CASE NO: 2022-CP-10-05123
Appellate Case No. 2024-000256

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

MARK CALHOUN,
Appellant,

v.

MEMBERS OF CITY COUNCIL OF THE CITY OF CHARLESTON, SOUTH CAROLINA, CAROLINE PARKER, KEVIN SHEALY, JASON SAKRAN, ROBERT M. MITCHELL, KARL L. BRADY, JR., STEPHEN BOWDEN, PETER SHAHID, JR., MICHAEL S. SEEKINGS, PERRY K. WARING, WILLIAM DUDLEY GREGORIE, and ROSS A. APPEL AND THE CITY OF CHARLESTON, SOUTH CAROLINA, THE HONORABLE ALAN WILSON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, AND THE HONORABLE JOHN TECKLENBURG, MAYOR OF THE CITY OF CHARLESTON, SOUTH CAROLINA,
Respondents.

FINAL BRIEF FOR APPELLANT MARK CALHOUN

Mark Calhoun, Pro Se

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court commit an error of law by holding that the Petitioners lacked standing to enforce the Heritage Act?

2. Did the Circuit Court commit an error of law by holding that only the South Carolina Attorney General, settlor, or trustee, and not the Petitioners, can enforce the alleged Charitable Trust of the Calhoun Monument and therefore Petitioners lacked standing to bring the Charitable Trust Act claim?

3. Did the Circuit Court commit an error of law and fact in holding that the South Carolina Attorney General had previously issued an opinion that the removal of the Calhoun Monument from Marion Square was not in violation of the Heritage Act, when the Attorney General had previously asserted in a filed answer that a court could determine a violation by the said removal under the rededication provision of the Heritage Act?

STATEMENT OF THE CASE

FACTS

The historic facts about the John C. Calhoun monument and the parties' involvement and/or connection to the monument establishment and Charitable Trust are outlined in the Petition. Respondents' memorandum repeated the substantive historic allegations from Petitioners' Complaint. What bears repeating for the sake of this motion is that the City accepted the Calhoun Monument by way of unanimous resolution of City Council on 18 July, 1898 as follows:

> "Whereas, the Ladies Calhoun Monument Association, 'after vicissitudes and efforts extending over many years, has at length accomplished the sacred object of its existence,' by the erection in Marion Square of the magnificent monument to South Carolina's greatest son, John Caldwell Calhoun; and whereas, the Association is now about to dissolve and disband, and desires to place the monument under the control and care of the City of Charleston for all time, and has placed in the hands of the Mayor and the city the key to the enclosure, 'as symbolizing its possession and custody'; Resolved, That the City Council

> gratefully accepts the high honor and the responsibilities which it involves, and pledges the faith of the city to watch over and keep it as a priceless treasure and sacred trust. Resolved, that his Honor the Mayor by (*sic*) requested to express to the ladies of this Association the thanks of the City and the entire State for their untiring labors and heroic endurance in the face of many obstacles and difficulties in the completion of such a handsome and imposing monument to the great statesman. Resolved, that this action of the City Council be suitably engrossed and sent to the Ladies Calhoun Monument Association."

Relevant to the issue of Petitioners' standing under the Public Importance exception (further explained below) are the events and decisions surrounding the destruction of the monument and removal of the lifelike statue of John C. Calhoun on June 24, 2020, and then later plans to transfer the statue of Calhoun to Los Angeles for display in an exhibit subjecting the Calhoun statue and name to "ridicule". This background provides an example that connects the purpose of both the Heritage Act and South Carolina Trust Code of protection of such historic artifacts as the Calhoun Monument and Statue. It is also relevant to the issue of the particular harm to the Petitioners and the relation of that harm to the issue of standing.

Shortly after the death of George Floyd in the summer of 2020, nationwide civil unrest came to Charleston, South Carolina. As described in the Charleston City Paper (July 8, 2021, edition):

> "The night of May 30, 2020, a group of people took to upper King Street downtown, breaking windows and setting fires following a day of protest marches throughout downtown in which hundreds of people demonstrated against the police killing of George Floyd in Minneapolis a few days earlier."

In the weeks following, civil unrest also moved to the John C. Calhoun monument with vandalism against the statue and ensuing protests and demands it come down. This was during the time of heated unrest which included ubiquitous threats of "no justice, no peace" against decision-makers for not following the directives of those protesting against particularly historic monuments.

A Charleston City Council vote was taken on June 23 to remove the statue, and the actual removal took place within hours of the successful vote to the cheers of the crowds. While the base of the structure was destroyed by the City, the statue of Calhoun was transferred from Marion Square and stored outside of public view in an undisclosed location alleged by the City. Petitioners understand from the City it is located in a warehouse on the peninsula, where it has remained since being removed (note: to this point, neither the Petitioners nor their counsel have been given permission to assess the condition of the statue).

While the statue languished out of site, in 2021, the city began coordination with Hamza Walker, Director of "LAXART" (further described hereafter), to send the John C. Calhoun statue to the Los Angeles, California "LAXART Monument" exhibit. When the City of Charleston's Commission on History, whose members were approved by City Council, voted on December 15, 2021 to send the statue to LAXART, a dissenting commission member said the following about the decision:

> "The remaining light and honor of respect cannot be extinguished by subjecting Calhoun to further ridicule in the form of a distant or traveling show."

The impending transfer of the Calhoun Statue to LAXART for "ridicule" was the catalyst for a lawsuit brought by descendants of the Calhoun family and of the Ladies Calhoun Monument Association who created the statue and transferred it to the City of Charleston in trust. This group had previously waited to see what the City had planned for the statue and did not have plans to sue until the said LAXART plan.

After the said destruction of the Monument and warehousing of the Calhoun statue, the South Carolina Supreme Court issued its opinion upholding the Constitutionality of the **"Heritage Act"** (though with a majority vote of the legislature to act versus the original super majority). The South Carolina Supreme Court Declaratory Judgment Opinion 28062 (2021) upholding the

Constitutionality of SC Code subsection 10-1-165(A) **"Heritage Act"** provided the following passage relevant to the powers of state versus local government with regard to historic memorials we argue include the Calhoun Monument and the rededication of Marion Square (further explained below):

"The Petitioners argue subsection 10-1-165(A) conflicts with Home Rule because it prevents local governments from acting on requests of the public for the change, removal, or relocation of controversial historic monuments or memorials." They contend local governments are in a better position to act with regard to this subject because "they can be more responsive" to the thoughts of the community. This may be true, but Home Rule is not about who holds the better wisdom. Home Rule does not allow local governments to ignore legislatively enacted state law because they are in a more suitable position to address an issue. Subsection 10-1-165(A) does not apply to a specific county or geographic area and, thus, it is a general law with respect to territorial classifications. Further, as we analyzed above, the statute is not an unconstitutional special law in any other respect. Importantly, "the subject matter of the legislation is not peculiar to [any] political subdivision." *Kleckley v. Pulliam*, 265 S.C. 177, 187, 217 S.E.2d 217, 222 (1975). Therefore, we hold subsection 10-1-165(A) does not violate Home Rule and all counties must comply with it because "no county shall be exempted from the general laws." S.C. Const. art. VIII, § 7."

STANDARD OF REVIEW

"Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure do not have identical standards of review. In particular, the rules differ as to whether this Court needs to accept the well-pleaded allegations of the complaint as true. Under Rule 12(b)(1), this Court "examines whether the complaint fails to state facts upon which jurisdiction can be founded." *Rega v. Rega*, No. 19-259, 2019 WL 4466977, at *3 (D.S.C. Sept. 17, 2019) (interpreting Federal Rule 12(b)(1)).

When resolving a Rule 12(b)(1) motion, the Court "may consider undisputed facts and any jurisdictional facts that it determines." Id. (same). As a result, the Court may review "affidavits and other evidence outside the pleadings . . . in support of a motion to dismiss based on lack of jurisdiction." *Baird v. Charleston Cty*., 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

Under Rule 12(b)(6), by contrast, the complaint should be "construed liberally and the Court must presume all well plead facts to be true." *Charleston Cty. School Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). So a Rule 12(b)(6) dismissal is improper "[i]f the facts alleged and inferences reasonably deductible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff on any theory." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 (2014). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Id.

This motion to dismiss under Rule 12(b)(6), by the arguments as set forth below, should fail under the above standard.

ARGUMENTS

1. The Circuit Court's denial of standing to Petitioners to bring the Heritage Act claim was justified by the assertion that only the South Carolina Attorney General has standing under the Heritage Act to bring a claim. This holding does not allow for any of the doctrines which allow for standing, like public importance, nor does it recognize that the Heritage Act categorizes groups of South Carolina citizens, for example minority citizens, with unique interest from the general public. This was in error and should be reversed.

As stated in *Sloan v. School Dist. Of Greenville County*, even a taxpayer has standing to challenge unauthorized or illegal governmental acts under this exception. 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct.App.2000). This case is of such importance that if the Petitioners are not found

to fall under the "among others" for standing to enforce the Charitable Trust, the Court should confer standing so it may provide for future guidance. See *Sloan v. Wilkins*, 362 S.C. at 436-37, 608 S.E.2d at 583, abrogated on other grounds, *Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009). Petitioners have personal standing due to the harm experienced and described above, and furthermore, the issues in question are of such public importance, that the Court should grant standing by recognizing the Respondents' interpretation of Section 62-7-405(c) is extreme and this matter requires the kind of guidance intended with the Public Importance exception.

Beyond principles of constitutional construction or the public importance exception, according to the Court in Denton, a statute can imply a private cause of action by a two-party test: 1. The essential purpose of the statute is to protect from the kind of harm the petitioners have suffered. 2. That he is a member of the class the statute is intended to protect. It's important to note that the Court also opined that "Legislation in derogation of common law must be strictly construed." Conversely, legislation not in derogation of common law need not be strictly construed. Neither the Heritage Act nor the Charitable Trust Act are in derogation of common law. Petitioners meet the said two-part test for standing under the Denton analysis. Critical to the two-part test to the Calhoun case is the Pinckney opinion of the Supreme Court upholding the constitutionality of the heritage act. The Pinckney opinion described in detail the quid pro quos for both sides of the Confederate Battle Flag within the Legislature. The Court asserts the Heritage Act was formed and passed due to compromises from both sides for protection of competing groups or classes of people. Of note, A Civil Rights memorial was to be created on state grounds in exchange for the moving of the Confederate battle flag on State House grounds. The Court noted that the Heritage Act provided for special protection of African American and Native American

Monuments/Memorials. The Supreme Court specifically recognized these two groups, did not include other groups (in apparent violation of equal protection), and yet recognized the uniqueness of those groups in the context of this debate. This was another quid pro quo for the group protected by the Heritage Act which includes Petitioners. By Legislative intention, the Heritage Act was to protect the class of people who appreciate and value South Carolina history, including history connected to memorials associated with the Civil War, other wars, or South Carolina historic figures like John C. Calhoun. The Petitioners are part of a class harmed in the way the legislature sought to protect under the Heritage Act. Specifically, Petitioner descendants were harmed by the reputational damage to their family name/reputation when the monument was destroyed and the statue warehoused. A year and a half later, they were further harmed with the publicized plans to send the statue to LAXART in California for ridicule, which generated the lawsuit.

John C. Calhoun was arguably South Carolina's most important and accomplished son, and this case allows for critical future guidance for the Heritage Act and Charitable Trust provisions. Allowing standing in this unique case with these unique Petitioners does not stand to create a deluge of lawsuits and harm judicial economy. The guidance flowing from this case will likely help with judicial economy for the reasons presented. Petitioners met the standard to defeat the Respondents' motion to dismiss and allow for the courts to more fully hear the arguments of parties and make determinations affecting future generations of South Carolinians.

2. The Circuit Court's incorrect statement of fact that the South Carolina Attorney General's alleged position with regards to the potential Heritage Act violation (with the removal of the Calhoun Monument) does not comport with the Attorney General's answer to lawsuit. The Attorney General's position is that under the "rededication" provision of the Heritage Act a court could find a violation of the Heritage Act in the removal of the monument. The Court's error of

fact becomes an error of law by holding that the claim should be dismissed because a court could not find a Heritage Act violation occurred.

In dismissing the Heritage Act claim, the Court permitted the Respondent's erroneous assertion, "The Court also notes that when the statue was removed in 2020, the Attorney General issued an opinion that the City's action did not violate the Act." The Attorney General did not issue an opinion the City did not violate the Act. The Attorney General made a personal video statement (also transcribed in the Post and Courier in an article about the Statue). On July 25, 2020, the Attorney General issued an opinion about the Constitutionality of the Heritage Act, but not about the Calhoun Monument removal. Please note below that the Attorney General stated he would focus on the Constitutionality of the Heritage Act. The following was the conclusion of the Attorney General's statement to the media in Charleston: "Our Legal Analysis of the law's ambiguity, coupled with the organization's understanding from the City of Charleston that it would protect and care for the statue until a suitable place was found for it led us to the decision not to file a legal challenge at this time but instead to focus on the overall legal defense of the Heritage Act". In Paragraph 28 of the Attorney General's answer to the first lawsuit brought against Respondents over the removal of the Calhoun Statue, the Attorney General asserted that a court could find that the removal of the Calhoun Monument violated the "rededication" provision of the Heritage Act.

CONCLUSION

FOR THE FOREGOING REASONS, Appellant asks that this Court to reverse and remand for further proceedings.

/S/Mark Calhoun
Mark Calhoun
Pro Se
3 Broad Street, Suite 350
Charleston, SC 29401
843-991-5631

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