemson, although "highly useful and valuable to the State, is not an institution or corporation ***wholly*** owned and controlled by the State." *Id.* (emphasis added). The court highlighted the terms of the Will and the structure of the Board, noting "***of course this method of choice of the trustees prevails under the law***." *Id.* (emphasis added). Therefore, the Successor Trustee position and term does not run afoul of South Carolina law.

Appellant then contends that because the Will refers to the initial Successor Trustees as being "appointed" ***by Thomas Green Clemson*** and the Will gives them the power to resign, this brings them within the purview of the Constitutional provisions. Appellant did not raise either of these arguments to the Probate Court and thus they are not preserved. "It is well-settled that an

[10] Appellant notes that the Probate Court's Order only referenced appointment by the Governor or General Assembly. (Probate Court Order p. 10; R. __.) However, Appellant fails to acknowledge that the Circuit Court noted that appointed contemplates by "either the Governor, General Assembly, governmental body, or other body to whom the foregoing officials have delegated authority." (Circuit Court Order p. 11; R. __.)

issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Where a party fails to raise the issue in its briefing and argument to the trial court, that party is precluded from raising that issue on appeal. *Easterling v. Burger King Corp.*, 416 S.C. 437, 452-53, 786 S.E.2d 443, 451-452 (Ct. App. 2016).[11]

Regardless, even if these grounds were preserved, Appellant's position is not a reasonable interpretation of the constitutional provisions and strains to reach an unconstitutional reading rather than presuming constitutionality. The mere fact that the Will used the term "appointed by me" when referring to the naming of Successor Trustees by Mr. Clemson and gave them the power to resign ***as Successor Trustees under the Will*** does not transform them into State "public officers." Moreover, as noted above, the Act of Acceptance uses the term ***nominated*** rather than "appointed" (and uses "elected" when referring to the six legislative trustees, demonstrating the General Assembly's knowledge of the important distinctions between the two positions). The unique structure of Clemson University and its Board, as detailed below, sets the Successor Trustee position apart in any event.

Appellant also makes the unpreserved argument that because the South Carolina Code declares the Board of Trustees to be a "body politic and corporate," this also means the Successor Trustees are subject to the constitutional provisions. Again, Appellant did not raise this argument to the Probate Court. Moreover, the corporate form of the Board of Trustees as an entity has no

[11] As the Supreme Court explained in *Herron v. Century BMW*, the issue preservation rules are "designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "The requirement also . . . prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

bearing on the Successor Trustee position itself and whether the Successor Trustees are "officers" who are "elected or appointed" for purposes of the constitutional provisions at issue.

B. The Constitution of 1868 further supports the propriety of the Successor Trustee term of service.

Second, this Court should affirm the lower courts' correct finding that the Constitution of 1868 supports the propriety of the Successor Trustee term of service. The Constitution of 1868 was the operative constitution at the time of the Act of Acceptance, and already prohibited the creation of an office "the appointment to which shall be longer for a time than good behavior." S.C. Const. Art. I, § 32 (1868). The Will and Act of Acceptance specifically provide that the Successor Trustee term is until "***death, resignation, refusal to act or otherwise***." S.C. Code Ann. § 59-119-40 (emphasis added). Appellant concedes that the successor trustee position was constitutional under the Constitution of 1868. (*See* Br. of Appellants at 22 (noting that the Act of Acceptance "did not violate the Constitution of 1868 when it was enacted").)

Appellant's Complaint nevertheless alleged that the Successor Trustee position has a term of "life." Taking Appellants' allegation as true, which the courts must at the motion to dismiss stage, this term would necessarily have been longer than a term of good behavior. The General Assembly and the Chief Justice, however, deemed the term of service lawful under the terms of the Constitution of 1868 because, as detailed herein, Clemson University was viewed as a unique entity not subject to this restriction because of its status as a charitable trust.

Since the Successor Trustee term was deemed lawful by the General Assembly at the time of the Act of Acceptance under the terms of the Constitution of 1868, and thereafter by the Chief Justice of the South Carolina Supreme Court, the term is equally constitutional under the Constitution of 1895. *See* S.C. Const. Art. XVII, § 10 ("All laws now in force in this State and not repugnant to this Constitution shall remain and be enforced until altered or repealed by the General

Assembly, or shall expire by their own limitations."); *see also* S.C. Const. Art. XVII, § 11 (explaining that all laws in force and all "rights of individuals, of bodies corporate and of the State, when not inconsistent with this Constitution," remain valid and in full force). As the Supreme Court has explained, the framers of the Constitution of 1895 intended "that there should not be a break in any of the departments of government, as otherwise great inconvenience would have ensued." *In re Hooper*, 48 S.C. 149, 26 S.E. 466, 468 (1897).

Therefore, the lower courts correctly found that even if the Successor Trustees were "elected or appointed" (which they are not), the language of the constitution of 1868 and 1895 is similar as applied to the Successor Trustee position and therefore does not give Appellant relief.

C. Even if the Successor Trustees were "public officers," the constitutional provisions raised by Appellant would be unconstitutional as applied to them in the manner advanced by Appellant.

The lower courts further appropriately found that even if Appellant was correct that the Successor Trustees are "public officers" under S.C. Code Ann. § 8-1-10 and are therefore subject to the restrictions of Article VI, § 1 and Article XVII, § 1B, these constitutional provisions and statute would be unconstitutional as applied.

As an initial matter, Appellant's brief raises many new arguments in support of his position that the Successor Trustees are "public officers." All of the arguments raised in Section I.A. and the initial portion of I.B. of his brief were not raised below, (*see* Br. of Appellant pp. 10-15), and are thus unpreserved. Regardless, as noted below, even if the Successor Trustees are "public officers" under § 8-1-10 and the common law, *see Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907), as Appellant contends, the constitutional provisions raised by Appellant are inapplicable.[12]

[12] In advancing this argument, Appellant asserts several times that the Clemson Board of Trustees

As the lower courts explained, these provisions are not applicable due to Clemson University's status as a charitable trust created through contract between Thomas Green Clemson and the State of South Carolina. *See Hopkins*, 77 S.C. 12, 57 S.E. at 558 (1907) ("[T]he state holds the fee in the 814 acres contained in the Fort Hill place, and has founded and is maintaining the 'Clemson Agricultural College of South Carolina' by and through 'the board of trustees,' as its agents, in accordance with the terms of the trust, created in the will of Mr. Clemson, and specifically accepted by the state."); *see also* Op. S.C. Atty. Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (noting that *Hopkins* "recognize[d] the binding nature of the Trust established by Clemson and accepted by the State").

Under South Carolina law, the General Assembly cannot terminate or alter a charitable trust. *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 183, 642 S.E.2d 552, 556 (2007). Rather, any changes must be approved by a court of equity since supervision of a charitable trust is an "an inherent judicial function and is not a matter for the legislature." *Id.* This is because legislative interference with the charitable trust would constitute an impairment of contract in violation of the Contract Clauses of both the federal and State constitutions. *See* U.S. Const. Art. I, § 10; S.C. Const. Art. I, § 4 (providing that the State shall not enter into any law "impairing the obligation of contracts"); *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 28-29, 736 S.E.2d 651, 658 (2012) (explaining that a Contracts Clause violation occurs where a new provision goes

governs the "City of Clemson." (Br. of Appellant pp. 7, 13.) This is not the case. Although Clemson University exercises the powers of a municipal corporation, *see* S.C. Code Ann. § 15-119-130, the City of Clemson is an entirely separate entity governed by a mayor and city council. *See Petersen v. City of Clemson*, 312 S.C. 162, 439 S.E.2d 317 (1993) (describing actions of City of Clemson's City Council concerning certain zoning issues of the City Clemson). *See also id.* at 172, 439 S.E.2d at 323 ("The testimony of Mayor Abernathy that council was aware of the changing conditions along Highway 93 and the 1989 land use plan when the rezoning was considered and adopted also supports the finding that the rezoning was done in compliance with the land use plan.").

beyond merely clarifying existing law and operates retroactively to substantially impair pre-existing contracts by materially changing their terms).

The Successor Trustee structure was a fundamental term of the bequest to the State. As the lower courts accurately concluded, Clemson University and the Successor Trustee structure is unique and ***any*** legislative attempts to modify the Board in a way that conflicts with the Will and Act of Acceptance would impermissibly impair the contract. *See* Op. S.C. Att'y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (concluding that the legislature cannot increase the number of trustees on Clemson's board in light of its status as a trust, explaining that "[t]he terms of such a Trust, when accepted by the State, are binding upon the State"); Op. S.C. Att'y Gen., 1971 WL 22432, at *1 (Mar. 16, 1971)[13] (same). Applying the statute and constitutional provisions in the manner advanced by Appellant to restrict the Successor Trustee terms of service would result in an improper, substantial impairment of a material provision of the contract between Mr. Clemson and the State. *See* Op. S.C. Att'y Gen., 1971 WL 22432, at *1 (Mar. 16, 1971) (opining that an attempt by the General Assembly to enlarge Clemson's board would be an unconstitutional impairment of a contract by the State); *see also Bogert's The Law of Trusts and Trustees* § 397 (explaining that statutes attempting to "alter a trust ***with regard to the method of selecting successor trustees*** have been held unconstitutional" (emphasis added)).

The lower courts also properly noted that the Attorney General has the power, and is the proper party, to address any concerns regarding the administration of a charitable trust such as those claimed by the Appellant in this matter. *See Epworth Children's Home v. Beasley*, 365 S.C. 157, 164 n.3, 616 S.E.2d 710, 714 n.3 (2005) (explaining that, under South Carolina law, the

[13] Although they are not binding authority, the lower courts properly found these opinions of the Attorney General to be persuasive. *See Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011).

Attorney General is "the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts"); *see also Wilson v. Dallas*, 403 S.C. 411, 431, 446-67, 743 S.E.2d 746, 757, 765-66 (2013) (stating that the Attorney General has the "duty to represent the unspecified charitable beneficiaries," and serves as "protector, supervisor, and enforcer of charitable trusts"). Therefore, the charitable trust structure is not without oversight and Appellant does not have a viable cause of action merely because he purports to vindicate the rights of the public.

As a result, the lower courts properly declined to interpret and apply the "public officer" statute in the manner advocated by Appellant. *See Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977) ("Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation."); *Foster v. Taylor*, 210 S.C. 324, 329, 42 S.E.2d 531, 534 (1947) ("It is equally well settled that determination of unconstitutionality of a legislative act will be avoided when possible."). To adopt Appellant's position would require a finding of repeal by implication which, as noted above, is disfavored and only appropriate where there is no possibility of reconcilement of the provisions. *See Taub*, 336 S.C. at 317, 519 S.E.2d at 801.[14]

Therefore, the lower courts correctly determined that the United States and South Carolina Constitutions protect against any impairment of contracts, which would result if the Appellant

[14] The General Assembly's 135-year acquiescence to Clemson's structure also supports the lower courts' conclusion. As the Supreme Court has noted: "[b]oth this Court and the United States Supreme Court have found that courts should accord weight to past practice and legislative interpretations." *Williams v. Morris*, 320 S.C. 196, 205-06, 464 S.E.2d 97, 102 (1995); *see also N.L.R.B. v. Noel Canning*, 573 U.S. 513, 533 (2014) ("[T]hree-quarters of a century of settled practice is long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision[.]").

received the relief sought here and, regardless, the Attorney General would be the proper party to protect the interests of the public at large with regard to a charitable trust, not Appellant.

D. This Court should affirm the lower courts' well-reasoned holdings.

The lower courts correctly found that, as a matter of law, the Successor Trustee positions established under the Will and their terms do not run afoul of the South Carolina Constitution and that, as a result, Appellant failed to state facts sufficient to constitute a cause of action. Therefore, the Probate Court properly granted Respondents' motions to dismiss pursuant to Rule 12(b)(6), SCRCP, and this Court should affirm for the same reasons as the Circuit Court.

II. Appellant's arguments regarding the applicability of the doctrine of equitable deviation are not preserved.

As the Circuit Court noted, Appellant did not raise the doctrine of equitable deviation until his reply brief in the appellate proceedings. Appellant did not state a claim for equitable deviation in his Complaint, raise it in his briefing or argument to the Probate Court, or raise it in his opening brief to the Circuit Court.[15] Therefore, it is not preserved for review by this Court. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000); *Easterling v. Burger King Corp.*, 416 S.C. 437, 452-53, 786 S.E.2d 443, 451-452 (Ct. App. 2016).

Regardless, as the Circuit Court correctly found, application of equitable deviation would not be appropriate. This doctrine "permits deviation from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or

[15] Appellant contends that Respondents raised the doctrine below, placing it at issue. (Br. of Appellant 24.) This is not accurate. Respondents cited *S.C. Dep't of Mental Health v. McMaster*, 372 S.C. 175, 183, 642 S.E.2d 552, 556 (2007) and *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) only to support the propositions that: (1) the General Assembly lacks the power to terminate or alter a charitable trust and this ability is reserved to a court of equity and (2) the Attorney General is tasked with representing the interests of the general public for charitable trusts. Respondents have ***never*** advanced the argument at any point in this case that the doctrine of equitable deviation should apply to modify the trust.

substantially impair the accomplishment of the purposes of the trust." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 169, 616 S.E.2d 710, 716–717 (2005). The court's authority to deviate from the terms of the trust is where it is necessary "to carry out the settlor's intent," *All Saints Par., Waccamaw v. Protestant Episcopal Church in the Diocese of S.C.*, 358 S.C. 209, 227, 595 S.E.2d 253, 263 (Ct. App. 2004), or "carry out the purposes thereof." *Furman University v. McLeod*, 238 S.C. 475, 490, 120 S.E.2d 865, 872 (1961). Here, modifying the trust in the manner advanced by Appellants is not necessary to carry out Thomas Green Clemson's intent or the purpose of the trust and, in fact, it would directly contradict it.

Furthermore, Appellant is not a proper party entitled to seek equitable deviation. Aside from the Trustees, the only proper party who could raise equitable deviation would be the Attorney General. *See Beasley*, 365 S.C. at 164 n.3, 616 S.E.2d at 714 n.3 (noting that the Attorney General represents the interests of the public at large).

Therefore, Appellant's equitable deviation argument is not preserved and, even it was, the doctrine is not applicable here as the Circuit Court correctly held. This Court should affirm.

III. As an additional sustaining ground, this Court may affirm the dismissal due to lack of subject matter jurisdiction.

The lower courts found that Appellant had public importance standing and presented a justiciable controversy. However, as Respondents argued in their motions to dismiss and briefing below, Appellant has not met his burden of establishing either of these issues. Therefore, lack of subject matter jurisdiction represents an additional sustaining ground.

A. Appellant lacks standing.

Despite the lower courts' finding on this issue, Respondents maintain that Appellant has not established his standing to bring this suit and thus the Court lacks subject matter jurisdiction. *See Anders v. S.C. Parole & Cmty. Corrs. Bd.*, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983)

(noting that courts have no subject matter jurisdiction when a party lacks standing).[16] Standing is a threshold question that must be answered before analyzing the merits of a claim. *See ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 194, 669 S.E.2d 337, 339 (2008). The Probate Court correctly determined that Appellant lacks constitutional, statutory, or taxpayer standing. However, it determined that Appellant has public importance standing. This Court may affirm based on its independent finding of a lack of standing if it disagrees with the Probate Court's determination.

1. South Carolina law and policy demonstrate that public importance standing is a narrow exception.

Public importance standing is a judicially recognized exception recognizing that the "standing rules may be relaxed when the case involves a matter of wide public importance and resolution of the case is needed for future guidance affecting the public interest, not merely the interests of private litigants." *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024).[17] It is an exception to the "general rule" that "a litigant must have a personal stake in the subject matter of the litigation." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). However, "[c]ourts must cautiously balance competing interests—the citizenry's need to hold public officials accountable for alleged injustices and 'the concomitant integrity of

[16] Although standing is often discussed in terms of subject matter jurisdiction, South Carolina courts will also occasionally dismiss an action for lack of standing without any reference to subject matter jurisdiction. Under either approach, dismissal is warranted.

[17] Public importance standing was judicially created—it was not a product of the Constitution, statute, or the Supreme Court's rulemaking authority. Although the Supreme Court has the power to promulgate rules governing court administration, the General Assembly must review rules "governing the practice and procedure of all courts of the State." S.C. Const. Art. V, §4.A.; S.C. Code Ann. § 14-3-940. As the Supreme Court has recognized, it lacks the authority to "promulgate a procedural rule for future cases by simply issuing an opinion." *State v. Beaty*, 423 S.C. 26, 41, 813 S.E.2d 502, 510 (2018). Although Respondents recognize that this Court cannot ignore this judicially created standing because of binding precedent, they assert that "public importance standing" is nevertheless an unconstitutional conferral of standing and will move for leave to argue against precedent if this matter finds its way to the Supreme Court.

government action'—to determine whether the issue presented is 'inextricably connected to the public need for court resolution for future guidance.'" *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341-42, 878 S.E.2d 891, 895 (2022). "Only then can the issue 'transcend[ ] a purely private matter and rise[ ] to the level of public importance.'" *Id.* (quoting *ATC*, 380 S.C. at 199, 669 S.E.2d at 341). Importantly, public importance standing is not without limit under South Carolina precedent. The Supreme Court has noted that courts must be "cautious" in applying the exception lest it "swallow the [general rule of standing]." *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013).

In light of these concerns, the Supreme Court has imposed a number of limitations on the exception over the years. First, for public importance standing to be conferred, the action must raise an issue of public importance. *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472. Second, as noted above, even if the action raises such an issue, there must be some need for ***future guidance***. *See, e.g., ATC South, Inc.*, 380 S.C. at 199, 699, S.E.2d at 341. Third, the action must typically be brought against a government entity or a public official in their official capacity. *See, e.g., S.C. Transp. Infrastructure Bank*, 403 S.C. at 644, 744 S.E.2d at 523 (action against South Carolina Transportation Infrastructure Bank and legislators in their official capacities); *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (action against the Governor). Fourth, there must be ***no other adequate remedy*** for addressing the issue raised in the action. *See Jowers v. South Carolina Dep't of Health and Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014) (finding the public importance exception inapplicable where other parties could assert a similar action).

In addition to these limitations, the Supreme Court has held that competing policy concerns are the most significant factor in determining the application of the exception. *Carnival Corp.*, 407

S.C. at 80, 753 S.E.2d at 853. Weighing in favor of its application is the recognition that "[c]itizens must be afforded access to the judicial process to address alleged injustices." *Id* (quoting *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472). Weighing against its application is the understanding that "standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Id*.

The Supreme Court provided further guidance on public importance standing in *Jowers* in examining the applicability of the exception to a challenge to the registration provisions of the Surface Water Withdrawal Act. 423 S.C. at 348, 815 S.E.2d at 449. The plaintiffs in that case claimed that provisions of the act constituted an unconstitutional taking, violated due process, and violated the public trust doctrine. *Id*. In rejecting the plaintiffs' theory of public importance standing for the taking and due process claims, the court emphasized that there was no need for future guidance on the issue of the allocation of riparian rights. 423 S.C. at 360, 815 S.E.2d at 360. The court noted that the alleged injustice in the case was entirely hypothetical—that "at some point in the future the State may fail to protect against currently nonexistent unreasonable uses of surface water, which in turn could become so severe that the State's inaction amounts to a violation of its responsibilities to protect the public trust." 423 S.C. at 365-66, 815 S.E.2d at 458. Weighing the competing policy concerns in the case, the court reasoned that the plaintiffs' interest in judicial process carried very little weight because the state already had a duty to protect against hypothetical future unreasonable uses. 423 S.C. at 366, 815 S.E.2d at 458. Consequently, it determined that the exception was inapplicable. *Id*.

The Supreme Court's decision in *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022) is also instructive. In that case, the Supreme Court found that the plaintiff

was entitled to public importance standing in a matter involving disbursement of state funds. Unlike this case, however, in *Wilson* plaintiff contended that the Attorney General was "***improperly*** disburs[ing] state settlement funds," which the Supreme Court recognized was an issue of public importance. *Id.* (emphasis added). There was also a need for future guidance in *Wilson* because the issue of the Attorney General's authority to enter into contingency fee arrangements with private law firms like the one at issue in that case would "inevitably arise again in the future" because there were seven other active retention agreements between the Attorney General and private law firms. *Id.*

2. The applicable factors weigh against conferring public importance standing to Appellant under these unique facts.

Appellant's Complaint contains no specific allegations supporting application of the exception and instead just asserts that it should apply because the case raises an issue of public importance. For this reason alone, dismissal was appropriate.

Furthermore, the factors for attaining public importance standing are not met as a matter of law. First, like in *Jowers*, there are alternative mechanisms by which the issues in this case can be addressed. As noted above, Clemson University is a charitable trust, and the Attorney General is the proper party to protect the interests of the public with regard to charitable trusts. *Beasley*, 365 S.C. at 164 n.3, 616 S.E.2d at 714 n.3. The Attorney General, in fact, has the "***duty*** to represent the unspecified charitable beneficiaries," and serves as "protector, supervisor, and enforcer of charitable trusts." *Wilson v. Dallas*, 403 S.C. 411, 431, 446-67, 743 S.E.2d 746, 757, 765-66 (2013) (emphasis added). Because of Clemson University's status as a charitable trust, the Attorney General has the unique—and exclusive—role of protecting the interests of the public. Appellant's' interest in the judicial process carries little, if any, weight as a result since there is no need for them to vindicate a right on behalf of the public.

Second, like in *Jowers* and unlike in *Wilson*, there is no need for future guidance on this issue. *See Jowers*, 423 S.C. at 360, 815 S.E.2d at 360. Here, Appellant's Complaint challenges the constitutionality of a 135-year-old legislative act. The likelihood of this situation—a bequest to create a new public university if the State agrees to its terms (subject to the Chief Justice's approval), an Act of Acceptance by the State, the approval of the Chief Justice in a written opinion, the subsequent adoption of a new State Constitution, and a lawsuit being filed 130 years later to mount a constitutional challenge—occurring in the future is exceedingly unlikely. There is simply no need for future guidance under these facts. *See Bodman v. State*, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2013) (explaining that the court does not sit as "a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them" (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011))); *Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853 (noting that the courts are not "bodies for the resolution of public policy and generalized grievances").

Third, as detailed above, the Successor Trustees are not "public officials" for the purposes of the public importance exception to standing.

Finally, the competing policy factors in this case weigh against the application of the exception. Here, like in *Jowers*, Appellant's interest in the judicial process carries little weight given: (1) the Attorney General's authority and duty to supervise charitable trusts and (2) the lack of any injustice in the operation of a public trust—duly approved by the General Assembly and the Chief Justice of South Carolina—that has operated under the same structure since 1889. In contrast, the Successor Trustees' interest in avoiding "frivolous lawsuits" is high—Appellant is nothing more than an ordinary citizen asserting a generalized grievance against Clemson University and its Successor Trustees.

Weighing these considerations, this Court may properly choose to exercise caution and decline to find that the public importance exception applies in this case. Therefore, lack of standing represents an additional sustaining ground for affirming the Probate Court's dismissal.[18]

B. There is no justiciable controversy.

The Probate Court also found that Appellant presented a justiciable controversy. Although Appellant invoked the Court's subject matter jurisdiction under the Declaratory Judgment Act, the Court lacks jurisdiction under the act where there is no justiciable controversy. *See Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). The lack of any justiciable controversy represents another additional sustaining ground for affirming the dismissal.

The Uniform Declaratory Judgment Act ***is not*** an independent grant of jurisdiction to courts. *Id.* at 81, 742 S.E.2d at 374. Rather, the "existence of an ***actual controversy*** is essential to jurisdiction to render a declaratory judgment." *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970) (quoting *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 54 S.E.2d 777 (1949)) (emphasis added).

"A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Power*, 255 S.C. at 154, 177 S.E.2d at 553. Stated differently, "[w]here a

[18] In finding that Appellant has public importance standing, the Probate Court relied on *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013). *Infrastructure Bank* involved a challenge to the composition of the defendant bank's board contending it was unconstitutionally compromised. The Supreme Court found that public importance standing applied because the plaintiffs raised a colorable claim casting "a cloud of illegitimacy which could marginalize the important decisions of the board." *Id.* This matter is distinguishable in light of the Attorney General's power and duty to oversee charitable trusts on behalf of the public, which eliminates Appellant's claimed justification for attempting to represent the public interest. Moreover, as detailed above, Appellant has failed to advance a claim that is even "colorable" here.

concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action." *Power*, 255 S.C. at 153, 177 S.E.2d at 553. Although the act is broadly construed, it is not without limits. *Sunset Cay L.L.C. v. City of Folly Beach*, 357 S.C. 414, 423-24, 593 S.E.2d 462, 466 (2004). It does not require a court to give a purely advisory opinion as to the issues raised. *Id.* at 154, 177 S.E.2d at 553. In *Power*, for example, the Supreme Court declined to issue a declaratory judgment to determine whether a person simultaneously holding the office of city policeman and a commission as a state constable would violate the constitutional provisions prohibiting dual officeholding. In declining to issue the declaratory judgment, the court noted that the plaintiffs had not yet been appointed constables and that an adjudication of the issue would thus settle no legal rights between the parties. *Power*, 255 S.C. at 154, 177 S.E.2d at 553.

Here, Appellant's connection is even more attenuated than in *Power*. Appellant has no legal rights or duties with respect to the constitutional provisions and has alleged no relationship whatsoever with Clemson University or its board. Rather, Appellant has only purported to be representing the rights of the public at large which, as detailed above, is a role reserved for the Attorney General in overseeing charitable trusts.

The primary interest identified in Appellant's Complaint and briefing is a generalized concern about the funds appropriated to Clemson University by the State. (*See* Br. of Appellant p.5.) However, Appellant has not alleged any ***injury*** with regard to those funds. He made no allegations that any funds have been improperly spent or misappropriated, which contrasts this case with matters such as *Wilson*. Instead, Appellant's claims appear to raise a generalized concern about the ***possibility*** of ***future*** funds being misused. This is not sufficient to establish a justiciable

controversy. *See Jowers*, 423 S.C. at 361-62, 815 S.E.2d at 456 ("First, as we have already explained, the theory depends on the possible occurrence of unknown future circumstances that might—or might not—cause the loss of trust assets. Claims that depend on contingent, future harm are not justiciable.").

Funds appropriated to Clemson are subject to additional oversight in any event. The S.C. Code requires two thirds of the Board (meaning joinder of at least two legislatively appointed trustees) to expend funds appropriated to the school by the State. S.C. Code Ann. § 59-119-80. Moreover, the Board must obtain approval from the State Fiscal Accountability Authority or Department of Administration to borrow money via bond issue, and any such issue must be reviewed by the Joint Bond Review Committee. S.C. Code Ann. § 59-119-740. Finally, the Board is also required to submit an annual report of all receipts and expenditures to the General Assembly. S.C. Code Ann. § 59-119-140.

"The Uniform Declaratory Judgment Act . . . does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise' or 'license litigants to fish in judicial ponds for legal advice.'" *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957). Respectfully, Appellant's Complaint does precisely that by seeking relief based on a generalized allegation without any explanation of any harm that has occurred.[19] Appellant's failure to present a justiciable controversy represents an additional sustaining ground for the dismissal.

[19] As Respondents noted in their briefing to the lower courts, in addition to not serving for terms of "life or good behavior" as a matter of law (as those courts correctly determined), the Successor Trustees have all agreed they will not serve beyond the age 75. This further supports that this action presents a purely hypothetical question and there is no justiciable controversy under the Declaratory Judgment Act. The lower courts, however, did not rely on the existence of any such private agreement among the Successor Trustees in reaching its holding. Therefore, Appellant's contention that he needed discovery to develop this factual assertion is without merit.

CONCLUSION

As detailed above, the Probate Court correctly dismissed the Complaint because Appellant has failed to state facts sufficient to constitute a cause of action and the Circuit Court properly affirmed. Moreover, Appellant's lack of standing and failure to present a justiciable controversy represent additional sustaining grounds for the dismissal. This Court should affirm.

Signature on Following Page

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