

RECEIVED

Aug 19 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2024- 001391

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.

RECORD ON APPEAL

C. Mitchell Brown, S.C. Bar No. 12872
Blake T. Williams, S.C. Bar No. 100794
Nelson Mullins Riley &
Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211
(803) 799-2000
mitch.brown@nelsonmullins.com
blake.williams@nelsonmullins.com
Attorneys for Respondents E. Smyth
McKissick, III, David E. Dukes, Cheri
M. Phyfer, Mark S. Richardson,
William “Bill” C. Smith, Jr.,
Kim Wilkerson, and David H. Wilkins

James G. Carpenter, S.C. Bar No. 1136
Jennifer J. Miller, S. C. Bar No. 11316
The Carpenter Law Firm, PC
819 E. North Street
Greenville, South Carolina 29601
(864)235-1269
jim@carpenterlawfirm.net
jennifer.miller@carpenterlawfirm.net
Attorneys for Appellant

Boyd B. Nicholson, Jr., S.C. Bar No. 65387
Haynsworth Sinkler Boyd
Post Office Box 2048 (29602-2048)
One North Main, 2nd Floor
Greenville, South Carolina 29601
(864) 240-3247
nnicholson@hsblawfirm.com
Attorney for Respondent Clemson University

INDEX

1. Order entered July 31, 2024.....	1
2. Order entered April 3, 2023.	20
3. Order Transferring the Case to the Pickens County Probate Court entered September 28, 2021.	33
4. Order dated September 1, 2021 of the Honorable Alex Kinlaw, Jr. granting Motions for a Protective Order and Stay of Discovery	41
5. Form 4 Order entered July 27, 2021, transferring the case to the Probate Court of Pickens County.	45
6. Form 4 Order entered July 27, 2021, granting Defendants’ Motion for Protection from Discovery.	48
7. Form 4 Order entered July 27, 2021, granting the Motion to Substitute John Sloan as a Party Plaintiff.	51
8. Form 4 Order of Continuance upon the death of Mr. Edward D. Sloan Jr. entered October 30, 2020.	54
9. Summons and Complaint filed July 1, 2020.	57
10. Acceptance of service for Clemson University.	62
11. Acceptance of service for the Trustee Defendants.	63
12. Clemson Motion to Dismiss filed August 26, 2020.	64
13. Trustees’ Motion to Dismiss filed August 26, 2020.	67
14. Clemson Memorandum in Support of Motion to Dismiss filed on or about October 23, 2020.	70
15. Trustees’ Memorandum in Support of Motion to Dismiss filed on or about October 23, 2020.	89
16. Plaintiffs’ Memorandum of Law in Opposition to Motions to Dismiss filed on or about October 24, 2020.	110
17. Motion for Substitution of Party Plaintiff filed January 16, 2021.	120

18. Clemson Motion for Protective Order and to Stay Discovery filed on or about June 30, 2021.	122
19. Defendants Successor Trustees’ Motion for Protective Order and Stay of Discovery, filed June 22, 2021	134
20. Last Will & Testament of Thomas Green Clemson, and Codicil.	140
21. Act of Acceptance, Statutes of South Carolina, Volume XX, Page 277 (November 27, 1889).	147
22. Opinion of W.D. Simpson, Chief Justice of the South Carolina Supreme Court, Statutes of South Carolina, Volume XX, Pages 781 and 782 (December 6, 1889)...149	
23. Plaintiff’s interrogatories.	150
24. Plaintiff’s requests for production.	152
25. Transcript of hearing dated September 30, 2022.	154
26. Transcript of hearing dated June 14, 2024.	195
27. Notice of Appeal dated April 12, 2023.	242
28. Notice of Appeal dated August 23, 2025.	243
29. Certificate of Service.	245

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

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

Appellants,

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.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2023-CP-39-00416

ORDER

This matter comes before the Court on Appellants John Sloan, individually, and on behalf of all other similarly situated and NOLAS Trading Co., Inc.’s (collectively, “Appellants”) appeal of the Probate Court’s April 3, 2023 Order granting Respondent Clemson University (“Clemson University”) and Respondents’ 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”) Motions to Dismiss.

The parties fully briefed the appeal and the Court heard oral argument on June 14, 2024. James G. Carpenter, Esq. appeared for the Appellants, Boyd B. Nicholson, Jr., Esq. appeared for Clemson University, and Blake T. Williams, Esq. appeared for the Successor Trustees.

¹ Appellants named the individual trustees as Clemson University “Life Trustees” in the Summons and Complaint. Respondents have asserted they should be referred to as the “Successor Trustees” instead. Based on the findings of the Probate Court, which this Court affirms, the Court uses the term “Successor Trustees” herein.

Having considered the matters of record including the briefing, the parties' oral argument, and the record on appeal, the Court **AFFIRMS** the Probate Court's findings of fact and conclusions of law in its well-reasoned Order. The Court agrees with and adopts the Probate Court's holdings that: (1) Appellants have standing; (2) the Successor Trustees are not "elected or appointed" as contemplated by the South Carolina Constitution; (3) even if it was determined they were elected or appointed, which the Court finds they were not, the language in the Constitution of 1868 and 1895 is similar and therefore does not give Appellant relief; and (4) the United States and South Carolina Constitutions protect against any impairment of contracts, which would occur here if Appellant is granted relief, as does the South Carolina Probate Code for charitable trusts.

I. BACKGROUND

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. Thomas Green Clemson executed his Will in 1886 and an accompanying Codicil in 1887.²

Relevant to this matter, the Will provided for, and the Act of Acceptance accepted, a board of trustees consisting of: (i) seven trustees named by the Will and their successors, and (ii) six trustees to be chosen by the General Assembly. 1889 S.C. Act No. 166 § 1; *see also* S.C. Code Ann. § 59-119-40.

² The Will is a public record on file with the Probate Court. The Court may "take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). Additionally, the Court "may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013). Appellants have not disputed the authenticity or accuracy of the reprinting of the Will cited by Respondents, and the Probate Court properly took judicial notice of its contents.

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.

Last Will & Testament of Thomas Green Clemson. 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. *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.* at Item 3.

After Thomas Green Clemson's death in 1888, the General Assembly passed the Act of Acceptance, which the Governor signed into law on November 27, 1889. In 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 § 1. The Act of Acceptance provided Clemson University would be governed in the manner specified by the Will. *Id.* Regarding the Board, the Act of Acceptance stated that Clemson "shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will and their successors and six members elected by the General Assembly in joint assembly." *Id.* at § 3.

After passage of the Act of Acceptance, the Chief Justice of South Carolina, W.D. Simpson, issued an opinion finding that "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.”³

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

II. PROCEDURAL HISTORY

Appellants first petitioned the Supreme Court of South Carolina on February 21, 2020 to accept this matter in its original jurisdiction. However, the Supreme Court declined to hear the matter via a 2-2 vote.

Appellants then filed their Complaint with the Court of Common Pleas for Greenville County on July 1, 2020.

The contents and provisions of the Will, Act of Acceptance, and Chief Justice’s opinion are not in dispute. Instead, Appellants’ Complaint posed the purely legal question of whether the terms of service of the Successor Trustees are unconstitutional. Specifically, Appellants alleged that the terms of service violate Articles VI and XVII of the South Carolina Constitution. 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.

³ The Chief Justice’s Opinion is also reprinted on Clemson University’s website. See Appendix C, *Board of Trustees Manual*, Clemson University (last visited March 11, 2023), available at <https://www.clemson.edu/administration/bot/manual/index.html>. Appellants have not disputed the authenticity of this reprinting of the Opinion.

The Constitution of 1895 does not define “office” or “officer.” However, Appellants’ 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”). Appellants alleged that the Will and the Act of Acceptance are unconstitutional because the Successor Trustees are “officers” whose term is not for “some specified period.” (Compl. at ¶ 14.)

Appellants 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 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.) Appellants also sought to recover their attorney’s fees and costs under S.C. Code Ann. § 15-77-300. (*Id.*)

Respondents timely moved to dismiss or, in the alternative, to transfer venue to the Pickens County Probate Court. Respondents’ motions initially were initially heard by the Honorable Alex Kinlaw on July 27, 2021. 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.

After receiving the case, the Probate Court proceeded to consider the merits of Respondents' 12(b)(6) motions and held a hearing on September 30, 2022. After carefully evaluating the issues raised in the motions, the Probate Court entered an Order granting Respondents' motions on April 3, 2023. Appellants then appealed to this Court as provided by S.C. Code Ann. § 62-1-308.

III. STANDARD OF REVIEW

On appeal from the final order of the probate court, the circuit court should apply the same standard of review that the Supreme Court or Court of Appeals would apply on appeal. *In re Est. of Boynton*, 355 S.C. 299, 302, 584 S.E.2d 154, 155 (Ct. App. 2003).

“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). “[W]ell pleaded facts are admitted, but inferences drawn by the plaintiff from such facts and conclusions of law are not admitted.” *Jensen v. S.C. Dep’t of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App. 1988)

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).

IV. THE COURT'S ANALYSIS

I. Appellants have public importance standing.

Respondents have contended that Appellants lack standing to assert the claims raised in this action. Like the Probate Court, this Court agrees that although Appellants lack constitutional, statutory, or taxpayer standing, Appellants have satisfied the requirements for showing public importance standing.⁴

Public importance standing 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).⁵ This exception recognizes that in certain circumstances “standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance” even without an allegation of particularized injury. *Id.*

“The key to the public importance analysis is whether a resolution is needed for future guidance.” *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341-42, 878 S.E.2d 891, 895 (2022)

⁴ The Court concurs with the Probate Court that Appellants lack constitutional standing because they have not shown any particularized injury, harm, or prejudice that they would personally suffer as a result of the actions detailed in the complaint. See *S.C. Pub. Int. Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117-18, 804 S.E.2d 854, 858 (2017) (setting forth the elements for establishing constitutional standing). Additionally, Appellants lack statutory standing since they have not identified any statute conferring a right to sue. See *Youngblood v. S.C. Dep’t of Social Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Finally, the Supreme Court of South Carolina has foreclosed any theory of standing premised on generalized injury as a taxpayer. See *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013).

⁵ Respondents contend that “public importance standing” is an unconstitutional conferral of standing because it was judicially created and not a product of the Constitution, statute, or the Supreme Court’s rulemaking authority. However, like the Probate Court, this Court is bound by Supreme Court precedent supporting the continued viability of public importance standing.

(quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)). “Courts must cautiously balance competing interests—the citizenry’s need to hold public officials accountable for alleged injustices and ‘the concomitant integrity of government action’—to determine whether the issue presented is ‘inextricably connected to the public need for court resolution for future guidance.’” *Id.* (quoting *SCDOT*, 421 S.C. at 118-19, 804 S.E.2d at 858). “Only then can the issue ‘transcend[] a purely private matter and rise[] to the level of public importance.’” *Id.* (quoting *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341).

The Probate Court relied on *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), finding it to be instructive. That case involved a challenge to the composition of the Board of Trustees of the South Carolina Transportation Infrastructure Bank, with the plaintiffs alleging that it violated the prohibition against dual office holding and separation of powers. *Id.* The court found that the plaintiffs presented a colorable claim that the board was unconstitutionally comprised, which cast a cloud of illegitimacy that could marginalize the important decisions of the board. *Id.* at 646, 744 S.E.2d 521, 524 (2013). Therefore, the court held that “resolution of this question is certainly of importance and concern to the public” and the plaintiffs had standing. *Id.*

The Probate Court found this analysis of the standing question, along with other South Carolina case law that has granted standing in cases that are more similar in posture to this case and fact scenario, to be more persuasive than the *contra* authorities cited by Respondents.⁶

⁶ For example, Respondents contended that, like in *Jowers v. South Carolina Dep’t of Health and Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018), there are alternative mechanisms by which the issue in this case could be addressed. Specifically, the Attorney General is tasked with protecting the interests of the public at large in administering or enforcing charitable trusts. Although the Attorney General has such an interest, as detailed below, the Court agrees with the Probate Court’s finding that it does not eliminate Appellants’ standing. Moreover, Respondents cite to *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020) to support their argument that

Therefore, the Probate Court found that Appellants have public importance standing. This Court agrees and adopts that analysis.

II. Appellants have presented a justiciable controversy.

The Probate Court also found that Appellants have presented a justiciable controversy. Respondents correctly note that the Uniform Declaratory Judgment Act and public importance exception to standing both require the plaintiff to present an underlying controversy for resolution. Respondents contend that Appellants have no legal rights or duties with respect to the constitutional provisions raised and have not alleged any injury. The Probate Court, however, found that a justiciable controversy exists in this matter because it is in line with the cases granting public importance standing where the plaintiff raises issues of constitutional import. Thus, the Probate Court found that Appellants' contention that the Act of Acceptance and the ongoing actions of Respondents are unconstitutional presents a justiciable controversy. The Court also concurs with this finding.

III. Appellants have failed to state facts sufficient to constitute a cause of action.

Although, like the Probate Court, the Court finds that Appellants have standing and have presented a justiciable controversy, the Court agrees with the Probate Court that Appellants' Complaint fails to state facts sufficient to constitute a cause of action.

In reaching this conclusion, the Probate Court acknowledged and considered that its ruling must be based solely on the allegations set forth in the Complaint and that a motion to dismiss should not be sustained if the Appellants are entitled to relief on any theory of the case. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (quoting *Stiles v. Onorato*, 318 S.C. 297,

public importance standing is not necessary where there is no need for future guidance. The Court finds, however, like the Probate Court, that there is a need for future guidance here.

300, 457 S.E.2d 601, 602 (1995)). Moreover, the Probate Court construed the pleadings liberally in favor of the Appellants. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Finally, the Probate Court recognized that dismissal should not be granted merely because the Court doubts Appellants will prevail in the action. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192 (2007). This Court has likewise taken this guidance into consideration.

Mindful of these considerations, the Court agrees with the Probate Court that the dispute here is not as to the underlying facts but as to the interpretation of the law and the controversy is already established in the pleadings. Therefore, it was properly resolved on a motion to dismiss. *See Palmer v. State*, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019).

A. The Successor Trustees are not “elected or appointed” as contemplated by the South Carolina Constitution.

The constitutional provisions raised by Appellants only reference a person “elected or appointed” to office. *See* S.C. CONST. ART. VI, § 1; S.C. CONST. ART. XVII, § 1B. “Office” and “Officer” are not defined by the Constitution. Therefore, the Appellants rely on a subsequently adopted statute, S.C. Code Ann. § 8-1-10, which provides that “public officer” includes “trustees of the various colleges of the State.” *Id.* Appellants assert that the Successor Trustees are public officers and, as a result, their term must be for “some specified period.” They contend that the term of service under the Will and Act of Acceptance does not meet this requirement.⁷

The Probate Court correctly began its analysis with the recognition that the courts “will not construe statutes to be unconstitutional when susceptible to a constitutional interpretation.”

⁷ Respondents have contended that the Successor Trustees do not actually serve for “life or good behavior” because they have all agreed not to serve past 75 years old. The Probate Court noted that its ruling was in no way based on this alleged private agreement, and agreed with Appellants that the existence or implications of such agreement is outside the scope of Rule 12(b)(6). This Court does not reach this issue either.

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 reconciliation.” *State v. Taub*, 336 S.C. 310, 317, 519 S.E.2d 797, 801 (Ct. App. 1999).

The Court agrees with the Probate Court that a reasonable reading of the constitutional provisions at issue is that “elected” means 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. Other types of college trustees (including the legislatively appointed trustees at Clemson) would be subject to the provisions. However, the Successor Trustees, are not “elected or appointed” as contemplated by the Constitution. Rather, the Will named the original seven Successor Trustees, and that group of trustees has been self-perpetuating ever since, choosing new Successor Trustees as the 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. § 59-119-40.⁸

Appellants’ arguments that: (1) 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

⁸ 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.* 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).

brings them within the purview of the Constitutional provisions and (2) 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 are unpreserved. Appellants did not raise either of these arguments to the Probate Court. “It is well-settled that an 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) (citing *Creech v. South Carolina Wildlife and Marine Res. Dep’t*, 328 S.C. 24, 491 S.E.2d 571 (1997)). 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). Regardless, even if these arguments were preserved, they are not a reasonable reconciliation of the applicable constitutional provisions and statutes and interpreting them in this fashion would strain to reach an unconstitutional reading.

For the foregoing reasons, the Court affirms the Probate Court’s holding that the Successor Trustees are not “elected or appointed” as contemplated by the South Carolina Constitution.

B. The Probate Court correctly found that the operative Constitution of 1868 further supports the propriety of the Successor Trustee term of service.

As the Probate Court correctly determined, the Constitution of 1868 was the operative constitution at the time of the Act of Acceptance. The Constitution of 1868 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 of service is until “death, resignation, refusal to act or otherwise.” S.C. Code Ann. § 59-119-40 (emphasis added). Appellants concede that the successor trustee position

was constitutional under the Constitution of 1868. (See Br. of Appellants at 19 (noting that the Act of Acceptance “did not violate the Constitution of 1868 when it was enacted”).)

Appellants’ Complaint alleged that the Successor Trustee position has a term of “life.” Taking Appellants’ allegation as true, as the Court must at this 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. Therefore, the Successor Trustee term of service is equally lawful under the Constitution of 1895.⁹ 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 Court also affirms the Probate Court’s conclusion that even if it the Successor Trustees were “elected or appointed,” which they are not, the language in the Constitution of 1868 and 1895 is similar and therefore does not give Appellant relief.

⁹ As Respondents correctly note, Appellants misconstrue the Probate Court’s holding here—it did not find that the Constitution of 1895 made no change to the prohibited terms of office. Rather, what the Probate Court found was that the new provisions did not alter the constitutionality of the Successor Trustee position.

C. Even if the Successor Trustees were “public officers” the constitutional provisions raised by Appellants would be unconstitutional as applied to them.

Finally, the Probate Court further appropriately found that even if Appellants were correct that the Successor Trustees are “public officers” under S.C. Code Ann. § 8-1-10 and their terms of service are subject to the restrictions of Article VI, § 1 and Article XVII, § 1B (which neither this Court nor the Probate Court found), these constitutional provisions and statute would be unconstitutional as applied.

The Court agrees they are not applicable to the Successor Trustee position due to Clemson University’s status as a charitable trust created through a 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. Att’y 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.* 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 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 Probate Court correctly found, 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 charitable 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) (same).¹⁰ Applying the statute and constitutional provisions in the manner advanced by Appellants 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 Probate Court also correctly 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 Appellants in this matter. See *Epworth Children’s Home v. Beasley*, 365 S.C.

¹⁰ Although they are not binding authority, like the Probate Court, this Court finds these opinions of the Attorney General persuasive. See *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011).

157, 164 n.3, 616 S.E.2d 710, 714 n.3 (2005) (explaining that, under South Carolina law, the 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 Appellants do not have a viable cause of action purporting to vindicate the rights of the public here.

The Probate Court properly declined to interpret and apply the “public officer” statute in the manner advocated by Appellants. *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 reconciliation of the provisions. *See Taub*, 336 S.C. at 317, 519 S.E.2d at 801.¹¹

Therefore, the Court affirms the Probate Court’s holding that the United States and South Carolina Constitutions protect against any impairment of contracts, which would occur here if

¹¹ The General Assembly’s longstanding recognition of the validity of Clemson’s structure is also noteworthy. As our Supreme Court has explained: “Both 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”).

Appellant was granted relief, and the Attorney General is the proper party to protect the interests of the public at large with regard to a charitable trust.

IV. Appellants' equitable deviation argument is not preserved.

For the first time in their Reply appellate brief to this Court, Appellants contended that the Court should apply the doctrine of equitable deviation and modify the Successor Trustee term of office to require that they serve terms of "some specified period." This argument is not preserved. Appellants did not state a claim for equitable deviation in their Complaint, raise the doctrine in any of their briefing to the Probate Court, or raise it in their opening brief to this Court.¹²

Regardless, the Court finds that equitable deviation would not be appropriate in this matter. 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 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 (and, in fact, would directly contradict it) or carry out the purpose of the trust.

¹² The Court disagrees with Appellants that Respondents "raise[d] the doctrine of Equitable Deviation." (Reply Br. of Appellant p. 5.) The portion of Respondents' brief quoted by Appellants was merely discussing the General Assembly's lack of power to terminate or alter a charitable trust and noted that this power was reserved to a court of equity. Respondents were not advancing any argument that the Court should apply equitable deviation in this case, nor have they at any point in this case. f

V. CONCLUSION

For the foregoing reasons, the Court finds that the Probate Court correctly determined that, as a matter of law, the Successor Trustee position established under the Will and its term of service does not run afoul of the South Carolina Constitution and that, as a result, Appellants have failed to state facts sufficient to constitute a cause of action. As a result, the Probate Court properly granted Respondents' motions to dismiss pursuant to Rule 12(b)(6), SCRCF.

IT IS THEREFORE ORDERED that the Probate Court's April 3, 2023 Order is **AFFIRMED**.

The Honorable G.D. Morgan
Presiding Judge



Pickens Common Pleas

Case Caption: John Sloan , plaintiff, et al VS Clemson University , defendant, et al

Case Number: 2023CP3900416

Type: Order/Other

So Ordered

G.D. Morgan Jr.

Electronically signed on 2024-07-31 12:26:58 page 19 of 19

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

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

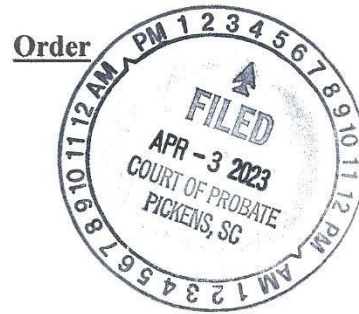
Plaintiffs,

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,

Defendants.

IN THE PROBATE COURT
Case No. 2021-GC-39-00046



This matter comes before the Court on Defendant Clemson University's ("Clemson University") and Defendants' E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins'¹ (collectively, "Defendants") Motions to Dismiss Plaintiffs John Sloan, individually, and on behalf of all other similarly situated and NOLAS Trading Co., Inc.'s (collectively, "Plaintiffs") Complaint.

The Court held a hearing at 9:30 a.m. on Friday, September 30, 2022 on Defendants' motions. Plaintiffs were represented by James G. Carpenter, Esq., Clemson University was represented by Boyd B. Nicholson, Jr., Esq., and the Will Trustees were represented by Blake T. Williams, Esq.

¹ Defendants assert that the Plaintiffs have incorrectly identified the individually named trustees as Clemson University "Life Trustees" in the Summons and Complaint, and that instead they should be referred to as "Successor Trustees." Where necessary, the Court will refer to these trustees as "Will Trustees."

DLA

Having considered the matters of record including the briefing and the parties' arguments at the hearing, the Court finds that Plaintiffs have standing and that this case presents a justiciable controversy. However, the Court finds that Plaintiffs have failed to state facts sufficient to constitute a cause of action and, therefore, **GRANTS** Defendants' Motions to Dismiss pursuant to Rule 12(b)(6).

I. BACKGROUND

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. Among other things, the Will provided for, and the Act of Acceptance accepted, a board of trustees consisting of: (i) seven trustees named by the Will and their successors, and (ii) six trustees to be chosen by the General Assembly. 1889 S.C. Act No. 166 § 3; *see also* S.C. Code Ann. § 59-119-40.

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.

Last Will & Testament of Thomas Green Clemson.² 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

² The Will is a public record on file with the Probate Court. The Court may "take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). The Will is also reprinted in full on Clemson University's website. *See* Appendix B, *Board of Trustees Manual*, Clemson University (last visited March 11, 2023), available at <https://www.clemson.edu/administration/bot/manual/index.html>. The Court "may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013). Plaintiffs have not disputed the authenticity of this reprinting of the Will.

accordance with Thomas Green Clemson's wishes as set forth 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.* at Item 3.

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" through its Act of Acceptance in 1889. 1889 S.C. Act No. 166 § 1. The Act of Acceptance provided Clemson University would be governed in the manner specified by the Will. *Id.* Regarding the Board, the Act of Acceptance stated that Clemson "shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will and their successors and six members elected by the General Assembly in joint assembly." *Id.* at § 3.

After passage of the Act of Acceptance, the Chief Justice of South Carolina, W.D. Simpson, issued an opinion finding that "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."³

The contents and provisions of the Will, Act of Acceptance, and Chief Justice's opinion are not in dispute. Instead, Plaintiffs' Complaint poses the purely legal question of whether the terms of service of the Will Trustees are unconstitutional. Specifically, Plaintiffs allege that the terms of service violate Articles VI and XVII of the South Carolina Constitution. Article VI, § 1 sets forth, in part, as follows: "No person may be elected or appointed to office in this State for

³ The Chief Justice's Opinion is also reprinted on Clemson University's website. *See* Appendix C, *Board of Trustees Manual*, Clemson University (last visited March 11, 2023), *available at* <https://www.clemson.edu/administration/bot/manual/index.html>. Plaintiffs have not disputed the authenticity of this reprinting of the Opinion.

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. Plaintiffs claim that the Will Trustees are “officers” as defined by S.C. Code Ann. § 8-1-10 and thus fall under 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”). Plaintiffs allege that the Will and the Act of Acceptance are unconstitutional because the Will Trustees’ term is not for “some specified period.” (Compl. at ¶ 14.)

Plaintiffs request that the Court: (1) declare that the parts of the Acceptance Act accepting and authorizing the Will 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 Will 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 Clemson University Will Trustee; and (4) enjoin any election or appointment of any Clemson University Will Trustees in violation of S.C. Constitution, Art. VI, § 1 and Art. XVII, § 1B . (*Id.* at WHEREFORE.) Plaintiffs also seek to recover their attorney’s fees and costs under S.C. Code Ann. § 15-77-300. (*Id.*)

II. PROCEDURAL HISTORY

Plaintiffs first petitioned the Supreme Court of South Carolina on February 21, 2020 to accept this matter in its original jurisdiction. However, the Supreme Court declined to hear the matter via a 2-2 vote.

Plaintiffs then filed their Complaint with the Court of Common Pleas for Greenville County on July 1, 2020. Defendants timely moved to dismiss or, in the alternative, to transfer venue to this Court.

Defendants' motions initially were initially heard by the Honorable Alex Kinlaw on July 27, 2021. On September 28, 2021, Judge Kinlaw entered an order continuing Defendants' motions to dismiss and granting their alternative request to transfer venue to this Court. After transfer, this Court proceeded with considering the merits of Defendants' motions.

III. STANDARD OF REVIEW

"A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction." *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022). "Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (internal quotation marks and citation omitted).

Furthermore, under Rule 12(b)(6), the court "may dismiss a claim when the defendant demonstrates the plaintiff's failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct. App. 2006) (quoting Rule 12(b)(6), SCRCP)). In reviewing a motion to dismiss, only the "well pleaded facts are admitted, but inferences drawn by the plaintiff from such facts and conclusions of law are not admitted." *Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App. 1988). The motion to dismiss must be granted if, viewing the

evidence in favor of the plaintiff, the “facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

IV. THE COURT’S ANALYSIS

I. Plaintiffs have public importance standing.

Defendants initially contend that Plaintiffs lack standing to assert the claims raised in this action. Although the Court agrees that Plaintiffs lack constitutional, statutory, or taxpayer standing, the Court finds that Plaintiffs have satisfied the requirements for showing public importance standing.⁴ Public importance standing 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).⁵ This exception recognizes that in certain circumstances “standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance” even without an allegation of particularized injury. *Id.*

⁴ The Court agrees with Defendants’ argument that Plaintiffs lack constitutional standing because they have not shown any particularized injury, harm, or prejudice that they would personally suffer as a result of the actions detailed in the complaint. *See S.C. Pub. Int. Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117-18, 804 S.E.2d 854, 858 (2017) (setting forth the elements for establishing constitutional standing). Additionally, the Court agrees that Plaintiffs lack statutory standing since they have not identified any statute conferring a right to sue. *See Youngblood v. S.C. Dep’t of Social Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Finally, the Court agrees with Defendants that the Supreme Court of South Carolina has foreclosed any theory of standing premised on generalized injury as a taxpayer. *See Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013).

⁵ Defendants contend that “public importance standing” is an unconstitutional conferral of standing because it was judicially created and not a product of the Constitution, statute, or the Supreme Court’s rulemaking authority. However, this Court is bound by Supreme Court precedent, which has recognized the continued viability of public importance standing.

“The key to the public importance analysis is whether a resolution is needed for future guidance.” *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341-42, 878 S.E.2d 891, 895 (2022) (quoting *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)). “Courts must cautiously balance competing interests—the citizenry’s need to hold public officials accountable for alleged injustices and ‘the concomitant integrity of government action’—to determine whether the issue presented is ‘inextricably connected to the public need for court resolution for future guidance.’” *Id.* (quoting *SCDOT*, 421 S.C. at 118-19, 804 S.E.2d at 858). “Only then can the issue ‘transcend[] a purely private matter and rise[] to the level of public importance.’” *Id.* (quoting *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341).

The Court finds that *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013) is instructive. That case involved a challenge to the composition of the Board of Trustees of the South Carolina Transportation Infrastructure Bank, with the plaintiffs alleging that it violated the prohibition against dual office holding and separation of powers. *Id.* The court found that the plaintiffs presented a colorable claim that the board was unconstitutionally comprised, which cast a cloud of illegitimacy that could marginalize the important decisions of the board. *Id.* at 646, 744 S.E.2d 521, 524 (2013). Therefore, the court held that “resolution of this question is certainly of importance and concern to the public” and the plaintiffs had standing. *Id.*

The Court finds that the analysis of the standing question in that opinion applies to this case, as well as other South Carolina case law that has granted standing in cases that are more

similar in posture to this case and fact scenario than the authorities referenced by Defendants.⁶ As a result, the Court finds that Plaintiffs have public importance standing.

II. Plaintiffs have presented a justiciable controversy.

The Court also finds that Plaintiffs have presented a justiciable controversy. Defendants correctly note that the Uniform Declaratory Judgment Act and public importance exception to standing both require the plaintiff to present an underlying controversy for resolution. Defendants contend that Plaintiffs have no legal rights or duties with respect to the constitutional provisions raised and have not alleged any injury. However, the Court finds that, in line with the cases granting public importance standing where the plaintiff raises issues of constitutional import, a justiciable controversy exists in this matter. Thus, Plaintiffs' contention that the Act of Acceptance and the ongoing actions of Defendants are unconstitutional presents a justiciable controversy.

III. Plaintiffs have failed to state facts sufficient to constitute a cause of action.

Although the Court finds that Plaintiffs have standing and have presented a justiciable controversy, the Court finds that Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action.

In reaching this conclusion, the Court acknowledges and has considered that its ruling must be based solely on the allegations set forth in the Complaint and that a motion to dismiss

⁶ For example, Defendants contended that, like in *Jowers v. South Carolina Dep't of Health and Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018), there are alternative mechanisms by which the issue in this case could be addressed. Specifically, Defendants contend that the Attorney General is the proper party to protect the interests of the public at large in administering or enforcing charitable trusts. Although the Court agrees that the Attorney General has such an interest, as detailed below, the Court finds that it does not eliminate Plaintiffs' standing. Moreover, Defendants cite to *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020) to support their argument that public importance standing is not necessary where there is no need for future guidance. The Court finds, however, that there is a need for future guidance here.

should not be sustained if the Plaintiffs are entitled to relief on any theory of the case. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). Moreover, the Court has construed the pleadings liberally in favor of the Plaintiffs. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Finally, the Court recognizes that dismissal should not be granted merely because the Court doubts Plaintiffs will prevail in the action. *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192 (2007).

Mindful of these considerations, the Court finds that although Plaintiffs have 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. Therefore, development of the record will not aid in the resolution of the issues. The actual framework for this controversy is already established in the pleadings and, as a result, it is proper to decide this issue on a motion to dismiss. See *Palmer v. State*, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019).

The crux of Plaintiff's case is that "elected or appointed" officers must serve for "some specified period." The constitutional provisions cited by Plaintiffs only reference a person "elected or appointed" to office. See S.C. CONST. ART. VI, § 1; S.C. CONST. ART. XVII, § 1B. "Office" is not defined by the Constitution. Therefore, the Plaintiffs rely on a subsequently adopted statute, S.C. Code Ann. § 8-1-10, which provides that "public officer" includes "trustees of the various colleges of the State." *Id.* Plaintiffs assert that the Will Trustees are public officers and, as a result, their term must be for "some specified period." They contend that the term of office under the Will and Act of Acceptance does not meet this requirement.

The starting point for the Court's analysis is the recognition that the 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).

The Court finds that a reasonable reading of the constitutional provisions at issue is that “elected” means voted on either by the populace or General Assembly and appointed means by either the Governor or General Assembly. Other types of college trustees (including the legislatively appointed trustees at Clemson) would be subject to the provisions. However, the Will Trustees, are not “elected or appointed” as contemplated by the Constitution, as the original seven were named by a private bequest and have been self-perpetuating ever since.⁷

Regardless, the Court further finds that S.C. Code Ann. § 8-1-10 cited by Plaintiffs is not applicable to the Will Trustee position due to Clemson University’s status as a charitable trust created through a contract between Thomas Green Clemson and the State of South Carolina. 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

⁷ Defendants also contend that the Will Trustees do not actually serve for “life or good behavior” because they have all agreed not to serve past 75 years old. The Court’s ruling is in no way based on this alleged private agreement. The Court agrees with Plaintiffs that the existence or implications of such agreement is outside the scope of Rule 12(b)(6).

provision goes beyond merely clarifying existing law and operates retroactively to substantially impair pre-existing contracts by materially changing their terms). If the “public officer” statute was intended to apply to the Will Trustees as Plaintiffs argue, it would be unconstitutional as applied. The Will Trustee structure was a fundamental term of the bequest to the State, and these constitutional provisions, combined with the statute, would operative retroactively to substantially impair this material provision in the contract between Mr. Clemson and the State. As a result, this Court declines to interpret the “public officer” statute in the manner advocated by Plaintiff. *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.”).

The Constitution of 1868, which was the operative Constitution at the time of the Act of Acceptance, further supports this conclusion. The Constitution of 1868 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). Plaintiffs’ Complaint alleges that the Will Trustee position has a term of “life,” which would necessarily be longer than a term of good behavior. Therefore, since the Successor Trustee term was deemed constitutional by the General Assembly at the time of the Act of Acceptance under the terms of the Constitution of 1868,⁸ the term is equally constitutional under the Constitution of 1895. *See* 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

⁸ Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motions to Dismiss acknowledged that the Will Trustee position did not violate the Constitution of 1868. (*See* Pltf. Memo. at 9.)

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).

The Court notes that Clemson University and the Will Trustee structure presents a unique circumstance. Several Attorney General’s opinions have dispelled the notion that legislative activity could impact the University’s founding terms. *See* Op. S.C. Att’y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (“The 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). In both of these opinions, the Attorney General addressed questions about whether the General Assembly could alter the size or structure of Clemson’s board and concluded it would constitute an improper impairment of the contract between Mr. Clemson and the State for the general assembly to do so.⁹

The longstanding practice of the General Assembly’s acquiescence to Clemson’s structure is also noteworthy. As the Supreme Court of the United States has explained: “Both 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”).

Finally, the Court notes that the Attorney General has the power to address any concerns regarding the administration of a charitable trust such as those claimed by the Plaintiffs in this

⁹ Although they are not binding authority, the Court finds these opinions persuasive. *See Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011).

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 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.

For all these reasons, the Court agrees with Defendants that, as a matter of law, the Successor Trustees as established under the Clemson Will are constitutional and that Plaintiffs have failed to state facts sufficient to constitute a cause of action. Therefore, Defendants motions to dismiss pursuant to Rule 12(b)(6), SCRPC should be granted.

V. CONCLUSION

IT IS THEREFORE ORDERED that Defendants’ motions to dismiss are **GRANTED** and this matter is **DISMISSED** with prejudice.

SO ORDERED this 3rd day of April, 2023.


The Honorable David K. Allison
Pickens County Probate Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

C.A. NO.: 2020-CP-23-03178

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

Plaintiffs,

ORDER

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,

Defendants.

Plaintiffs brought this action against Clemson University and its Life Trustees¹ (collectively, “Defendants”). Defendants moved to dismiss. The Court held a hearing at 10:30 a.m. on Tuesday, July 27, 2021. James G. Carpenter, Esquire, represented Plaintiffs. Boyd B. Nicholson, Jr., Esquire, and Jonathan D. Klett, Esquire, represented Clemson University, and Blake T. Williams, Esquire, represented the Will Trustees.

Having considered the matters of record including the Motions to Dismiss; the briefs supporting and opposing the Motions; and the parties’ arguments at the hearing, the Court continues the Defendants’ Motions to Dismiss and Orders this matter transferred to the Pickens County Probate Court.

¹ Defendants claim that the Plaintiffs have incorrectly identified the individually named trustees as Clemson University “Life Trustees” in the Summons and Complaint, and that instead they should be referred to as Successor Trustees. Where necessary, the Court will refer to these trustees as “Will Trustees.”

I. BACKGROUND

This action concerns the last will and testament of Thomas Green Clemson (the “Will”) establishing Clemson University, and the General Assembly’s Act of Acceptance in 1889 (the “Clemson Act”), accepting the terms of the Will. *See* S.C. Code Ann. § 59-119-10. Among other things, the Will created, and the Clemson Act accepted, a board of trustees consisting of (i) seven trustees named by the Will and their successors, and (ii) up to six trustees to be chosen by the General Assembly.

The Will provided that “the State, if it accepts the donation, 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.” Further, the Will explained 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.

The Will set forth that the Chief Justice of South Carolina shall review the State’s acceptance of the devise and ensure it was in accordance with Thomas Green Clemson’s wishes as set forth in the Will. 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, devotes said property to the purposes of the donation.”

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” through the Clemson Act enacted in 1889. 1889 S.C. Act No. 166. The Clemson Act provided Clemson University would be governed in the manner specified by the Will. S.C. Code Ann. § 59-119-20. The Clemson Act stated that Clemson “shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will and their

successors and six members elected by the General Assembly in joint assembly.” S.C. Code Ann. § 59-119-40.

After enactment of the Clemson Act, the Chief Justice of South Carolina, W.D. Simpson, issued an opinion finding that “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.” Clemson University has operated in accordance with the Will and Clemson Act since 1889.

Plaintiffs bring this action alleging that the terms of service of the Will Trustees are unconstitutional. Specifically, Plaintiffs allege that these terms of service violate Articles VI and XVII of the South Carolina Constitution. 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 sets forth, in part, as follows: “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. Plaintiffs claim that the Will Trustees are “officers” as defined by S.C. Code Ann. § 8-1-10.

Plaintiffs allege that the Will and Clemson Act are unconstitutional because the Will Trustees serve lifetime appointments. Plaintiffs request that the Court (1) declare the Clemson Act is incompatible with the South Carolina Constitution, and is invalid, null, and void; (2) declare the Will Trustees are in violation of the South Carolina Constitution; (3) enjoin or terminate the services of the Will Trustees; and (4) enjoin any election or appointment of any Will Trustees in violation of the Constitution.

II. PROCEDURAL HISTORY

Plaintiffs first petitioned the South Carolina Supreme Court on February 21, 2020, to take original jurisdiction of this action. The Court, in an equally divided vote, denied the Petition for Original Jurisdiction. Thereafter, the Plaintiffs filed their Complaint with this Court on July 1, 2020. Defendants filed their motions to dismiss on August 26, 2020.

III. STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) should be granted when a court lacks subject matter jurisdiction. Rule 12(b)(1), SCRCP. “Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (internal quotation marks and citation omitted). The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1). *Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). Pursuant to Rule 82(b), “When an action is brought in the wrong county or in the wrong court, the court shall not dismiss the action but shall transfer it to any proper county or court in which it could have been brought.” A court sitting where venue is improper may only render judgment when the party who possesses venue consents. *Dove*, 314 S.C. at 238, 442 S.E.2d at 600.

“The circuit court may dismiss a claim when the defendant demonstrates the plaintiff’s failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct. App. 2006) (quoting Rule 12(b)(6), SCRCP). In reviewing a motion to dismiss, only the “well pleaded facts are admitted, but inferences drawn by the plaintiff from such facts and conclusions of law are not admitted.” *Jensen v. S.C. Dep’t of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App.

1988). The motion to dismiss must be granted if, viewing the evidence in favor of the plaintiff, the “facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

In addition to the factual allegations, “a court also ‘must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.’” *Loftus v. F.D.I.C.*, 989 F.Supp.2d 483, 488 (D.S.C. 2013) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). “A court may similarly consider documents or exhibits attached to a motion to dismiss, ‘so long as they are integral to the complaint and authentic.’” *Id.* at 489 (quoting *Kensington Volunteer Fire Dep’t, Inc. v. Montgomery Cnty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012)); *see also* Rule 10(c), SCRCPP (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.”).

IV. ANALYSIS

Among other things, Defendants have challenged Plaintiffs’ standing, the Court’s venue, and the Court’s jurisdiction to hear the matters asserted in Plaintiffs’ Complaint. The Court holds that it lacks jurisdiction because the exclusive original jurisdiction to resolve the matters alleged in the Complaint resides in Probate Court.

Section 62-1-302(a) of the South Carolina Probate Code sets forth:

(a) To the full extent permitted by the Constitution, and except as otherwise specifically provided, the probate court has exclusive original jurisdiction over all subject matter related to:

(1) estates of decedents, including the contest of wills, construction of wills, determination of property in which the estate of a decedent or a protected person

has an interest, and determination of heirs and successors of decedents and estates of protected persons, except that the circuit court also has jurisdiction to determine heirs and successors as necessary to resolve real estate matters, including partition, quiet title, and other actions pending in the circuit court; [and]

....

(3) trusts, inter vivos or testamentary, including the appointment of successor trustees[.]

Further, Section 62-7-201(a) of the South Carolina Trust Code sets forth:

(a) Subject to the provisions of Section 62-1-302(d), the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. These proceedings must be formal as defined by Section 62-1-201(17) but consent petitions are not subject to the requirements of formal proceedings. Proceedings that may be maintained pursuant to this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

....

(4) appoint or remove a trustee.

Plaintiffs complain of the terms of the Will and the administration of Clemson University as a charitable trust. Plaintiffs claim that the Will and appointed Will Trustees are improper. Plaintiffs seek, among other things, “to enjoin or terminate the services” of the Will Trustees. See *Amended Complaint*. Therefore, the issues alleged are within the exclusive original jurisdiction of the Probate Court.

At the hearing, Plaintiffs argued that this Court had concurrent jurisdiction pursuant to Section 62-7-201(c) of the South Carolina Trust Code. However, that provision establishes the “probate court has concurrent jurisdiction with the circuits courts of this State of actions and proceedings concerning the external affairs of trusts.” S.C. Code Ann. § 62-7-201(c) (emphasis added). Because the appointment and removal of trustees concerns the internal affairs of a trust, the Court finds this argument inapposite.

Based on the foregoing findings and analysis, Defendants' motions to dismiss are continued and this matter is transferred to the Pickens County Probate Court.

ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss are **CONTINUED**.

IT IS FURTHER ADJUDGED that this matter be **TRANSFERRED** to the Pickens County Probate Court for adjudication.

IT IS SO ORDERED.

The Honorable Alex Kinlaw, Jr., Presiding Judge
Thirteenth Judicial Circuit

_____, 2021
_____, South Carolina

[JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW]



Greenville Common Pleas

Case Caption: Edward D Sloan Jr , plaintiff, et al vs. Clemson University ,
defendant, et al
Case Number: 2020CP2303178
Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2021-09-28 12:40:12 page 8 of 8

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

ORDER

This matter comes before the Court on Defendant Clemson University and Defendants E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William “Bill” C. Smith, Jr., Kim Wilkerson, and David H. Wilkins’s (the “Will Trustees”¹ and, collectively with Clemson University, “Defendants”) Motions for a Protective Order and Stay of Discovery. The undersigned heard these motions on July 27, 2021. James G. Carpenter, Esq. appeared on behalf of Plaintiffs. Blake T. Williams, Esq. appeared on behalf of the Will Trustees. Boyd B. Nicholson, Jr., Esq. and Jonathan David Klett, Esq. appeared on behalf of Defendant Clemson University. After careful reflection and having fully considered the parties’ respective arguments and filings, the Court grants the Defendants’ motions.

¹ Defendants claim that the Plaintiffs have incorrectly identified the individually named trustees as Clemson University “Life Trustees” in the Summons and Complaint, and that instead they should be referred to as Successor Trustees. Where necessary, the Court will refer to these trustees as “Will Trustees.”

Plaintiffs filed their Complaint with this Court on July 1, 2020. After obtaining an extension of time to answer, the Will Trustees and Clemson University each timely filed motions to dismiss on August 26, 2020 raising five grounds: (1) Plaintiffs have no standing to bring this action; (2) Plaintiffs have failed to establish the existence of a justiciable controversy; (3) the Pickens County Probate Court has the exclusive jurisdiction to resolve the matters alleged in Plaintiffs' complaint; (4) Greenville County is an improper venue for this lawsuit; and (5) Plaintiffs fail to state facts sufficient to constitute a cause of action.

On May 24, 2021, Plaintiffs served their First Interrogatories and First Requests for Production on Defendants. In light of the pending motions, Defendants each sought an order protecting them from any obligation to respond to these discovery requests.

The Court heard Defendants' motions to dismiss on July 27, 2021. After careful consideration, the Court determined that the probate court had jurisdiction over the issues raised by Plaintiff's complaint. Therefore, the Court continued Defendants' motions to dismiss and will issue an Order transferring the case to the Pickens County Probate Court.

"Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Under Rule 26(d), SCRCp, the Court also has broad discretion to alter the sequence of discovery "for the convenience of the parties. . . and in the interests of justice." *Id.* Rule 26(c) further allows a party opposing discovery to seek a protective order to prevent "annoyance, embarrassment, oppression, or undue burden by expense." *Id.* Moreover, for good cause shown, a court "may make any order which justice requires," including "that the discovery [at issue] not be had." *Id.*

In light of the Court's transfer of the case and continuance of Defendants' motions to dismiss, the Court finds that a stay of discovery is appropriate. A stay will promote judicial economy and prevent unnecessary waste of resources of the Court and the parties. Moreover, requiring Defendants to respond to merits-based discovery while Defendants have raised challenges to standing and alleged that Plaintiffs have failed to state facts sufficient to constitute a cause of action would impose an undue burden on Defendants. A stay of discovery pending resolution of the motions to dismiss would not significantly delay this litigation, and the Court finds that Plaintiffs would suffer no prejudice as a result.

Therefore, the Court **GRANTS** Defendants' Motions for Protective Order and Stay of Discovery.

IT IS SO ORDERED.

The Honorable Alex Kinlaw, Jr.
Thirteenth Judicial Circuit

_____, 2021



Greenville Common Pleas

Case Caption: Edward D Sloan Jr , plaintiff, et al vs. Clemson University ,
defendant, et al
Case Number: 2020CP2303178
Type: Order/Protective Order

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2021-08-31 16:25:18 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2303178

Edward D Sloan, Jr et al
PLAINTIFF(S)

Clemson University et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

At the call of the case Attorney James G. Carpenter appeared on behalf of the Plaintiff. Appearing on behalf of the named defendants were John David Klett, Boyd Benjamin Nicholson, Jr and Blake Terrence Williams. After hearing the arguments of Counsel on both sides, the Court is inclined to continue the Defendants, David H. Wilkins and Clemson University's Motion to Dismiss at this time and direct that the matter be transferred to the Pickens County Probate Court for adjudication which this Court deems the place of proper jurisdiction. A formal order is to be submitted within 30 days by Attorney Boyd Benjamin Nicholson, jr. on the Motion to Dismiss filed by Defendant Wilkins and the Motion to Dismiss filed by the Defendant Clemson University.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/27/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Greenville Common Pleas

Case Caption: Edward D Sloan Jr , plaintiff, et al vs. Clemson University ,
defendant, et al
Case Number: 2020CP2303178
Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2021-07-27 12:47:07 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2303178

Edward D Sloan, Jr et al
PLAINTIFF(S)

Clemson University et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

At the call of the case the Plaintiff was represented by Attorney James G. Carpenter. Appearing on behalf of the named defendants were Jonathan David Klett, Benjamin Boyd Nicholson, jr and Blake Terence Williams. After hearing the arguments on both sides the Court is inclined to grant the Defendants, David H. Wilkins and Clemson University's Motion for Protection from Discovery at this time. A formal order is to be submitted by Attorney Nicholson within 30 days from the date of this hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/27/2021 .

Boyd Benjamin Nicholson, Jr. for Clemson University
Jonathan David Klett for Clemson University
Thomas Tyler Hydrick for David H Wilkins, Kim Wilkerson, William C Smith, Jr, Mark S Richardson, Cheri M Phyfer, David E Dukes, E Smyth Mckissick, III
C. Mitchell Brown for David H Wilkins, Kim Wilkerson, William C Smith, Jr, Mark S Richardson, Cheri M Phyfer, David E Dukes, E Smyth Mckissick, III
Blake Terence Williams for David H Wilkins, Kim Wilkerson, William C Smith, Jr, Mark S Richardson, Cheri M Phyfer, David E Dukes, E Smyth Mckissick, III
James G. Carpenter for Edward D Sloan, Jr, Nolas Trading Co Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Greenville Common Pleas

Case Caption: Edward D Sloan Jr , plaintiff, et al vs. Clemson University ,
defendant, et al
Case Number: 2020CP2303178
Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2021-07-27 12:54:27 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP2303178

Edward D Sloan, Jr et al
 PLAINTIFF(S)

Clemson University et al
 DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

At the call of the case Counsel for the Plaintiff, James G. Carpenter was present along with his client. Appearing on behalf of the named Defendants were Attorneys John David Klett, Boyd Benjamin Nicholson, Jr. and Blake Terence Williams. After hearing the arguments of Counsel on both sides, the Court is inclined to grant the Plaintiff's Motion to substitute the son of the deceased Edward Sloan as the party Plaintiff in the matter. A formal order is to be submitted by Mr. Carpenter within 30 days.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/27/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Greenville Common Pleas

Case Caption: Edward D Sloan Jr , plaintiff, et al vs. Clemson University ,
defendant, et al
Case Number: 2020CP2303178
Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2021-07-27 12:33:47 page 3 of 3

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 2020 CP-23-03178

EDWARD D. SLOAN JR.
PLAINTIFF(S)

CLEMSON UNIVERSITY, ET AL.
DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

MATTER IS CONTINUED PURSUANT TO AGREEMENT OF THE PARTIES.

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2155

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Greenville Common Pleas

Case Caption: Edward D Sloan Jr , plaintiff, et al vs. Clemson University ,
defendant, et al
Case Number: 2020CP2303178
Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2020-10-30 11:34:19 page 3 of 3

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)
_____)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-00_____

SUMMONS

To the Defendants:

You are hereby summoned and required to serve upon the attorney at the address below an Answer to the attached Complaint within 30 days of the date of service hereof. If you fail to do so, judgment by default will be entered against you for the relief demanded in the Complaint.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

/S/ James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

July 1, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)
_____)

IN THE CIRCUIT COURT

CASE NO: 2020-CP-23-00_____

**COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

NOW COME the Plaintiffs, by their undersigned attorney, and as a Complaint against the Defendants, would show unto the Court:

1. Plaintiff Edward D. Sloan, Jr., is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated.
2. Plaintiff NOLAS Trading Co., Inc., (“NOLAS”) is a corporation organized and existing under the laws of the State of South Carolina and a South Carolina taxpayer.
3. Defendant Clemson University is a South Carolina public university funded with more than \$123 million in State public funds in fiscal year 2018, and more than \$136 million in fiscal year 2019.
4. The individual defendants are “Life Trustees” of Clemson University. They are named as Defendants in their official capacities.
5. Plaintiffs and one or more Defendants reside in Greenville County; accordingly, venue in appropriately placed in Greenville County.

6. This Court possesses jurisdiction under S.C. Constitution, Art. VI, § 1 and Art. XVII, under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act, and under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *Sloan v Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997).
7. This action raises Constitutional issues of great public importance, and Plaintiffs ask the Court to grant them standing based upon the great public importance of the issues this action raises.

8. The will of Thomas G. Clemson established Clemson University and provided for seven Life Trustees, who constitute a majority of Clemson University's 13-member Board of Trustees. The will provides that each Life Trustee will serve for his lifetime, and that the Life Trustees are a self-perpetuating group. When one Life Trustee dies or resigns, the remaining Life Trustees nominate and elect a replacement.
9. The Act of Acceptance dated November 27, 1889, accepted the terms of Mr. Clemson's will. It is recorded at Statutes of South Carolina, Vol. XX, p. 277.
10. The tenures and terms of Life Trustees violate the South Carolina Constitution. "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. Constitution, Art. VI, § 1.
11. "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. Constitution, Art. XVII, §1B.
12. Clemson's Life Trustees are "officers." "Public officers" include "trustees of the various colleges of the State." S.C. Code Ann § 8-1-10.
13. Since 1895, the Life Trustees have held office in violation of the South Carolina Constitution. In recent years, the Board has overseen the expenditure of more than \$100 million a year of taxpayer funds.
14. South Carolina appellate courts have not ruled on the constitutionality of the Clemson University Life Trustees serving for a term that is not "some specified period."

WHEREFORE, Plaintiffs pray the Court to:

1. Declare that the parts of the Acceptance Act accepting and authorizing the Life Trustees are incompatible with S.C. Constitution, Art. VI, § 1, and Art. XVII, §1B, 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 Clemson University Life Trustee;
4. Enjoin any election or appointment of any Clemson University Life Trustees, in violation of S.C. Constitution, Art. VI, § 1 and Art. XVII, § 1B;
5. Grant Plaintiffs their costs and attorneys' fees under S.C. Code Ann. § 15-77-300 ff.; and
6. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

/S/ James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

July 1, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-03178

ACCEPTANCE OF SERVICE

The undersigned attorneys hereby accept service of process in this action on behalf of
Clemson University this 27th day of July, 2020.

HAYNSWORTH SINKLER BOYD, P.A.



Boyd B. Nicholson, Jr., S.C. Bar No. 65387
Post Office Box 2048
Greenville, SC 29602
Tel.: (864) 240-3247 (Telephone)
Fax.: (864) 240-3300 (Facsimile)
E-Mail: nnicholson@hsblawfirm.com
Attorneys for Clemson University

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
)
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,)
Defendants.)
_____)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-03178

ACCEPTANCE OF SERVICE

The undersigned attorney hereby accepts service of process in this action for 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 ("Defendants"),¹ this 27th day of July, 2020.

Blake T. Williams

C. Mitchell Brown
Blake T. Williams
Nelson Mullins Riley & Scarborough LLP
PO Box 11070
Columbia, SC 29211

¹ Defendants are incorrectly identified as Clemson University's "life trustees" in the Complaint and attachments. By accepting service, Defendants expressly preserve—and in no way waive—any defenses to this action, including the right to challenge Plaintiffs' assertion that they are "life trustees."

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

**DEFENDANT CLEMSON UNIVERSITY’S
MOTION TO DISMISS**

Defendant Clemson University (“Clemson University”), by and through the undersigned counsel, hereby moves pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6), SCRCF, for the Court to dismiss this action. The grounds for this motion include the following:

1. Plaintiffs have no standing to bring this action. “Standing may be acquired: (1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.” *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008); see also *Sea Pines Ass’n for Prot. Of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 600-03, 550 S.E.2d 287, 291-92 (2001). Plaintiffs have neither statutory nor constitutional standing to institute this action against Clemson University, and this action fails to meet the public importance exception to standing.¹

¹ Notably, the South Carolina Supreme Court previously denied Plaintiffs’ petition to consider this action in the Supreme Court’s original jurisdiction.

2. Plaintiffs do not have a justiciable controversy to bring this action. *Power v. McNair*, 255 S.C. 150, 152-54, 177 S.E.2d 551, 552-53 (1970). As a result, the Court lacks subject matter jurisdiction to render a declaratory judgment. *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373-74 (2013) (“To fall within the intended purpose and scope of the Declaratory Judgments Act, the parties must seek adjudication of a justiciable controversy.”).

3. In the alternative, this Court also lacks subject matter jurisdiction because the exclusive original jurisdiction to resolve the matters asserted in the Plaintiffs’ Complaint resides in the Pickens County Probate Court. *See, e.g.*, S.C. Code Ann. §§ 62-1-302 and 62-7-201.

4. Further in the alternative, Greenville County is an improper venue for this lawsuit. Clemson University is located in Pickens County, and the individual defendants are named in their “official capacities” as members of the Clemson University Board of Trustees². Therefore, Plaintiffs should have filed this lawsuit in Pickens County pursuant to S.C. Code Ann. §§ 15-7-20 and 15-53-20.

5. Moreover, Plaintiffs’ Complaint fails to state fact sufficient to constitute a cause of action. To the extent Plaintiffs attempt to assert a claim directly under the South Carolina Constitution, the Complaint should also be dismissed because there is no express or implied cause of action pursuant to Articles VI and XVII of the South Carolina Constitution. *See Brewer v. Brewer*, 242 S.C. 9, 24–25, 129 S.E.2d 736, 744 (1963); *Grant v. Grant*, 12 S.C. 29 (1879).

² Clemson University notes here that the individually named Defendants are incorrectly identified as Clemson University’s “life trustees” in the Plaintiff’s Complaint and attachments.

Based on the foregoing and Defendant Clemson University's forthcoming memorandum in support (which will be filed prior to a hearing on this Motion), Defendant Clemson University respectfully requests that the Court dismiss this action and enter an order granting such other relief as the Court deems appropriate.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

/s/Boyd B. Nicholson, Jr.

Boyd B. Nicholson, Jr. (SC Bar No. 65387)

Jonathan D. Klett (SC Bar No. 103208)

Haynsworth Sinkler Boyd, P.A.

P. O. Box 2048

Greenville, SC 29602

Phone: (864) 240-3200

Fax: (864) 240-3300

nnicholson@hsblawfirm.com

jklett@hsblawfirm.com

*Attorneys for Defendant
Clemson University*

August 26, 2020
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

**DEFENDANTS SUCCESSOR TRUSTEES’
MOTION TO DISMISS**

Defendants 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 by and through the undersigned counsel, hereby move pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the SCRCPP for the Court to dismiss this action. The Successor Trustees request that the action be dismissed for the following reasons:

1. Plaintiffs lack standing. The South Carolina Supreme Court has recognized three types of standing: (1) standing conferred by statute; (2) constitutional standing; and (3) public importance standing. *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017). Plaintiffs fail to establish standing under any theory of standing, including public importance and taxpayer standing. *See Jowers v. South Carolina Department of Health and Environmental Control*, 423 S.C. 343, 815 S.E.2d 446

¹ Defendants are incorrectly identified as Clemson University’s “life trustees” in the Summons and Complaint.

(2018). Consequently, the Successor Trustees respectfully request that the complaint be dismissed pursuant to Rule 12(b)(1) of the SCRCPP.

2. There is no justiciable controversy. Because there is no justiciable controversy, the plaintiffs fail to state a claim under the Uniform Declaratory Judgment Act, and this Court lacks subject matter jurisdiction. *See Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013); *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970). Consequently, and in the alternative, the Successor Trustees respectfully request that the complaint be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the SCRCPP.

3. This Court lacks subject matter jurisdiction. The Pickens County Probate Court has exclusive jurisdiction to resolve this dispute. *See, e.g.*, S.C. Code §§ 62-1-302 and 62-7-201. Consequently, and in the alternative, the Successor Trustees respectfully request that the complaint be dismissed pursuant to Rule 12(b)(1) of the SCRCPP.

4. Greenville County is an improper venue. Pursuant to South Carolina Code §§ 15-7-20 and 15-53-20, this action should have been brought in Pickens County because the Successor Trustees are being sued for acts done by virtue of their office as Successor Trustees. Consequently, and in the alternative, the Successor Trustees respectfully request that the complaint be dismissed pursuant to Rule 12(b)(3) of the SCRCPP.

5. The complaint fails to state facts sufficient to constitute a cause of action. To the extent plaintiffs attempt to assert a claim directly under the South Carolina Constitution, the complaint should also be dismissed because there is no express or implied cause of action under Articles VI and XVII of the South Carolina Constitution. *See Brewer v. Brewer*, 242 S.C. 9, 24–25, 129 S.E.2d 736, 744 (1963); *Grant v. Grant*, 12 S.C. 29 (1879).

Based on the above and the Successor Trustees' forthcoming memorandum in support of

their Motion, the Successor Trustees respectfully request that the Court dismiss this action and enter an order granting such other relief as the Court deems appropriate. A separate memorandum in support of this motion will be filed at a later time.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

C. Mitchell Brown
SC Bar No. 12872
E-Mail: mitch.brown@nelsonmullins.com
Blake T. Williams
SC Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
Thomas T. Hydrick
SC Bar No. 103198
E-Mail: thomas.hydrick@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

Attorneys for Respondents E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins

Columbia, South Carolina

August 26, 2020.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

**DEFENDANT CLEMSON UNIVERSITY’S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6), SCRCP, Defendant Clemson University, by and through undersigned counsel, hereby respectfully submits this memorandum in support of its Motion to Dismiss.

INTRODUCTION

Plaintiffs Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc. (collectively, “Plaintiffs”) bring this action against Defendants Clemson University (“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 (hereinafter, collectively “Successor Trustees”)¹ for declaratory judgment and injunctive relief.

¹ Plaintiffs incorrectly identify the Successor Trustees as Clemson University “Life Trustees” in the Summons and Complaint. The Successor Trustees have agreed not to serve beyond the age of 75 years old.

Clemson University has moved to dismiss this action for the following reasons:

- (1) Plaintiffs have no standing to bring this action;
- (2) Plaintiffs have not pleaded a justiciable controversy;
- (3) The Pickens County Probate Court has the exclusive jurisdiction to resolve the matters alleged in Plaintiffs' Complaint;
- (4) Greenville County is an improper venue for this lawsuit; and
- (5) Plaintiffs fail to state facts sufficient to constitute a cause of action.

Each reason above provides a sufficient basis for the Court to dismiss this action. Therefore, the Court should grant Clemson University's Motion and dismiss this action.

RELEVANT FACTUAL BACKGROUND

I. History of Clemson University and its Board of Trustees

This action concerns the last will and testament of Thomas Green Clemson (the "Will") establishing Clemson University, and the General Assembly's Act of Acceptance in 1889 (the "Clemson Act"), accepting the terms of the Will. *See* S.C. Code Ann. § 59-119-10. Among other things, the Will created, and the Clemson Act accepted, a board of trustees consisting of (i) seven trustees named by the Will and their successors, and (ii) up to six trustees to be chosen by the General Assembly. *See* Last Will & Testament of Thomas Green Clemson; *reprinted in full at* Appendix B, *Board of Trustees Manual*, Clemson University (last visited October 20, 2020), *available at* <https://www.clemson.edu/administration/bot/manual/index.html>.²

² The Will is a public record on file at the Pickens County Probate Court. *See Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records."); *see also Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013) ("A court may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and it is capable of accurate and ready determination." (citing Fed. R. Evid. 201(b))).

The Will provided that “the State, if it accepts the donation, 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.* Further, the Will explained 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). The Will set forth that the Chief Justice of South Carolina shall review the State’s acceptance of the devise and ensure it was in accordance with Thomas Green Clemson’s wishes as set forth in the Will. *Id.* 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, devotes said property to the purposes of the donation.” *Id.*

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” through the Clemson Act enacted in 1889. 1889 S.C. Act No. 166. The Clemson Act provided Clemson University would be governed in the manner specified by the Will. S.C. Code Ann. § 59-119-20. The Clemson Act stated that Clemson “shall be under the management and control of a board of thirteen trustees, ***composed of the seven members nominated by said will and their successors*** and six members elected by the General Assembly in joint assembly.” S.C. Code Ann. § 59-119-40 (emphasis added).

After enactment of the Clemson Act, the Chief Justice of South Carolina, W.D. Simpson, issued an opinion finding that “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.”³

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

II. Allegations in Plaintiffs’ Complaint

Plaintiffs broadly bring this action alleging that the terms of the Successor Trustees are unconstitutional. (Compl., generally). The Plaintiffs include an individual and his corporation. (*Id.* ¶¶1-2). In the Complaint, Plaintiffs fail to assert any connection with Defendants, or provide any specific harm they have suffered from Defendants. (*Id.*, generally). Plaintiffs claim that they have standing pursuant to their status as South Carolina taxpayers and because the issues alleged are of “great public importance.” (*Id.* ¶¶6-7).

Plaintiffs allege that the terms of the Clemson University Successor Trustees violate Articles VI and XVII of the South Carolina Constitution. (*Id.* ¶¶10-11). 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 sets forth, in part, as follows: “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. Plaintiffs claim that the Successor Trustees are “officers” as defined by S.C. Code Ann. § 8-1-10. (Compl. ¶12).

Plaintiffs allege that the Will and Clemson Act are unconstitutional because the Successor Trustees serve lifetime appointments. (*Id.* 13). Plaintiffs request the following relief from the

³ Chief Justice W.D. Simpson’s Opinion is reprinted in the Board Manual. *See Appendix C, Board of Trustees Manual*, Clemson University (last visited October 20, 2020), *available at* <https://www.clemson.edu/administration/bot/manual/index.html>.

Court: (1) declare that the Clemson Act is incompatible with the South Carolina Constitution, and is invalid, null, and void; (2) declare that the Successor Trustees are in violation of the South Carolina Constitution; (3) enjoin or terminate the service of the Successor Trustees; (4) enjoin any election or appointment of any Successor Trustees; (5) grant Plaintiffs their costs and attorneys' fees pursuant to S.C. Code Ann. 15-77-300; and (6) any further relief as the Court deems just and proper. (*Id.*, WHEREFORE clause).

PROCEDURAL HISTORY

Plaintiffs first petitioned the South Carolina Supreme Court on February 21, 2020 to take original jurisdiction of this action. However, Plaintiffs' petition was denied. Thereafter, the Plaintiffs filed their Complaint with the Greenville County Court of Common Pleas on July 1, 2020. Clemson filed its motion to dismiss on August 26, 2020.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) should be granted when a court lacks subject matter jurisdiction. Rule 12(b)(1), SCRPC. "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (internal quotation marks and citation omitted). The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1). *Edens v. Bellini*, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). Pursuant to Rule 12(b)(3), a motion to dismiss should be granted when the action is brought in an improper venue. Rule 12(b)(3), SCRPC. A court sitting where venue is improper may only render judgment when the party who possesses venue consents. *Dove*, 314 S.C. at 238, 442 S.E.2d at 600.

“The circuit court may dismiss a claim when the defendant demonstrates the plaintiff’s failure to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct. App. 2006) (quoting Rule 12(b)(6), SCRPC). In reviewing a motion to dismiss, only the “well pleaded facts are admitted, but inferences drawn by the plaintiff from such facts and conclusions of law are not admitted.” *Jensen v. S.C. Dep’t of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App. 1988). The motion to dismiss must be granted if, viewing the evidence in favor of the plaintiff, the “facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case.” *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

In addition to the factual allegations, “a court also ‘must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.’” *Loftus v. F.D.I.C.*, 989 F. Supp. 2d 483, 488 (D.S.C. 2013) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). “A court may similarly consider documents or exhibits attached to a motion to dismiss, ‘so long as they are integral to the complaint and authentic.’” *Id.* at 489 (quoting *Kensington Volunteer Fire Dep’t, Inc. v. Montgomery Cnty., Md.*, 684 F.3d 462, 467 (4th Cir. 2012)); *see also* Rule 10(c), SCRPC (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.”).

ARGUMENT

I. The Court should dismiss Plaintiffs’ Complaint because the Plaintiffs lack standing.

Plaintiffs do not have standing to institute an action against the Defendants in this lawsuit.

“Before any action can be maintained, a justiciable controversy must be present.” *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). “A declaratory judgment action must involve an actual, justiciable controversy.” *S. Bank & Trust Co. v. Harrison Sales Co.*, 285 S.C. 50, 51, 285 S.E.2d 66, 67 (1985) (citing *Blue Ridge Elec. Coop. v. Combined Util. Sys.*, 279 S.C. 135, 303 S.E.2d 91 (1983)). “The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing.” *Sloan v. Greenville Cnty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 346 (Ct. App. 2003). “A plaintiff must have standing to institute an action.” *Id.*, 590 S.E.2d at 347 (citing *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)).

Standing is a threshold inquiry before any decision on the merits can be reached. *See ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 194, 669 S.E.2d 337, 339 (2008). “Standing may be acquired: (1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.” *Id.* at 195, 669 S.E.2d at 339. Plaintiffs carry the burden of proof in establishing standing to institute this action. *See Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 770 (2016). Plaintiffs have failed to establish any of the three types of standing to bring this lawsuit. Plaintiffs merely “ask the Court to grant them standing based upon the great public importance of the issues this action raises.” (Compl. ¶7). As detailed below, this request should be denied and the action dismissed.

A. Plaintiffs do not have statutory standing.

First, Plaintiffs do not direct the Court to any particular statute that would allow Plaintiffs to bring this action. For a plaintiff to have statutory standing, a statute must confer a right to sue on a party. *Youngblood v. S.C. Dep’t of Social Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Courts must engage in statutory interpretation to determine whether a statute confers standing. *Id.* “The cardinal rule of statutory construction is to ascertain and effectuate the intent of

the legislature.” *S.C. Dep’t of Soc. Servs. v. Boulware*, 422 S.C. 1, 7-8, 809 S.E.2d 223, 226 (2018) (internal quotation marks and citation omitted).

[C]ourt must follow a statute’s plain and unambiguous language, and when the language is clear, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Th[e] Court looks beyond a statute’s plain language only when applying the words literally would lead to a result so patently absurd that the General Assembly could not have intended it.

Id. (internal quotation marks and citation omitted).

Plaintiffs claim Defendants violate Article VI, § 1 and Article XVII, § 1B of the South Carolina Constitution. (Compl. ¶¶10-11). However, these constitutional provisions do not confer any right to sue on a party. *See, generally*, S.C. CONST. art. VI, § 1; S.C. CONST. art. XVII, § 1B. These provisions were not created for the special benefit of a private party. *See Adkins v. S.C. Dep’t of Corrs.*, 360 S.C. 413, 419, 602 S.E.2d 51, 54 (2004). Accordingly, Plaintiffs do not have statutory standing.

B. Plaintiffs do not have constitutional standing.

Second, Plaintiffs fail to establish any constitutional standing to bring this action. For constitutional standing, a plaintiff must show: “(1) he suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) it is likely the injury will be redressed by a favorable decision.” *S.C. Pub. Interest Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117-18, 804 S.E.2d 854, 858 (2017). “[A] 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.” *Evins v. Richland Cnty. Historic Pres. Comm’n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000).

Plaintiffs do not allege an invasion of a legally protected interest. Plaintiffs fail to allege

any concrete or particularized injury, harm, or prejudice caused by the Defendants, nor any future injury, harm or prejudice. Plaintiffs fail to assert any relationship with the Defendants. Moreover, Plaintiffs do not allege that any injury would be corrected a decision from the Court.

In the Complaint, Plaintiffs cite several cases claiming “taxpayer standing.” (Compl. ¶6). However, the South Carolina Supreme Court has “unanimously closed the door” on any theory of taxpayer standing. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013) (“Here, to the extent Bodman has suffered or will suffer any harm as a result of this tax scheme, this harm is shared by all taxpayers in the State. In *ATC*, we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason.” (emphasis added)); *see also Freeman v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012) (finding the injury to “taxpayer is common to all citizens and taxpayers,” and thus, no constitutional standing). Therefore, Plaintiffs fail to establish constitutional standing.

C. This lawsuit does not meet the public importance exception to standing.

Lastly, Plaintiffs’ action does not meet the public importance exception to the standing requirement.⁴ Public importance standing 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). “[T]he public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived.” *Carnival Corp.*

⁴ As an initial matter, public importance is a judicially created exception to the standing requirements. 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, § 4A; S.C. Code Ann. § 14-3-940. As the Court recently 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). While this Court has no power to ignore this type of standing because of binding precedent, Clemson University asserts that “public importance standing” is an unconstitutional conferral of standing.

v. Historic Ansonborough Neighborhood Ass’n, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014). The South Carolina Supreme Court has found that “standing may be conferred upon a party ‘when an issue is of public importance as to require its resolution for future guidance.’” *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007) (quoting *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)).

However, South Carolina courts have placed limitations on the application of the public importance exception. When applying this exception,

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, 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.

Sloan, 357 S.C. at 434, 593 S.E.2d at 472. Courts must be cautious in applying the public importance exception, and “determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.” *S.C. Pub. Interest Found.*, 421 S.C. at 118-19, 804 S.E.2d at 859.

Furthermore, the exception generally applies to actions brought against a government entity or a public official in their official capacity. *See, e.g., S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 644, 744 S.E.2d 521, 523 (2013) (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); *Thompson v. S.C. Comm’n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (action against South Carolina Commission on Alcohol and Drug Abuse and Director of the Commission, in his official capacity). In addition, there must be no other adequate remedy for addressing the issue raised in the action. *See Jowers v. S.C. Dep’t of Health & Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458

(2018); *Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853 (finding the public importance exception inapplicable where other parties could assert a similar action).

The public importance exception does not apply here. Plaintiffs' Complaint simply claims that "[t]his action raises Constitutional issues of great public importance," without more. (Compl. ¶7). On this basis alone, Plaintiffs' Complaint is subject to dismissal. *See Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 486, 523 S.E.2d 795, 800 (Ct. App. 1999) (finding "conclusory allegations" for requisite standing insufficient to maintain lawsuit).

First, the public interest is already protected without involving the judiciary. *See Jowers*, 423 S.C. at 365-66, 815 S.E.2d at 457-58 (finding case non-justiciable because the State already had mechanisms to protect the public interest). Specifically, "[t]he Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164 n.3, 616 S.E.2d 710, 714 n.3 (2005). Under South Carolina law, the Attorney General is granted the authority to act 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); *see also Furman University v. McLeod*, 238 S.C. 475, 483, 120 S.E.2d 865, 868 (1961). Thomas Green Clemson bequeathed and devised what is now Clemson University in trust to convey to the State of South Carolina, and the General Assembly accepted the same through the Clemson Act. Accordingly, Clemson University is a charitable trust. As a charitable trust, the South Carolina Attorney General would have the exclusive authority to protect the interests of the public as they relate to Clemson University. *See Op. S.C. Att'y Gen.*, 1971 WL 22432, at *1 (Mar. 16, 1971) (opining "the membership upon the Board of Trustees of Clemson University cannot be enlarged without violating the constitutional

inhibition against impairment of the obligation of a contract.”); *see also* Op. S.C. Att’y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (referencing cases that “recognize the binding nature of the Trust established by Clemson and accepted by the State” that “are binding upon the State.”).

Second, future guidance is not necessary for the allegations in the Complaint. Clemson University and the foundation of its board of trustees was established in 1889. The General Assembly passed the Clemson Act and it was approved by the Chief Justice of South Carolina. *See Bodman v. State*, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2013) (noting that the public importance exception should be moderated because “[f]ew exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in a role of 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, 145-46 (2011))); *see also Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853 (“Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large . . . are to be remedied by the legislative and executive branches.”). Thomas Green Clemson’s Will “was considered in Hopkins v. Clemson Agricultural College in a decision [f]or the United States Supreme Court in 1910 and has been subsequently considered in other cases decided by the State Supreme Court and by the Federal District Court.” Op. S.C. Att’y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978). Therefore, the public importance exception is inapplicable because there is no need for future guidance. *ATC South, Inc.*, 380 S.C. at 199, 669 S.E.2d at 341 (“The key to the public importance analysis is whether a resolution is needed for future guidance.”).

Lastly, the public policy considerations weigh against applying the standing exception. Clemson University and its board were established by the Will, the General Assembly in passing

the Clemson Act, and through approval by the Chief Justice of South Carolina. Plaintiffs should not be granted unfettered authority to bring lawsuits for general grievances against Clemson University and its board of trustees. Further, as a charitable trust, the Attorney General is granted exclusive authority to protect the interests at large as they relate to Clemson University. Accordingly, public policy weighs in favor of not applying the public importance exception to the general standing requirements. Based on the foregoing, Plaintiffs have no standing to bring this lawsuit.

D. The Court should dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction because Plaintiffs do not have standing to institute this action.

As provided above, Plaintiffs lack standing to bring this action. If a party has no standing, the Court lacks subject matter jurisdiction to hear the case and should dismiss it. *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998); *Anders v. S.C. Parole & Cmty. Corrs. Bd.*, 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983); *see also Bardoona Props., NV v. Eidolon Corp.*, 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997) (“It is well-settled that issues relating to subject matter jurisdiction may be raised at any time.”). Because Plaintiffs lack standing, the Court lacks subject matter jurisdiction to hear this case and should dismiss it.

II. The Court should dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction because Plaintiffs have failed to establish a justiciable controversy.

Plaintiffs have failed to establish a justiciable controversy to bring this action. Plaintiffs claim the Court possesses jurisdiction pursuant to the Declaratory Judgments Act under S.C. Code Ann. 15-53-10, *et seq.* (Compl. ¶6). However, as set forth by the South Carolina Supreme Court, “the Uniform Declaratory Judgment[s] Act is not an independent grant of jurisdiction.” *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013) (citation omitted). The Declaratory Judgments Act has limitations. *Sunset Cay, LLC v. City of*

Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). There must be an actual justiciable controversy 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))). “[I]t is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues to be raised.” *Id.* at 154, 177 S.E.2d at 553 (citing *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957)).

A justiciable controversy is defined as “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.” *Id.* The elements of a justiciable controversy have been described as follows: “Where a 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.” *Id.* at 153, 177 S.E.2d at 553.

Plaintiffs fail to allege an actual justiciable controversy between the parties to maintain this action. Plaintiffs fail to assert any relationship to Defendants. Plaintiffs fail to claim any legal rights or positive legal duty that has been denied by the Defendants. Furthermore, a decision on the issues alleged by Plaintiffs would be based on an abstract dispute on hypothetical issues and render a purely advisory opinion. *See Jones v. Dillon-Marion Human Res. Dev. Comm’n*, 277 S.C. 533, 536, 291 S.E.2d 195, 196 (1982) (dismissing action as to issues that were “moot and academic”). Therefore, there is no justiciable controversy between the parties and this action should be dismissed.

III. The Court should dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction because the Pickens County Probate Court has the exclusive jurisdiction to resolve the matters alleged in the Complaint.

The Court also lacks jurisdiction because the exclusive original jurisdiction to resolve the matters alleged in the Complaint resides in Probate Court. The South Carolina Probate Code sets forth that “[t]o the full extent permitted by the Constitution” that “the *probate court has exclusive original jurisdiction* over all subject matter related to . . . estates of decedents, including the contest of wills, constructions of wills, . . . [and] trusts, inter vivos or testamentary.” S.C. Code Ann. § 62-1-302(a) (emphasis added). Further, the South Carolina Trust Code reiterates “the *probate court has exclusive jurisdiction* of proceedings initiated by interested parties concerning the internal affairs of trusts.” S.C. Code Ann. § 62-7-201(a) (emphasis added).

Plaintiffs complain of the terms of the Will and the administration of Clemson University as a charitable trust. Plaintiffs claim that the Will and appointed Successor Trustees are improper. Indeed, the Clemson Act sets forth the proper jurisdiction in stating that the Will was “duly admitted to probate on April 20, 1888 in the office of probate[.]” S.C. Code Ann. § 59-119-10. Therefore, the issues alleged are within the exclusive jurisdiction of the probate court. For this reason alone, this action should be dismissed for lack of jurisdiction.

IV. This Court should dismiss Plaintiffs' Complaint because Greenville County is an improper venue.

Even assuming Plaintiffs can bring this action in the Court of Common Pleas, Greenville County would be an improper venue. Plaintiffs bring this action against Clemson University and the Successor Trustees, in their official capacities as alleged “public officers.” (Compl. ¶¶4-12). S.C. Code Ann. § 15-7-20 expressly provides that actions against a “public officer or person specially appointed to execute his duties for an act done by him in virtue of his office” must “be tried in the county where the cause or some part thereof arose.” Clemson University is located in

Pickens County. Thus, any actions of the Successor Trustees in their positions on the board for Clemson University would have taken place in Pickens County. Therefore, Greenville County is the incorrect venue and this action should be dismissed pursuant to Rule 12(b)(3), SCRPC.

V. The Court should dismiss Plaintiffs' Complaint because the Plaintiffs fail to allege facts sufficient to constitute a cause of action.

A. Plaintiffs do not have a cause of action pursuant to Articles VI and XVII of the South Carolina Constitution.

First, Plaintiffs' action should be dismissed because the Complaint fails to allege facts sufficient to constitute a cause of action. As set forth in detail above concerning statutory standing, the constitutional provisions that Defendants allegedly violate do not create a private right of action for a party to sue. "[N]o remedy is complete without a definition of the cases to which it shall extend, and [] a mere grant of judicial power even in the constitution d[oes] not, without more, create a cause of action." *Brewer v. Brewer*, 242 S.C. 9, 24-25, 129 S.E.2d 736, 744 (1963) (Bussey, J., concurring); *Grant v. Grant*, 12 S.C. 29, 31 (1879). The provisions set forth in Plaintiffs' Complaint fail to sanction a private cause of action. Accordingly, Plaintiffs' Complaint fail to allege a sufficient cause of action against Defendants.

B. Plaintiffs do not allege facts sufficient to bring a declaratory judgment cause of action.

Second, Plaintiffs fail to provide sufficient facts for a declaratory judgment cause of action. Boiled down to its essence, Plaintiffs seek a declaration that the Will and Clemson Act are unconstitutional. (Compl., generally). "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *State*, 338 S.C. at 640, 528 S.E.2d at 650 (citing *Davis v. Cnty. of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996)). "A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Id.* (citing *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995)).

“A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.”

Id.

Regardless of the procedural defects in challenging the Will, Plaintiffs fail to allege sufficient facts to deem the Clemson Act unconstitutional beyond a reasonable doubt. As an initial matter, the Clemson Act was approved by the Chief Justice of South Carolina. Many federal and South Carolina courts have acquiesced to Clemson University and its governance. *See* Op. S.C. Att’y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978) (citing *Hopkins v. Clemson Agr. College of S.C.*, 221 U.S. 636 (1911)); *see also Williams v. Morris*, 320 S.C. 196, 205-06, 464 S.E.2d 97, 102 (1995) (“Both this Court and the United States Supreme Court have found that courts should accord weight to past practices and legislative interpretations.”). Thus, the Will and Clemson Act should be afforded great deference in construing the issues alleged in Plaintiffs’ Complaint.

Furthermore, while the crux of the Plaintiffs’ complaint is that the Successor Trustees violate two constitutional provisions relating to “officers”, the Successor Trustees are not “officers” as defined in the South Carolina Constitution.⁵ Both constitutional provisions define “officers” as “elected or appointed to office in this State for life or during good behavior[.]” *See* S.C. CONST. art. VI, § 1; S.C. CONST. art. XVII, § 1B. The Successor Trustees are not elected or appointed to office. The Successor Trustees are nominated by the Will and their successors. *See* S.C. Code Ann. § 59-119-40. Moreover, the Successor Trustees are not appointed “for life or during good behavior” because of the above-mentioned agreement that the Successor Trustees would not serve past 75 years old.

⁵ Plaintiffs cite S.C. Code Ann. § 8-1-10 in the Complaint to suggest the Successor Trustees are “public officers.” (Compl. ¶12). This statute, however, was enacted after passage of the Clemson Act. *See* 1901 S.C. Act No. 441; *see also Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762, 764 (1907).

In addition, the relief sought by Plaintiffs would violate the Contract Clause of the state and federal constitutions. *See* U.S. CONST. art. 1, § 10, cl. 1 (“No State shall . . . pass any . . . law impairing the Obligation of Contracts”); S.C. CONST. art. 1, § 4 (“No . . . law impairing the obligation of contracts . . . shall be passed”). “The will of Thomas G. Clemson was accepted by the State of South Carolina, and its terms are binding upon the State.” Op. S.C. Att’y Gen., 1971 WL 22432, at *1 (Mar. 16, 1971) (noting the Board of Trustees “cannot be enlarged without violating the constitutional inhibition against impairment of the obligation of a contract.”). “A contract valid under the laws of the state as expounded at the date of the contract, cannot be affected by any subsequent decision of the courts altering the construction of such laws.” *Walker v. State*, 12 S.C. 200, 1879 WL 4946 (1879); *see also Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 29-30, 736 S.E.2d 651, 658 (2012) (holding that the Contract Clause is violated when a new statute applied retroactively substantially impairs pre-existing contracts).

Based on the foregoing reasons, Plaintiffs fail to state a claim against Defendants. Plaintiffs do not allege a sufficient cause of action against the Defendants. Therefore, Plaintiffs have failed to state facts sufficient to constitute a cause of action and this action should be dismissed.

CONCLUSION

For the reasons set forth above, Defendant Clemson University respectfully requests that the Court dismiss the Plaintiff’s Complaint and enter an order granting such other relief as the Court deems appropriate.

Signature Page Follows

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Boyd B. Nicholson, Jr.

Boyd B. Nicholson, Jr. (SC Bar No. 65387)

Jonathan D. Klett (SC Bar No. 103208)

Haynsworth Sinkler Boyd, P.A.

P. O. Box 2048

Greenville, SC 29602

Phone: (864) 240-3200

Fax: (864) 240-3300

nnicholson@hsblawfirm.com

jklett@hsblawfirm.com

Attorneys for Defendant

Clemson University

October 23, 2020

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

**DEFENDANTS SUCCESSOR TRUSTEES’
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Defendants 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” and collectively with Clemson University, “Defendants”)¹, by and through the undersigned counsel, hereby submit this Memorandum in Support of the Successor Trustees’ Motion to Dismiss made pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the SCRCPP.

As outlined in the Successor Trustees’ Motion to Dismiss, the Successor Trustees request that the action be dismissed for five reasons: (1) Plaintiffs have no standing to bring this action; (2) Plaintiffs have failed to establish the existence of a justiciable controversy; (3) the Pickens County Probate Court has the exclusive jurisdiction to resolve the matters alleged in Plaintiffs’ complaint; (4) Greenville County is an improper venue for this lawsuit; and (5) Plaintiffs fail to

¹ The Successor Trustees are incorrectly identified as Clemson University’s “life trustees” in the Summons and Complaint. Regardless, the current Successor Trustees have all agreed they will not serve beyond the age 75.

state facts sufficient to constitute a cause of action. All five reasons are independently sufficient grounds for this Court to dismiss this action.

Factual and Procedural Background

I. Factual background of Clemson University.

Thomas Green Clemson (“Mr. Clemson”) bequeathed his plantation home, land, and much of his personal fortune to the State of South Carolina, in trust through his last will and testament (“the Will”), 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. The will nominated seven individuals and provided that, if the State accepted the donation, they would constitute the Board of Trustees. *See* Last Will & Testament of Thomas Green Clemson; *reprinted in full at* Appendix B, *Board of Trustees Manual*, Clemson University (last visited March 11, 2020), *available at* <https://www.clemson.edu/administration/bot/manual/index.html>.² These individuals and their successors are the “Successor Trustees.” 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.* The Will explained that:

[t]he 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

² The Will is a public record on file at the Pickens County Probate Court. The Court may, of course, “take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.” *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). Additionally, the Court “may take judicial notice of information publicly announced on a party’s web site, so long as the web site’s authenticity is not in dispute and ‘it is capable of accurate and ready determination.’” *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 F. App’x 223, 227 (4th Cir. 2013).

which may occur in their number by death, resignation, refusal to act or otherwise.

Id. (emphasis added). Finally, the Will provided that if the State purported to accept the devise, the Chief Justice of South Carolina would review the acceptance and ensure it was in accordance with Mr. Clemson’s wishes as set forth in the Will. *Id.* If the Chief Justice agreed that it was, the executor would then execute a deed of the property to the State and turn the property over “to be held as such by the said State so long as it, in good faith, devotes said property to the purposes of the donation.” *Id.*

In 1889, 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” via the Act of Acceptance. 1889 S.C. Act No. 166. The Act of Acceptance provided that “The Clemson Agricultural College of South Carolina” would be established upon execution of the deed and transfer of the property by the executor. *Id.* Importantly, the Act of Acceptance further provided that Clemson would be governed in the manner specified by the Will. 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).

Following the Act of Acceptance, 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, through the Act, 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.”³ Clemson University has operated in accordance with the Will and Act of Acceptance since 1889.

³ The Chief Justice’s Opinion is also reprinted in the Board Manual. See Appendix C, *Board of Trustees Manual*, Clemson University (last visited March 11, 2020), available at <https://www.clemson.edu/administration/bot/manual/index.html>.

II. Allegations of Plaintiff's Complaint

Plaintiffs are an individual (Edward D. Sloan, Jr.) and a corporation (NOLAS Trading Co., Inc.).⁴ (Compl. ¶¶ 1-2.) The Complaint does not allege any connection between either of these Plaintiffs and Clemson University or detail any specific harm that they have suffered as a result of the actions of Defendants. Rather, they premise their entire suit on their status as citizens, residents, and taxpayers of this State. (*See id.*) Plaintiffs assert that they are entitled to “public importance” standing due to the issues raised in their Complaint. (*Id.* at ¶ 8.)

Plaintiffs' Complaint alleges that the “tenures and terms” of the Successor Trustees provided by the Will and Act of Acceptance violate Article VI, § 1 of the South Carolina Constitution, which provides, “[n]o 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. Constitution, Article VI, § 1. The Complaint also alleges that the tenures and terms violate Article XVII, § 1B of the South Carolina Constitution, which provides, “[n]o 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. Constitution, Article XVII, § 1B. Plaintiffs contend that the Successor Trustees are “officers” in light of S.C. Code. Ann. § 8-1-10, which defines “public officers” to include, *inter alia*, “trustees of the various colleges of the State.” *Id.*

Plaintiffs allege that the Successor Trustees have held office in violation of the South Carolina Constitution because their term is not for “some specified period.” (Compl. ¶ 14.) Plaintiffs' complaint seeks six forms of relief: (1) a declaration that parts of the Acceptance Act of

⁴ The factual allegations and legal conclusions detailed in this section are taken directly from Plaintiffs' complaint. The Successor Trustees do not concede, and expressly reserve the right to challenge, their veracity.

1889 are incompatible with the Constitution and are invalid, null, and void; (2) a declaration that the Successor Trustees are holding office in violation of Article VI, § 1 and Article XVII, § 1B; (3) an injunction or termination of the service of the Successor Trustees; (4) an injunction against any election or appointment of Successor Trustees; (5) costs and attorneys' fees under S.C. Code Ann. § 15-77-300; and (6) any other relief the court deems proper. (*Id.* at **WHEREFORE ¶¶ 1-6**).

ARGUMENT

I. Applicable Legal Standards

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). A motion to dismiss under Rule 12(b)(3) of the South Carolina Rules of Civil Procedure should be granted when a lawsuit has been filed in an improper venue. Rule 12(b)(3), SCRCP. 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).

II. This Court should dismiss Plaintiffs' complaint under Rule 12(b)(1) because this Court lacks subject matter jurisdiction.

This Court lacks subject matter jurisdiction for three reasons. First, Plaintiffs cannot establish their standing to bring this suit. *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).⁵ Second, Plaintiffs have failed to establish the existence of a justiciable controversy. Plaintiffs’ invoke this Court’s subject matter jurisdiction under the Declaratory Judgment Act, but 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). Third, and finally, this Court lacks subject matter jurisdiction because the Pickens County Probate Court has the exclusive jurisdiction to resolve the matters alleged in Plaintiffs’ complaint pursuant to state statute.

In order to bring a claim, a plaintiff must have standing. 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 Supreme Court has recognized three types of standing: (1) standing conferred by statute; (2) constitutional standing; and (3) public importance standing. *S.C. Pub. Interest Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017). Plaintiffs have failed to establish any of these three types of standing.⁶

A. Plaintiffs cannot establish statutory standing.

For a plaintiff to have statutory standing, a statute must confer a right to sue on a party. *Youngblood v. S.C. Dep’t of Social Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Courts must engage in statutory interpretation to determine whether a statute confers standing. *Id.*

⁵ Although standing is often discussed in terms of subject matter jurisdiction, *see Anders*, 279 S.C. at 211, 305 S.E.2d at 231, 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.

⁶ In the Complaint, Plaintiffs seem to rely on only one theory of standing—the public importance exception. Regardless, for the reasons described herein, to the extent Plaintiffs rely on any other theory of standing, they have failed to establish it.

Here, neither Article VI, § 1 nor Article XVII, § 1B of the South Carolina Constitution confer any right to sue on a party. *See generally* S.C. Const. art. VI, § 1; S.C. Const. art. XVII, § 1B. Thus, by their plain terms, neither provision confers any private right of action and Plaintiffs lack statutory standing.

B. Plaintiffs cannot establish constitutional standing.

For a plaintiff to have constitutional standing, he must show: “(1) he suffered an invasion of a legally protected interest, which is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the challenged conduct; and (3) it is likely the injury will be redressed by a favorable decision.” *S.C. Dep’t of Transp.*, 421 S.C. at 117-118, 804 S.E.2d at 858. With respect to the injury requirement, “a 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.” *Evins v. Richland Cnty. Historic Preservation Comm’n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000).

Here, Plaintiffs fail to allege any concrete or particularized injury, harm, or prejudice caused by the actions of Clemson University or its Successor Trustees. Plaintiffs have alleged no connection to the University, no connection to the University’s Board, and no imminent future connection to either.

To the extent Plaintiffs allege they have suffered a generalized injury as a taxpayer, the South Carolina Supreme Court has plainly foreclosed any theory of taxpayer standing. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013) (“Here, to the extent Bodman has suffered or will suffer any harm as a result of this tax scheme, this harm is shared by all taxpayers in the State. In *ATC*, we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason.”).

C. Plaintiffs cannot establish public importance standing.

1. South Carolina law and policy demonstrate that this is a narrow exception.

Public importance standing 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).⁷ This exception recognizes that, in certain limited circumstances, “standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Id.*

Importantly, public importance standing is not without limit under South Carolina precedent. In recent years, the Supreme Court has admonished 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).⁸ Caution is necessary because “[o]therwise, public officials would be subject to numerous lawsuits at the

⁷ 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 Court recently 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). While this Court has no power to ignore this type of standing because of binding precedent, the Successor Trustees assert that “public importance standing” is an unconstitutional conferral of standing.

⁸ In *Infrastructure Bank*, the Supreme Court held that Plaintiff Edward Sloan and the South Carolina Public Interest Foundation had standing under the public importance exception to bring a constitutional claim as to the structure of the South Carolina Transportation Infrastructure Bank. See 403 S.C. at 646, 744 S.E.2d at 524. For the reasons outlined below, that case is readily distinguishable and does not bind this Court. Additionally, the Supreme Court subsequently elaborated on and clarified the limitations of the public importance exception in *Adams v. McMaster*, Op. No. 28000 (S.C. Oct. 7, 2020), available at <https://www.sccourts.org/opinions/HTMLFiles/SC/28000.pdf> and *Jowers v. South Carolina Dep’t of Health and Envtl. Control*, 423 S.C. 343, 815 S.E.2d 446 (2018).

expense of both judicial economy and the freedom from frivolous lawsuits.” *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472.

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, 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); *Thompson v. S.C. Comm’n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (action against South Carolina Commission on Alcohol and Drug Abuse and Director of the Commission, in his official capacity). Fourth, there must be **no other adequate remedy** for addressing the issue raised in the action. See *Jowers*, 423 S.C. at 366, 815 S.E.2d at 458; *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 *Sloan*, 357 S.C. at 434, 593 S.E.2d at 472). Weighing against 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*. That case examined the application of the public importance 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 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—namely 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.*

Likewise, earlier this month, the Supreme Court addressed the confines of public importance standing in a dispute over the Governor’s allocation of federal emergency education funding under Coronavirus Aid, Relief, and Economic Safety Act (“CARES Act”). *See Adams*, Op. No. 28000 at 7-8. The Court found that the Petitioners had public importance standing in light of the unprecedented nature of the coronavirus pandemic that has plagued our State and nation in recent months. *See id.* at 8. The Court highlighted the significant impact of the virus on education

in this State and the intent of the CARES Act’s appropriation of emergency funds to “protect our nation’s students and teachers and to supply states with additional resources to continue providing educational services during this difficult time.” *Id.* There was a clear need for future guidance under these circumstances because the issue involved the expenditure of public funds and it was likely the exact same situation would arise in the future if Congress approved additional education funding in response to the pandemic. *Id.* The situation here raises no comparison, and there should be no public importance standing.

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

Plaintiffs’ Complaint contains no allegations supporting any of factors for applying public importance exception aside from the assertion that they are entitled to public importance standing because the case raises an issue of public importance. For this reason alone, the Complaint should be dismissed.

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 issue in this case—the validity of the Successor Trustee position under the South Carolina Constitution—can be addressed. Clemson University is private eleemosynary corporation and a charitable trust created via contract between Mr. Clemson and the State. Op. S.C. Att’y Gen., 1971 WL 22432, at *1 (Mar. 16, 1971); *see also* Op. S.C. Att’y Gen., 1978 WL 34673, at *1 (Jan. 26, 1978). Under South Carolina law, the Attorney General is “the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts.” *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 164 n.3, 616 S.E.2d 710, 714 n.3 (2005). The Attorney General 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 Clemson is a charitable trust, the Attorney General has the unique—and exclusive—role of protecting the interests of the public. Given this fact, Plaintiffs’ interest in the judicial process carries little if any weight.

Second, like in *Jowers* and unlike in *Adams*, there is no need for future guidance on this issue. See *Jowers*, 423 S.C. at 360, 815 S.E.2d at 360. The *Jowers* holding is consistent with other courts’ application of the exception over the past half century. See, e.g., *ATC South, Inc.*, 380 S.C. at 200, 669 S.E.2d at 342 (refusing to apply the public importance exception to plaintiff’s challenge to a county’s zoning decision after zoning occurred); *Baird*, 333 S.C. at 530, 511 S.E.2d at 75 (applying the public importance exception to allow plaintiffs to seek an injunction barring the county from issuing bonds); *Thompson*, 276 S.C. at 467, 229 S.E.2d at 719 (applying the public importance exception to allow plaintiffs to challenge the validity of a statewide generally applicable law). Here, there is no need for future guidance because Plaintiffs’ Complaint challenges the constitutionality of a one hundred and thirty one 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 well over a century later mounting 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, the Successor Trustees are not “public officials” for the purposes of the public importance exception to standing. When courts have applied the public importance exception in the past, they have typically done so for claims brought against public **officeholders** in the state. *See, e.g., Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (action against the Governor); *S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (action against the Speaker of the South Carolina House of Representatives and the President Pro Tempore of the South Carolina Senate); *Thompson*, 267 SC. 463, 229 S.E.2d 718 (action against the Director of the South Carolina Commission on Alcohol and Drug Abuse). The Successor Trustees are neither elected by the public nor appointed by the General Assembly or a constitutional officer of the state and, as a result, are not public officials for the purposes of this exception. *See* S.C. Const. art. VI, § 6 (explaining that the Governor “shall commission all officers of the State”).⁹

Finally, the competing policy factors in this case weigh against the application of the exception. Here, like in *Jowers*, Plaintiffs’ interest in judicial process carries little weight given: (1) the duty of 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—Plaintiffs are nothing more than ordinary citizens asserting a generalized grievance against Clemson University

⁹ Like the Constitution of 1895, the Code section relied on by Plaintiffs to support their argument, S.C. Code Ann. § 8-1-10, was adopted subsequent to the Act of Acceptance. *See* 1901 S.C. Act No. 441. The language of this statute was originally part of a provision relating to oaths of office and was located in the criminal code. *See* 1901 S.C. Act No. 441. This section made 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,” and explained that “**“public officers’ shall be construed to mean all officers of the State that have heretofore been commissioned**, and Trustees of the various colleges of the State.” *Id.* (emphasis added).

and its Successor Trustees. Weighing these considerations, this Court should exercise caution and decline to apply the public importance exception in this case.

Therefore, because Plaintiffs failed to establish standing under a statute, the Constitution, or the public importance exception to standing, the Successor Trustees respectfully request that the complaint be dismissed pursuant to Rule 12(b)(1) of the SCRCPP.

D. The Court lacks subject matter jurisdiction because Plaintiffs have failed to establish the existence of a justiciable controversy.

The lack of a justiciable controversy represents an independent ground for dismissal. The Uniform Declaratory Judgment Act *is not* an independent grant of jurisdiction to courts. *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). 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))).

“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 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, Plaintiffs' connection to the legal rights and issues underlying the declaratory judgment action is even more attenuated than in *Power*. Plaintiffs have no legal rights or duties with respect to the constitutional provisions and have alleged no relationship whatsoever with Clemson University or its board. Moreover, as detailed herein, the current Successor Trustees do not serve for terms of "life or good behavior" and, regardless, have all agreed they will not serve beyond the age 75. Consequently, this action presents a purely hypothetical question and there is no justiciable controversy under the Declaratory Judgment Act. This Court lacks subject matter jurisdiction as a result.

E. The Court lacks subject matter jurisdiction because the Pickens County Probate Court has the exclusive jurisdiction to resolve the matters raised by Plaintiffs' and venue is proper in that Court.

Finally, the Court also lacks jurisdiction because this matter was brought in the incorrect court. The Pickens County Probate Court has exclusive jurisdiction over the issues raised by Plaintiffs. *See, e.g.*, S.C. Code §§ 62-1-302 and 62-7-201. The Probate Code provides that the probate court has **exclusive** original jurisdiction over all subject matter related to the "estate of decedents, **including the contest of wills** [and] constructions of wills." S.C. Code § 62-1-302(a)(1) (emphasis added). Likewise, the Trust Code also provides that the probate court has "exclusive jurisdiction of proceedings initiated by interested parties concerning the **internal affairs of trusts**." S.C. Code § 62-7-201(a) (emphasis added). Such proceedings include "those concerning the

administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts.” *Id.*

The sole issue raised by Plaintiffs’ Complaint is a challenge to the terms of Thomas Green Clemson’s Will and the administration of Clemson University as a charitable trust. Plaintiffs seek a declaration that the Successor Trustee position is improper and an injunction or termination of the Successor Trustees’ service in their position as a result. This type of claim and the requested relief fall directly within the probate court’s exclusive jurisdiction. The Court lacks subject matter jurisdiction for this additional reason and Plaintiffs’ complaint should be dismissed.

III. This Court should dismiss Plaintiff’s complaint under Rule 12(b)(6) because Plaintiffs fail to allege facts sufficient to constitute a cause of action.

A. Plaintiffs fails to allege facts sufficient to constitute a cause of action under the Declaratory Judgment Act.

In addition to the procedural deficiencies detailed above, Plaintiffs have failed to plead a valid cause of action. The starting point for analyzing Plaintiffs’ claim is the recognition that the 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, the Supreme Court has “long recognized that 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). A plain reading of the Act of Acceptance, the relevant constitutional provisions, and the South Carolina Code demonstrates that there is no constitutional defect.

The constitutional provisions cited by Petitioners only reference a person “elected or appointed” to office. See S.C. Const. art. VI, § 1; S.C. Const. art. XVII, § 1B. “Office” is not defined by the Constitution. Therefore, the Petitioners must rely on a subsequently adopted statute,

S.C. Code Ann. § 8-1-10, which provides that “public officer” includes “trustees of the various colleges of the State.” *Id.* A reasonable reading of the constitutional provisions would be that “elected” means voted on either by the populace or General Assembly and appointed means by either the Governor or General Assembly. Other types of trustees (including the legislatively appointed trustees at Clemson) would be subject to the provisions. The Successor Trustees, however, are not “elected or appointed” as contemplated by the Constitution, as the original seven were named by a private bequest and they have been self-perpetuating ever since. Additionally, the Successor Trustees do not serve a term of “life or good behavior” as a matter of law. The Will and Act of Acceptance specifically provide that the Successor Trustees have the right to fill vacancies which may occur “in their number by ***death, resignation, refusal to act or otherwise.***” S.C. Code Ann. § 59-119-40 (emphasis added).

Furthermore, the constitutional provisions cited by Plaintiffs are not applicable to the Successor Trustee position due to Clemson University’s status as a charitable trust created through a contract between Mr. Clemson and 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.* 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 beyond merely clarifying existing law and operates retroactively to

substantially impair pre-existing contracts by materially changing their terms). Even taking Plaintiffs' argument at face value that the constitutional provisions apply to the Successor Trustees, the statute regarding "public officer" would be unconstitutional as applied. The Successor Trustee structure was a fundamental term of the bequest to the State, and these constitutional provisions, combined with the statute, if applicable, would operative retroactively to substantially impair this material provision in 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").

Additionally, the Constitution of 1868 already had a prohibition against creation of an office "the appointment to which shall be longer for a time than good behavior." S.C. Const. art I, § 32 (1868). Therefore, the provisions in the Constitution of 1895 raised by Plaintiffs did not change anything—they merely tweaked the language to provide that a term cannot be "for life or during good behavior." The effect of the provisions, however, is substantially the same. Because the Successor Trustee term was deemed constitutional by the General Assembly at the time of the Act of Acceptance under the terms of the Constitution of 1868, the term is equally constitutional under the Constitution of 1895. *See* 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); *Fla. Cent. & P.R. Co. v. City of Columbia*, 54 S.C. 266, 32 S.E. 408, 412 (1899) (explaining that "all laws of force at the time of the adoption of the present constitution remained in force, unless they were unconstitutional when enacted, or were inconsistent with the provisions of the constitution of 1895"). As the Supreme Court has explained,

the framers of the Constitution 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).

Finally, the longstanding practice of the General Assembly’s apparent acquiescence to Clemson’s structure is persuasive. As the Supreme Court has explained: “Both this Court and the United States Supreme Court have found that courts should accord weight to past practices 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”).

All of these authorities directly establish that there is no constitutional violation under these facts as a matter of law. Accordingly, Plaintiff has failed to state facts sufficient to constitute a cause of action and dismissal is warranted under Rule 12(b)(b).

B. Plaintiffs fail to allege facts sufficient to constitute a cause of action because there is no cause of action under the state constitution.

To the extent plaintiffs attempt to assert a claim directly under the South Carolina Constitution, the complaint should be dismissed because there is no express or implied cause of action under Articles VI and XVII of the South Carolina Constitution. *See Brewer v. Brewer*, 242 S.C. 9, 24-25, 129 S.E.2d 736, 744 (1963) (Bussey, J., concurring); *Grant v. Grant*, 12 S.C. 29 (1879). As the Supreme Court explained in *Grant*, “a mere grant of judicial power in the constitution [does] not remove from the legislature authority to determine to what class of cases such judicial power should extend.” *Id.* at 31. Here, Plaintiffs cannot state a cause of action under these constitutional provisions because the General Assembly has not created a private right of

action under these constitutional provisions. This also supports that the Complaint should be dismissed under Rule 12(b)(6).

IV. This Court should dismiss the plaintiffs’ complaint under Rule 12(b)(3) because Greenville County is an improper venue.

Lastly, even assuming this matter could be brought in the Court of Common Pleas—which, as detailed above, does not have subject matter jurisdiction—Greenville County is not the proper venue. The South Carolina Code provides that actions against a “person specially appointed to execute his duties for an act done by him in virtue of his office” *must* “be tried in the county where the cause or some part thereof arose.” S.C. Code § 15-7-20. Plaintiffs assert that the Successor Trustees are “public officers” under S.C. Code Ann. 8-1-10, and purport to sue them for acts done by virtue of their offices, which acts are executed in Pickens County. The Successor Trustees, of course, dispute this assertion. However, under the Complaint’s plain allegations, venue would be proper only in Pickens County. Consequently, and in failing dismissal otherwise, the Successor Trustees respectfully request that the complaint be dismissed pursuant to Rule 12(b)(3) of the SCRCP.

CONCLUSION

For the reasons outlined above, and for the reasons stated in the Successor Trustees’ Motion to Dismiss, the Successor Trustees respectfully ask this Court to dismiss Plaintiffs’ claims pursuant to SCRCP 12(b)(1), 12(b)(3), or 12(b)(6).

Signature on Following Page

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

C. Mitchell Brown

SC Bar No. 12872

E-Mail: mitch.brown@nelsonmullins.com

Blake T. Williams

SC Bar No. 100794

E-Mail: blake.williams@nelsonmullins.com

Thomas T. Hydrick

SC Bar No. 103198

E-Mail: thomas.hydrick@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

(803) 799-2000

Attorneys for Respondents E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins

Columbia, South Carolina

October 23, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-03178

**PLAINTIFFS’ MEMORANDUM OF
LAW IN OPPOSITION TO
DEFENDANTS’ MOTIONS TO
DISMISS**

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in Opposition to the Defendants’ Motions to Dismiss filed August 26, 2020.

STATEMENT OF THE CASE

The will of Thomas G. Clemson established Clemson University and provided for seven Life Trustees, who constitute a majority of Clemson University’s 13-member Board of Trustees. The will provides:

The following named gentlemen, seven in number, shall be seven of the Board of Trustees, to wit: . . . , and the State, if it accepts the donation, 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. 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. But the Legislature may provide, as it sees proper, for the appointment or election of the other six trustees, if it accepts the donation. And I do hereby request the seven trustees above named, or such of them **as may be living**, or may be willing to act, to meet as soon after my death as practicable, and organize, and at once to **fill all vacancies** that may have occurred, and to exert themselves to effectuate my purposes as herein set forth.

Last Will & Codicil of Thomas Green Clemson, Item 2 (emphasis added).

Accordingly, each originally named trustee served for life, or until he became unwilling, and the Life Trustees are a self-perpetuating group. When one Life Trustee dies or resigns, the remaining Life Trustees nominate and elect a replacement.

Thomas G. Clemson died on April 6, 1888. The General Assembly enacted the Act of Acceptance November 27, 1889, which accepted the bequest “subject to the terms and conditions of the said will.” *Id.*, Section 1. Statutes of South Carolina, Vol. XX, p. 277. The Act of Acceptance states, “That said college shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will and their successors and six members to be elected by the Legislature in Joint Assembly every fourth year after the first election.” *Id.* Section 3. So the board consists of seven Life Trustees and six trustees serving a four-year term.

In 1895, South Carolina adopted a new Constitution, the Constitution of 1895, which currently governs the State of South Carolina. Two provisions in the Constitution of 1895 forbid any state officer to be elected or appointed to office for life.

“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. Constitution, Art. VI, § 1 (emphasis added).

“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. Constitution, Art. XVII, §1B (emphasis added).

“Public officers” include “trustees of the various colleges of the State.” S.C. Code Ann § 8-1-10. Accordingly, Clemson’s Life Trustees are “officers.” They are not appointed or elected

for “some specified period.” Since South Carolina adopted the Constitution of 1895, the Act of Acceptance has violated the Constitution, and the continuing service of the Life Trustees, not for “some specified period,” has violated the Constitution.

South Carolina appellate courts have not ruled on the constitutionality of the Clemson University Life Trustees serving for a term that is not “some specified period.”

In nearly identical Motions to Dismiss, the Defendants raise five grounds: (1) Plaintiffs lack standing; (2) Plaintiffs failed to state a justiciable controversy; (3) the Court lacks subject matter jurisdiction; (4) improper venue; and (5) failure to state facts sufficient to constitute a cause of action.

Plaintiffs will respond to the Defendants arguments in the order they raised them.

I. THE COURT SHOULD GRANT PLAINTIFFS PUBLIC INTEREST STANDING.

First, Defendants contend that the Plaintiffs lacked standing. Plaintiffs contend that this case raises issues of great public importance, and that this Court should grant them standing based on the great public importance of the issues raised.

Plaintiff Edward D. Sloan, Jr., is a citizen, resident, taxpayer, and registered elector of the State of South Carolina. He brings this action individually and on behalf of all others similarly situated. Plaintiff NOLAS Trading Co., Inc., (“NOLAS”) is a corporation organized and existing under the laws of the State of South Carolina and a South Carolina taxpayer.

Defendant Clemson University is a South Carolina public university funded with more than \$123 million in State public funds in fiscal year 2018, and more than \$136 million in fiscal year 2019. The individual defendants are “Life Trustees” of Clemson University. They are named as Defendants in their official capacities. Plaintiffs contend that the Life Trustees have been

serving in violation of the South Carolina Constitution, and that they are overseeing the expenditure of more than \$100 million a year of taxpayer funds in violation of the Constitution.

When a plaintiff raises an issue of great public importance, particularly an allegation of a Constitutional violation, a court may grant the plaintiff standing to address the issue. *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017) (“Petitioners have public importance standing” to address spending public money for private purposes); *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016) (original jurisdiction to address unconstitutional proviso in Appropriations Act); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013) (original jurisdiction to address constitutionality of State Transportation Infrastructure Bank), *American Petroleum Institute v. S.C. Dep’t. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009) (original jurisdiction to address claim that an Act violates the Constitution’s one subject rule), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008) (original jurisdiction to address violations of Constitution’s one subject rule), *Sloan v. Department of Transportation*, 379 S.C. 160, 170-71, 666 S.E.2d 236, 241 (2008) (“Sloan has standing because he has alleged a misuse of the statutory emergency procurement provision and therefore an unlawful expenditure by public officials”); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007) (original jurisdiction and public importance standing to address claims that DOT Commissioners were serving successive terms in violation of the authorizing statute); *Sloan v. Department of Transportation*, 365 S.C. 299, 305, 618 S.E.2d 876, 879 (2005) (“Sloan has standing to raise this issue [DOT violation of competitive bidding laws]”); *Sloan v. Wilkins*, 362 S.C. 430, 437, 608 S.E.2d 579 (2005) (“In light of the great public importance of this matter,

we find Sloan has standing to maintain this action” to challenge a violation of the Constitutional one subject rule); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470, 583 (2004) (Sloan was granted standing to challenge governor’s commission as an officer in the Air Force reserve); *Sloan v. Greenville County*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct. App. 2003) (Sloan was granted standing to bring declaratory judgment action alleging county failed to comply with ordinances governing procurement of construction services on design-build public works projects); *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) (“[a] taxpayer’s standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina”); *Baird v. Richland County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)(Standing may be conferred upon a party “when an issue is of such public importance as to require its resolution for future guidance”).

Defendants have been overseeing the expenditure of more than \$100 million a year of taxpayer funds in violation of the Constitution. They have manifested every intention to continue to do so. Accordingly, the facts of this case, like those cited above, raise an issue of great public importance, for which this Court should grant the Plaintiffs public importance standing.

II. PLAINTIFFS HAVE STATED A JUSTICIABLE CONTROVERSY.

Defendants contend that the Plaintiffs have not stated a justiciable controversy. The cases cited above demonstrate that on many occasions the courts of this state have granted public importance standing to plaintiffs who allege that an act of the General Assembly was unconstitutional or the conduct of a public official violated the Constitution. Accordingly, Plaintiffs’ allegations that the Act of Acceptance is unconstitutional, and the ongoing actions of the Defendants are unconstitutional constitute a justiciable controversy.

III. THE COURT POSSESSES SUBJECT MATTER JURISDICTION.

Defendants contend that this Court does not possess subject matter jurisdiction. Defendants have been violating S.C. Constitution, Art. VI, § 1 and Art. XVII for 125 years, and, as stated above, they have shown every intention to continue to violated the Constitution. This Court possesses subject matter jurisdiction to address constitutional violations. Furthermore, this Court possesses subject matter jurisdiction under S.C. Code Ann. § 15-53-10 *et seq.*, the Uniform Declaratory Judgment Act to declare the Act of Acceptance and the Defendants' violations unconstitutional. *See* the cases cited above.

Defendants contend the Probate Court of Pickens County should decide this constitutional issue. Of course, it should not. First, this case involves the constitutionality of the Act of Acceptance of 1889. It does not involve the construction of a will or the construction of a trust. There is no dispute about what the will says. There is no dispute about the wording of the Act of Acceptance. The Probate Court is not the appropriate venue to decide the constitutionality of an Act of the General Assembly or the constitutionality of the service of public officers.

Furthermore, even if this case were to involve the construction of a will or trust, Defendants reliance on South Carolina Code: §§ 62-1-302 and 62-7-201 is misplaced. Both of those sections allow for **concurrent** jurisdiction in the Circuit Court. Section 61-1-302(d) allows concurrent jurisdiction in the Circuit Court for “matters involving the internal or external affairs of trusts as provided in Section 62-7-201.” In addition, Section 61-1-302(f) allows for concurrent jurisdiction for “matters that would be in the best interest of the estate or in the interest of judicial economy.”

Finally, Section 62-7-201(c) grants the probate court “concurrent jurisdiction with the circuit courts of this State of actions and proceedings concerning the external affairs of trusts.”

Plaintiffs respectfully submit that a determination of the constitutionality of the Act of Acceptance and the unconstitutional service of public officers is not a matter internal to a trust, but rather it is external to the trust, and this issue is appropriate for determination by the Circuit Court rather than the Probate Court.

IV. THIS COURT IS A PROPER VENUE FOR THIS ACTION.

Defendants contend that this Court is not a proper venue for this action. Defendants rely on South Carolina Code §§ 15-7-20 and 15-53-20.

First, § 15-53-20 does not address venue; it merely reiterates the power of a court to issue declaratory judgments.

Defendants also rely on § 15-7-20(2), which addresses claims “against a public officer or persons specially appointed to execute his duties for an act done by him in virtue of his office.” *Id.* Such actions “must be tried in the county where the cause or some part thereof arose, **subject to the like power of the court to change the place of trial.**” *Id.* (*emphasis added*). Accordingly, the venue statute on which the Defendants rely is not mandatory, but it is subject to the power of the court to change the place of trial. Furthermore, the statute does not demand a dismissal of the case, as the Defendants request. It addresses a change of venue.

Third, Defendants did not request a change of venue, nor did they proffer any evidence to show that a Pickens County venue is any more convenient for the parties, witnesses, and counsel than that of Greenville County. Both Plaintiffs and one or more Defendants reside in Greenville County. Attorneys for the Plaintiffs and Clemson University reside and practice in Greenville County. Attorneys for the Life Trustees are from Columbia. This case requires the Court to determine the constitutionality of the Act of Acceptance and the constitutionality of the service of the Life Trustees. There will probably be few testifying witnesses. Plaintiffs respectfully suggest

that Greenville County is far more convenient venue. Accordingly, venue is appropriate in Greenville County.

V. THE COMPLAINT STATES FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

Finally, Defendants contend that this Complaint fails to state facts sufficient to constitute a cause of action, in violation of SCRCP 12(b)(6). This action alleges that the Act of Acceptance is unconstitutional and that the Defendants have been overseeing the expenditure of more than \$100 million a year in taxpayer funds, in violation of the South Carolina Constitution. As demonstrated above, these allegations of unconstitutional conduct and an unconstitutional Act of the General Assembly state facts sufficient to constitute a cause of action for declaratory judgment for the constitutional violation. Rule 12(b)(6). As stated above, they state claims of great public importance.

Defendants allege, without evidence, and contrary to their posture under Rule 12(b)(6), that the Life Trustees have agreed among themselves to refrain from service past age 75. First, Plaintiffs object to this factual assertion, because it is not within the four corners of the complaint, and it is not admissible.

The ruling on a Rule 12(b)(6), SCRCP, motion to dismiss must be based solely upon the allegations set forth in the complaint. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999); *Washington v. Lexington County Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct.App.1999). A 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.

Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

Second, even if Defendants were able, at the appropriate time, to present such evidence, no private agreement can modify or change the effect of an Act of the General Assembly. “Special

contract is invalid and unenforceable, as being contrary to the rules and regulations legally adopted by the Public Service Commission.” *Miller v. Central Carolina Tel. Co.*, 194 S.C. 327, 8 S.E.2d 355, 359 (1940). *See also, Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 639 S.E.2d 460 n. 1 (2006) (agreement between employee and employer was void, when it violated the statute). Accordingly, a private agreement has no effect on the question of whether the Act of Acceptance violates the Constitution.

Third, Defendants suggest that in the 1868 Constitution, there was also a prohibition of officers serving for life. Defendants did not cite a specific Article or Section. Section 32 of the Constitution of 1868 states: “no office shall be created the appointment to which shall be for a longer time than good behavior.”

Furthermore, case law from 100 year ago says the Constitution of 1895 change this rule: “Prior to the adoption of the Constitution of 1895, offices in this state might be held during good behavior. The purpose of section 11, art. 1, was to change this rule, and make the term a limited one so as to make office holders more amenable to the elective or appointive power.” *State v. Bowden*, 92 S.C. 393, 75 S.E. 866, 872 (1912) (Sease, Circuit Judge, concurring and attaching the original opinion) (emphasis added). Accordingly, although the Act of Acceptance did not violate the Constitution of 1868, it violates the Constitution of 1895.

WHEREFORE, Plaintiffs pray the Court to deny the Motions to Dismiss, and to grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

/S/ James G. Carpenter
S.C. Bar No. 1136
819 East North Street

Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

October 24, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-03178

**PLAINTIFFS' MOTION FOR
SUBSTITUTION OF PARTY
PLAINTIFF
SCRCP 25(a)**

NOW COME the Plaintiffs, by their undersigned attorney, and pursuant to SCRCP 25(a), move the Court for substitution of party plaintiff. In support of the motion, plaintiffs would show the Court the following:

Plaintiffs filed suit in this action July 1, 2020. On October 27, 2020, plaintiff Edward D. Sloan, Jr. died. Plaintiffs move the Court to substitute his son, John Sloan, as plaintiff, along with NOLAS Trading Company, Inc. John Sloan is a citizen, resident, taxpayer, and registered elector, of Greenville County, South Carolina. He is familiar with the allegations and history of this case.

Plaintiffs have twice requested the consent of counsel for the Defendants, and they have not responded.

WHEREFORE, Plaintiffs pray the Court to grant the Motion for substitution of party plaintiff.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

/S/ James G. Carpenter
James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

January 16, 2021

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

**DEFENDANT CLEMSON UNIVERSITY’S
MOTION FOR PROTECTIVE ORDER
AND STAY OF DISCOVERY**

PLEASE TAKE NOTICE that, pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, Defendant, Clemson University (“Clemson University”), hereby moves the Court for an Order protecting Clemson University from any obligation to respond to Plaintiffs’ First Set of Interrogatories and First Set of Requests for Production pending resolution of its Motion to Dismiss.

RELEVANT BACKGROUND

Plaintiffs Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc. (“Plaintiffs”) initially filed a petition for original jurisdiction and a complaint with the Supreme Court of South Carolina on March 12, 2020. Plaintiffs’ complaint challenges the constitutionality of the Successor Trustee position on the board of Clemson University. The South Carolina Supreme Court declined to accept the petition via order dated June 26, 2020. Plaintiffs then re-filed their Complaint in the Court of Common Pleas for Greenville County, South Carolina on July 1, 2020.

After obtaining an extension of time to answer, Clemson University and Defendants 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 (collectively, “Defendants”) each filed motions to dismiss on August 26, 2020. Defendants’ motions to dismiss detailed five independently sufficient grounds for the Court to dismiss the action: (1) Plaintiff have no standing to bring this action; (2) Plaintiffs have failed to establish the existence of a justiciable controversy; (3) the Pickens County Probate Court has exclusive jurisdiction to resolve the matters alleged in Plaintiffs’ Complaint; (4) Greenville County is an improper venue for this lawsuit; and (5) Plaintiffs fail to state facts sufficient to constitute a cause of action.²

The motions to dismiss were set for a hearing on October 28, 2020. Plaintiff Edward D. Sloan, Jr., however, passed away on October 27, 2020. As a result, Plaintiffs’ counsel requested that the hearings be continued, to which Defendants’ counsel consented. The hearings were continued as a result via Form 4 Order. The motions to dismiss are still pending and awaiting a hearing.

On January 16, 2021, Plaintiffs moved to substitute Plaintiff Edward D. Sloan, Jr.’s son, John Sloan, as plaintiff. That motion is also pending and awaiting a hearing.

On June 3, 2021, despite the pending motions, Plaintiffs served their First Interrogatories and First Requests for Production to Defendants (hereinafter “Plaintiffs’ Discovery Requests”) via U.S. Mail. See Plaintiffs’ Discovery Requests attached hereto as **Exhibit A**.

¹ The Successor Trustees are incorrectly identified as Clemson University’s “Life Trustees” in the Summons and Complaint. Regardless, the current Successor Trustees have all agreed they will not serve beyond the age of seventy-five.

² Clemson University incorporates its arguments raised in its motion by reference herein.

LEGAL STANDARD

“Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Under Rule 26(d), SCRCP, the Court also has broad discretion to alter the sequence of discovery “for the convenience of the parties. . . and in the interests of justice.” Rule 26(d), SCRCP. Furthermore, Rule 26(c) allows a party opposing discovery to seek a protective order to prevent “annoyance, embarrassment, oppression, or undue burden by expense. . . .” *Id.* Moreover, for good cause shown, a court “may make any order which justice requires,” including “that the discovery [at issue] not be had.” *Rhinehart*, 467 U.S. at 26 n.7.

ARGUMENT

Plaintiffs’ Discovery Requests are untimely. Clemson University should not be subjected to the burden of responding to discovery when Plaintiffs’ Complaint is subject to dismissal on the grounds of Plaintiffs’ lack of standing, improper venue, and failure to state a claim. Discovery should be stayed in an effort to promote judicial efficiency and prevent unnecessary waste of resources of the Court. The Court should enter a protective order relieving Clemson University from the obligation of responding to Plaintiffs’ Discovery Requests until the pending motions are resolved.

Courts routinely stay discovery pending determination of a motion to dismiss. *See, e.g., Chaudry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) (affirming stay pending resolution of Rule 12(b)(6) motion); *Cobin v. United States*, No. 6:04-cv-2455-HFF-BHH, 2005 WL 2200550, at *6 (D.S.C. June 22, 2005) (granting defendant's motion to stay discovery pending resolution of its motion to dismiss); *see also Sears v. Price*, No. 5:11-CT-3208-FL, 2012 WL 910016, at *3 (E.D.N.C. Mar. 16, 2012) (same).

Requiring Clemson University to participate in discovery before its motion to dismiss is resolved would be inefficient and would impose undue burden and expense on it. As the Supreme Court has recognized, standing is a preliminary issue that must be addressed prior to reaching the merits. *See ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 194-95, 669 S.E.2d 337, 339 (2008) (“We are obligated before reaching the merits of the rezoning question to determine whether ATC has standing to press its complaint. We conclude ATC does not have standing and that ends our inquiry.”); *see also Renois v. WVMF Funding, LLC*, No. 20CV09281 (LTS) (DF), 2021 WL 1721818, at *1 (S.D.N.Y. Apr. 30, 2021) (noting that since the defendant's motion to dismiss implicated standing and could result in dismissal of the entire action, a stay of discovery pending resolution of the motion was appropriate). Likewise, as the District of South Carolina has recognized, venue is also a threshold issue that should be addressed prior to the merits. *See, e.g., Sawgrass Sys. Inc. v. BASF Corp.*, No. 2:98-3574-11, 1999 WL 358682, at *1 (D.S.C. Mar. 3, 1999) (“As a general rule, discovery on the merits of an action should not occur until after issues of jurisdiction and venue have been decided.”); *see also Tradex Glob. Master Fund SPC Ltd. v. Palm Beach Cap. Mgmt, LLC*, No. 09-21622-CIV-MORENO, 2009 WL 10664410, at *1 (S.D. Fla. Nov. 24, 2009) (“The venue issue is a threshhold [sic] legal issue that is case-dispositive. It is appropriate to stay discovery pending resolution of a motion to dismiss where such an issue is raised.”).

Therefore, in light of Clemson University’s pending motion to dismiss, Clemson University should not be subjected to the burden of engaging in merits-based discovery when standing and venue are being challenged. Engaging in merits-based discovery prior to a decision on that motion would be wasteful and inefficient and would impose an undue burden on Clemson University. A stay of discovery pending resolution of the pending motions would not significantly delay this litigation and Plaintiffs would suffer no prejudice as a result. Lastly, the motions to dismiss should

properly dispose of the actions in its entirety and discovery is neither necessary nor relevant to deciding the motions to dismiss. Therefore, the entry of a protective order and order to stay will promote “the just, speedy, and inexpensive determination” of this action. *See* Rule 1, SCRPC.

CONCLUSION

For the foregoing reasons, and pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, Clemson University respectfully requests that the Court enter an Order staying discovery and protecting Clemson University from the burden of, and any obligation to, respond to Plaintiffs’ First Set of Interrogatories and First Set of Requests for Production while the Defendants’ Rule 12(b) motions are pending.

Counsel for Clemson University attempted to consult with Counsel for Plaintiffs prior to filing this Motion, in a good-faith attempt to resolve this dispute, but was unable to resolve the issue.

HAYNSWORTH SINKLER BOYD, P.A.

s/ Jonathan D. Klett

Boyd B. Nicholson, Jr. (SC Bar No. 65387)

Jonathan D. Klett (SC Bar No. 103208)

Haynsworth Sinkler Boyd, P.A.

P. O. Box 2048

Greenville, SC 29602

Phone: (864) 240-3200

Fax: (864) 240-3300

nnicholson@hsblawfirm.com

jklett@hsblawfirm.com

*Attorneys for Defendant
Clemson University*

June 30, 2021
Greenville, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-03178

**PLAINTIFFS' FIRST
INTERROGATORIES**

SCRCP 33

NOW COME the Plaintiffs, by their undersigned attorney and submit these Interrogatories to the Defendants, pursuant to S.C.R.Civ.P. 33.

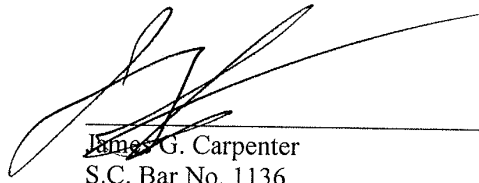
These Interrogatories are addressed to you as a *party* to this action, and your answer must be based on all information known to *you, your attorney, or any other representative*. These requests are to be regarded as *continuing*, and you are requested to provide by way of supplementation, such additional information as may hereafter be retained by you or by any person on your behalf, which will augment or otherwise modify any answer now given. Such supplementary answers are to be given within ten days of the receipt of such information but not later than the time of trial. The answers to these Interrogatories shall be produced at the office of the undersigned attorney within 30 days of service of these requests.

INTERROGATORIES

1. Give the names and addresses of persons known to the Defendant or counsel to have knowledge concerning the facts of the case and indicate whether written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of the Defendant or counsel that relate to any claim, or defense in the case.
3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.
4. List the names and addresses of any expert witnesses whom the Defendant or counsel propose to use as a witness at the trial of the case.

5. For each person known to the Defendant or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiff of the important facts known to or observed by such witnesses, and provide a copy of any written or recorded statements taken from such witnesses.
6. For each expert witness whom the Defendant or counsel proposes to use as a witness at the trial of the case, state:
 - a. the subject matter on which the expert is expected to testify;
 - b. the substance of the facts and opinions to which the expert is expected to testify; and,
 - c. a summary of the grounds for each opinion.
7. If the Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and complaint reflecting the correct information.
8. State the County of residence of each Defendant.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

June 3, 2021

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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

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,
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2020-CP-23-03178

**PLAINTIFFS' FIRST
REQUESTS FOR PRODUCTION**

SCRCP 34

NOW COME the Plaintiffs, by their undersigned attorney and submit these Requests for Production to the Defendants, pursuant to S.C.R.Civ.P. 34.

These Requests for Production are addressed to you as a *party* to this action, and your answer must be based on all information known to *you, your attorney, or any other representative*. These requests are to be regarded as *continuing*, and you are requested to provide by way of supplementation, such additional information as may hereafter be retained by you or by any person on your behalf, which will augment or otherwise modify any answer now given. Such supplementary answers are to be given within ten days of the receipt of such information but not later than the time of trial. The answers to these Interrogatories shall be produced at the office of the undersigned attorney within 30 days of service of these requests.

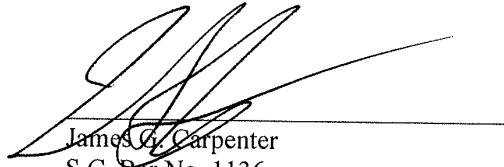
REQUESTS FOR PRODUCTION

1. Produce any written or recorded statements that have been taken from the witnesses and indicate who has possession of such statements.
2. Produce all photographs, plats, sketches, or other prepared documents in possession of the Defendant or counsel that relate to any claim, or defense in the case.
3. Produce the CV of any expert witnesses whom the Defendant or counsel propose to use as a witness at the trial of the case.
4. Produce any agreement among the Life Trustees or Successor Trustees relating or referring to their voluntarily termination of service.
5. Produce any communication from any Life Trustee or Successor Trustee, to the Board of Trustees or any other Trustee, dated from 1990 to the present, relating or referring to any

Life Trustee or Successor Trustee's voluntarily termination of service.

6. Produce a copy of any communication by or on behalf of the Board of Trustees, the Life Trustees or Successor Trustees to any State legislator addressing the length of the terms of service of the Life Trustees or Successor Trustees, and any response received from any State legislator.
7. Produce a copy of any communication between or among the Life Trustees or Successor Trustees addressing the length of the terms of service of the Life Trustees or Successor Trustees.
8. Produce a copy of any communication by or on behalf of the Board of Trustees, the Life Trustees or Successor Trustees to the Attorney General addressing the length of the terms of service of the Life Trustees or Successor Trustees, and any response received.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

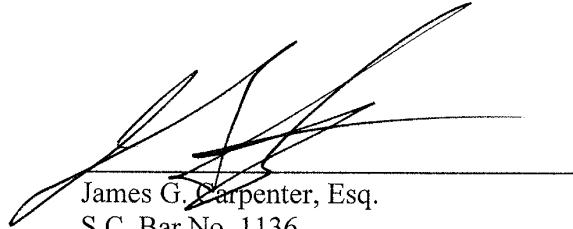
June 3, 2021

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing Plaintiffs' First Interrogatories and Plaintiffs' First Requests for Production upon counsel for the Defendants by first class mail, postage prepaid, this June 3, 2021, addressed as follows:

Boyd B. Nicholson, Jr.
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29602

C. Mitchell Brown
Blake Williams
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia, SC 29211



James G. Carpenter, Esq.
S.C. Bar No. 1136
819 East North Street
Greenville, South Carolina 29601
(864) 235-1269 Tel.
(864) 331-3083 Fax.



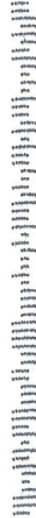
THE CARPENTER LAW FIRM, P.C.
819 EAST NORTH STREET GREENVILLE, SC 29601

GREENVILLE SC 29601
4 JUN 2021 PM 4 L



Boyd B. Nicholson, Jr.
Haysworth Sinkler Boyd, P.A.
PO Box 2048
Greenville, SC 29602

29602-204848



HSB Received via USPS mail on 6/8/2021 (PBF)
C/M# 36343-0059

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Edward D. Sloan, Jr., individually, and on
behalf of all others similarly situated, and
NOLAS Trading Co., Inc.,

Plaintiffs,

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,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2020-CP-23-03178

**DEFENDANTS SUCCESSOR TRUSTEES’
MOTION FOR PROTECTIVE ORDER
AND STAY OF DISCOVERY**

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, Defendants 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” and collectively with Clemson University, “Defendants”)¹, hereby move the Court for an Order protecting the Successor Trustees from any obligation to respond to Plaintiffs’ First Set of Interrogatories and First Set of Requests for Production pending resolution of the their Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6), SCRCF for lack of standing, improper venue, and for failure to state a claim.

¹ The Successor Trustees are incorrectly identified as Clemson University’s “life trustees” in the Summons and Complaint. Regardless, the current Successor Trustees have all agreed they will not serve beyond the age 75.

RELEVANT FACTS

Plaintiffs Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc. ("Plaintiffs") initially filed a petition for original jurisdiction and a complaint with the Supreme Court of South Carolina on March 12, 2020. Plaintiffs' complaint challenges the constitutionality of the Successor Trustee position on the board of Clemson University. An equally divided Supreme Court declined to accept the Petition via order dated June 26, 2020. Plaintiffs then re-filed their Complaint in the Court of Common Pleas for Greenville County, South Carolina on July 1, 2020.

After obtaining an extension of time to answer, the Successor Trustees and Clemson University each timely filed motions to dismiss on August 26, 2020. Defendants' motions to dismiss detailed five independently sufficient grounds for the Court to dismiss this action: (1) Plaintiffs have no standing to bring this action; (2) Plaintiffs have failed to establish the existence of a justiciable controversy; (3) the Pickens County Probate Court has the exclusive jurisdiction to resolve the matters alleged in Plaintiffs' complaint; (4) Greenville County is an improper venue for this lawsuit; and (5) Plaintiffs fail to state facts sufficient to constitute a cause of action.²

The motions to dismiss were set for a hearing on October 28, 2020. Plaintiff Sloan, however, passed away on October 27, 2020. As a result, Plaintiffs' counsel requested that the hearings be continued, to which defense counsel consented. The hearings were continued as a result via Form 4 Order. The motions to dismiss are still pending and awaiting a hearing.

On January 16, 2021, Plaintiffs moved to substitute Plaintiff Sloan's son, John Sloan, as plaintiff. That motion is also pending and awaiting a hearing.

² The Successor Trustees incorporate the arguments raised in their motion by reference herein.

On May 24, 2021, despite the pending motions, Plaintiffs served their First Interrogatories and First Requests for Production to Defendants (See Plaintiffs' Interrogs. & Requests for Prod., Exhibit A.)

ARGUMENT

"Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).³ Under Rule 26(d), SCRCF, the Court also has broad discretion to alter the sequence of discovery "for the convenience of the parties. . . and in the interests of justice." *Id.* Rule 26(c) further allows a party opposing discovery to seek a protective order to prevent "annoyance, embarrassment, oppression, or undue burden by expense." *Id.* Moreover, for good cause shown, a court "may make any order which justice requires," including "that the discovery [at issue] not be had." *Id.*

The Successor Trustees should not be subjected to the burden of responding to discovery when challenges to Plaintiffs' standing to sue and venue are pending. Here, it would promote judicial efficiency and prevent unnecessary waste of resources of the Court and the parties if discovery is stayed pending resolution of the motions to dismiss. Moreover, because the Successor Trustees have been served with Plaintiffs' interrogatories and requests for production and, in the interests of efficiency and economy, the Court should enter a protective order relieving them of any obligation to respond.

³ Because "[t]he language of Rule 26(c), SCRCF, mirrors that of federal Rule 26(c)," South Carolina courts often look to federal precedent interpreting Rule 26(c) as "persuasive authority" in the absence of state precedent. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 n.10, 674 S.E.2d 154, 162 n.10 (2009).

Courts routinely stay discovery pending determination of a motion to dismiss. *See, e.g., Chaudry v. Mobil Oil Corp.*, 186 F.3d 502, 505 (4th Cir. 1999) (upholding district court's decision to stay discovery pending resolution of a defendant's Rule 12(b)(6) motion to dismiss); *Cobin v. United States*, No. 6:04-cv-2455, 2005 WL 2200550, at *6 (D.S.C. June 22, 2005) (granting defendant's motion to stay discovery pending resolution of its motion to dismiss); *see also Sears v. Price*, No. 5:11-CT-3208, 2012 WL 910016, at *3 (E.D.N.C. Mar. 16, 2012) (same).

Requiring the Successor Trustees to participate in discovery before their motion to dismiss is resolved would be inefficient and would impose undue burden and expense on them. As the Supreme Court has recognized, standing is a preliminary issue that must be addressed prior to reaching the merits. *See ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 194-95, 669 S.E.2d 337, 339 (2008) ("We are obligated before reaching the merits of the rezoning question to determine whether ATC has standing to press its complaint. We conclude ATC does not have standing and that ends our inquiry."); *see also Renois v. WVMF Funding, LLC*, No. 20CV09281 (LTS) (DF), 2021 WL 1721818, at *1 (S.D.N.Y. Apr. 30, 2021) (noting that since the defendant's motion to dismiss implicated standing and could result in dismissal of the entire action, a stay of discovery pending resolution of the motion was appropriate). Likewise, as the District of South Carolina has recognized, venue is also a threshold issue that should be addressed prior to the merits. *See, e.g., Sawgrass Sys. Inc. v. BASF Corp.*, No. 2, 1999 WL 358682, at *1 (D.S.C. Mar. 3, 1999) ("As a general rule, discovery on the merits of an action should not occur until after issues of jurisdiction and venue have been decided."); *see also Tradex Glob. Master Fund SPC Ltd. v. Palm Beach Cap. Mgmt., LLC*, No. 09-21622-CIV, 2009 WL 10664410, at *1 (S.D. Fla. Nov. 24, 2009) ("The venue issue is a threshhold [sic] legal issue that is case-dispositive. It is appropriate to stay discovery pending resolution of a motion to dismiss where such an issue is raised.").

Therefore, in light of the Successor Trustees' pending motion to dismiss, the Successor Trustees should not be subjected to the burden of engaging in merits-based discovery when standing and venue are being challenged. Engaging in merits-based discovery prior to a decision on that motion would be wasteful and inefficient and would impose an undue burden on the Successor Trustees. A stay of discovery pending resolution of the pending motions would not significantly delay this litigation and Plaintiffs would suffer no prejudice as a result. Lastly, the motions to dismiss should properly dispose of the action in its entirety and discovery is neither necessary nor relevant to deciding the motions to dismiss. Therefore, the entry of a protective order and order to stay will promote "the just, speedy, and inexpensive determination" of this action. *See* Rule 1, SCRPC.

CONCLUSION

For the foregoing reasons, and pursuant to Rule 26(c)(4) of the South Carolina Rules of Civil Procedure, the Successor Trustees respectfully request that the Court enter an Order staying discovery and protecting the Successor Trustees from the burden of, and any obligation to, respond to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production while the Successor Trustees' and Clemson University's 12(b) motions are pending.

Counsel for the Successor Trustees attempted to consult with counsel for Plaintiffs prior to filing this Motion in a good-faith attempt to resolve this dispute, but was unable to resolve the issue.

Signature on Following Page

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

C. Mitchell Brown

SC Bar No. 12872

E-Mail: mitch.brown@nelsonmullins.com

Blake T. Williams

SC Bar No. 100794

E-Mail: blake.williams@nelsonmullins.com

Thomas T. Hydrick

SC Bar No. 103198

E-Mail: thomas.hydrick@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

(803) 799-2000

Attorneys for Respondents E. Smyth McKissick III, David E. Dukes, Cheri M. Phyfer, Mark S. Richardson, William "Bill" C. Smith, Jr., Kim Wilkerson, and David H. Wilkins

Columbia, South Carolina

June 22, 2021

State of South Carolina, County of Oconee.

Whereas, I, Thos. G. Clemson, of the county and State aforesaid, did, on the 14th day of August, 1883, execute my last will and testament wherein I sought to provide for the establishment of a scientific institution upon the Fort Hill place, and therein provided what sciences should be taught in said institution: and, whereas, I am now satisfied that my intention and purpose therein may be misunderstood as intending that no other studies or sciences should be taught in said institution than those mentioned in said will, which was not my purpose or intention. Now, desiring to make my purpose plain as well as to make some other changes in the distribution of my property, then made in said will, I do now make, publish and declare this instrument as and for my last will and testament, hereby revoking all previous wills and codicils by me made, especially the will above referred to, dated August 14th, 1883.

Feeling a great sympathy for the farmers of this State, and the difficulties with which they have to contend in their efforts to establish the business of agriculture upon a prosperous basis, and believing that there can be no permanent improvement in agriculture without a knowledge of those sciences which pertain particularly thereto, I have determined to devote the bulk of my property to the establishment of an agricultural college upon Fort Hill place.

This institution, I desire, to be under the control and management of a board of trustees, a part of whom are hereinafter appointed, and to be modeled after the Agricultural College of Mississippi as far as practicable.

My purpose is to establish an agricultural college which will afford useful information to the farmers and mechanics, therefore it should afford thorough instruction in agriculture and natural sciences connected therewith - it should combine, if practicable, physical and intellectual education, and should be a high seminary of learning in which the graduate of the common schools can commence, pursue and finish the course of studies terminating in thorough, theoretic and practical instruction in those sciences and arts which bear directly upon agriculture, but I desire to state plainly that I wish the trustees of said institution to have full authority and power to regulate all matters pertaining to said institution - to fix the course of studies, to make rules for the government of the same, and to change them, as in their judgment, experience may prove necessary, but to always bear in mind that the benefits herein sought to be bestowed are intended to benefit agricultural and mechanical industries. I trust that I do not exaggerate the importance of such an institution for developing the material resources of the State by affording to its youth the advantages of scientific culture, and that I do not overrate the intelligence of the legislature of South Carolina, ever distinguished for liberality, in assuming that such appropriations will be made as will be necessary to supplement the fund resulting from the bequest herein made.

Item 1. I therefore give and devise to my executor, hereinafter named, the aforesaid Fort Hill place, where I now reside, formerly the home of my father-in-law, John C. Calhoun, consisting of eight hundred and fourteen acres, more or less, in trust, whenever the State of South Carolina may accept said property as a donation from me, for the purpose of thereupon founding an agricultural college, in accordance with the views I have hereinbefore expressed, (of which Chief Justice of South Carolina shall be the judge), then my executor shall execute a deed of the said property to the said State, and turnover to the same all property hereinafter given as an endowment of said institution,

to be held as such by the said State so long as it, in good faith, devotes said property to the purposes of the donation; provided, however, that this acceptance by the State shall be signified, and a practical carrying-out to be commenced within three year from the date of the probate of this my will. During this term of three years, or as much thereof as may elapse before the acceptance or refusal of this donation, my executor shall invest the net produce of the land and other property; such invested fund awaiting the action of the legislature, and to form a part of the endowment of said institution if accepted, or to form a part of the endowment of the college or school hereinafter provided for, should the donation not be accepted by the State.

Item 2. The following named gentlemen, seven in number, shall be seven of the Board of Trustees, to wit: R.W. Simpson, D.K. Norris, M.L. Donaldson, R.E. Bowen, B.R. Tillman, J.E. Wannamaker and J.E. Bradley, and the State, if it accepts the donation, 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. 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. But the Legislature may provide, as it sees proper, for the appointment or election of the other six trustees, if it accepts the donation. And I do hereby request the seven trustees above named, or such of them as may be living, or may be willing to act, to meet as soon after my death as practicable, and organize, and at once to fill all vacancies that may have occurred, and to exert themselves to effectuate my purposes as herein set forth, and I hereby instruct my executor to notify them of their appointment herein as soon after my death as practicable. The name of this institution shall be the "Clemson Agricultural College of South Carolina."

Item 3. Should the three years expire without the State accepting the donation, in manner as hereinbefore provided, and if accepted, at the expiration of the three years from my death no practical beginning has been made to carry into effect the purposes of the donation, or, if before the three years expire the Legislature shall refuse to accept said donation, then the donation to the State is hereby revoked, and my executor shall execute his trust by conveying the said Fort Hill place, and the accumulated fund arising therefrom, together with all other property, real or personal, hereinafter disposed of and intended to be given to the said agricultural college, as an endowment, to the seven trustees named above, or their successors, who shall erect upon the Fort Hill place such a school or college for the youth of South Carolina as, in their judgment, will be for their best interests; provided, that said school or college shall be for the benefit of the agricultural and mechanical classes principally, and shall be free of costs to the pupils, as far as the means derived from the endowment hereinafter provide and the use of the land may permit. The trustees shall securely invest the funds hereinafter provided and given to said institution and hold them as a perpetual endowment, and shall only use the interest derived therefrom and the income of the land to support and maintain said school or college, except that the accumulated fund derived from the land, and the interest derived from the fund hereinafter given said institution, from the time of my death, and as much as five thousand dollars of the principal fund, may be used if, in the judgment of trustees, it may be necessary to erect suitable buildings for said school or college. The name of this institution shall be the "Clemson Scientific School" or "College."

Item 4. It is my desire that the dwelling house on Fort Hill shall never be torn down or altered, but shall be kept in repair, with all the articles of furniture and vesture which I hereinafter give for that purpose, and shall always be open for the inspection of visitors, but a part of the house may be used by such of the professors as the trustees may direct.

Item 5. I give and bequeath to my granddaughter, Floride Isabella Lee, all of my silver plate and table silver, also all of the family pictures, except the large picture of John C. Calhoun, now hanging in my sitting room, also any one article in my present residence which she may select as a memento of me, also my decorations, and also the sum of fifteen thousand dollars, (\$15,000), to be paid to her on the day of her marriage, or when she becomes twenty-one years of age, if unmarried, provided, that if my said granddaughter should die unmarried, and before she is twenty-one years of age, then all of said property mentioned in this item shall revert to and become a part of the the residue of my estate, and become subject to the trusts and conditions of Items 1, 2 and 3 of this my will.

Item 6. I give and bequeath to my faithful housekeeper, Mrs. Jane Prince, one year's provisions for her and her daughter, and furniture and bedding, suitable to her condition, sufficient to furnish two rooms, and the sum of three thousand dollars, (\$3,000), to be paid to her at the expiration of one year after the probate of this my will, and I also desire my executor to permit her to live at Fort Hill until he disposes of the property as herein directed.

Item 7. I give and bequeath to Hester Prince, the daughter of my faithful housekeeper, as aforesaid, the sum of three thousand dollars, (\$3,000), to be paid to her, or such person as may be selected by her and appointed her guardian, at the expiration of one year from the probate of this my will.

Item 8. I give to my executor, James H. Rion, as a memento of my friendship, the antique intaglio Marcus Aurelius Antonius sealing which I habitually wear, and also such one of my pictures as he may select, if the same is not selected by myself.

Item 9. I give and bequeath to my executor, to be held by him subject to the trusts and conditions of Items 1, 2 and 3 of this my will, and for the purpose of adorning the Fort Hill residence as provided in Item 4 of this my will, all of my permanent furniture, relics and articles of vesture, pictures and paintings, including the large painting or picture of John C. Calhoun, now hanging in my sitting room, and not otherwise disposed of herein, and all my books.

Item 10. I direct my executor to sell, at public or private sale, as he may deem best, all the balance of my personal property upon my Fort Hill place, not herein disposed of, and to sell and convey all of my real estate lying and situate outside of the State of South Carolina, either at private or public sale, as he may deem best, and to hold the proceeds derived therefrom, together with proceeds of the personal property, herein directed to be sold, subject to the trusts and conditions of Items 1, 2 and 3 of this my will.

Item 11. All the residue and remainder of my property of every kind and description whatsoever, after paying off the legacies above provided for, together with the property which may revert to my estate, should it revert thereto, and the proceeds of all my real and personal property herein directed to be sold, and all accumulated funds derived from the Fort Hill place and interest on my

investments, I give and bequeath to my executor, to be held by him subject to the trusts and conditions of Items 1, 2 and 3 of this my will.

Item 12. I nominate, constitute and appoint my friend, James H. Rion, the executor of this my will.

In witness whereof I have hereunto subscribed my name and affixed my seal before the witnesses below subscribing, this the 6th day of November, A.D. , 1886.

Thos. G. Clemson, L.S.

The above written instrument was subscribed by the said Thos. G. Clemson in our presence and acknowledged by him, to each one of us, and he, at the same time, published and declared the same to be his last will and testament, and we, at his request, and in his presence, and in the presence of each other, have signed our names as witnesses hereto.

James
T.O.
E.L.C. Terrie.

Hunter
Jenkins

Codicil to Last Will and Testament of Thomas Green Clemson

State of South Carolina, County of Oconee.

I, Thos. G. Clemson, of Fort Hill, in the State and county aforesaid, do make this my codicil to my last will and testament, dated the 6th day of November, 1886, hereby confirming my said last will and testament, so far as the same is not inconsistent with this my codicil.

Item 1. I will and direct my executor to pay my debts and funeral expenses as soon after my death as practicable out of the proceeds of any part of my estate that is the most available.

Item 2. I hereby revoke the 12th item of my last will and testament as aforesaid, in which I appointed James H. Rion as executor of my will, he having recently departed this life, and I now do nominate and appoint my trusted friend, Richard W. Simpson, of Pendleton, South Carolina, my executor of my said last will and testament and of this my codicil thereto, and in my said last will and testament the name of James H. Rion, wherever it appears, shall be stricken out, and Richard W. Simpson shall be inserted in place thereof.

Item 3. I revoke the 8th item of my said last will and testament, in which I gave to James H. Rion my sealing ring and one of my pictures, which he may select, and I do now give and bequeath to R.W. Simpson my sealing ring, which I habitually wear, and such one of my pictures as he may select.

Item 4. I do hereby revoke item 6 of my said last will and testament, which contains a bequest to my faithful housekeeper, Mrs. Jane Prince, she having been otherwise provided for.

Item 5. It is my will and I do direct that neither the legacy to my granddaughter in the fifth item of my said last will and testament, or the legacy to Hester Prince in the seventh item of my said will, shall bear any interest until the same are due and payable, as provided in said items of my said will.

Item 6. I authorize my executor to purchase that portion of the original Fort Hill tract of land which set off to Gideon Lee, guardian of Floride Isabella Lee, and the same if so purchased shall become a part of the Fort Hill tract of land, and shall go with and be disposed of as I have in my said will disposed of the Fort Hill tract.

Item 7. I will and direct my executor to sell either at private or public sale, and for cash or upon a credit, both as he may think best, all real estate or which I may die seized and possessed, except the Fort Hill tract of land, whether the same be situated in the State of South Carolina or outside of it.

Item 8. Should the Chief Justice of South Carolina decline to decide when the State of South Carolina has or has not accepted the donation given to it in the first item of my said will, then I give to my executor the same power as I in the said first item of my will gave to the said Chief Justice, and his decision shall be final.

Item 9. I hereby authorize and direct my executor to employ such persons as he may deem necessary to take charge of the Fort Hill dwelling house and the articles therein donated, and to manage the farm and to pay the said persons such a sum of money for their service as he may deem right and proper.

Item 10. In view of the great responsibility and labor which my executor will encounter in managing the affairs of my estate, as directed in my said will, and in consideration of the great kindness he has shown to me, and of the assistance in taking care of my business when I had no other friend to help me, I will and bequeath that he, my said executor, shall have, take and receive, in addition to the usual commissions allowed by law to executors as commissions for receiving and paying out money, five percent of the appraised value of my entire estate, both real and personal.

Item 11. I desire to state here that my granddaughter, Floride Isabella Lee, has received the one-fourth part in value of the original Fort Hill tract of land, the part which her mother, under the will of Mrs. John C. Calhoun, was entitled to, the same having been appraised and set off to her by her commissioners appointed by Mrs. Clemson, and by Gideon Lee, her said guardian, and she has also received through Gideon Lee, her father and said guardian, her mother's share of the estate of my son, John C. Clemson. Notwithstanding this fact, from a letter received by me sometime ago from Gideon Lee, I am led to believe that as guardian of my said granddaughter, he will make claim of my estate a large balance alleged by him to be due my said granddaughter by me. I therefore desire and direct my executors to examine closely into such a claim if so made, and if he, my said executor, is satisfied that the claim so made is justly due by me, to my said granddaughter to pay the same; but on the other hand, if he is not satisfied that the said claim or claims are justly due by me, then he shall not pay it or them unless compelled by law to do so, in which case I hereby revoke so much of the bequest of fifteen thousand dollars given in the fifth

item of my said last will and testament to my said granddaughter as will be equal to the amount which my said granddaughter may recover against my estate.

Item 12. The desire to establish such a school or college as I have provided for in my said last will and testament, has existed with me for many years past, and many years ago, I determined to devote the bulk of my property to the establishment of an agricultural school or college. To accomplish this purpose is now the one great desire of my life. I have not been unmindful of the interest of my said granddaughter, nor have I acted in this matter through any prejudice to anyone. It may be possible that the disposition of my property as herein made may not give satisfaction to my said granddaughter or to Gideon Lee, her father and guardian, but I trust that neither the one nor the other, or any other person lawfully authorized by law to represent my said granddaughter, will ever attempt to frustrate or defeat the purposes which I have herein sought to accomplish, but will respect the settled desire of my life as contained in this my will, but should my desire and request as herein expressed be ignored, and should Gideon Lee, as guardian of said granddaughter, or should my said granddaughter herself, or any other person lawfully authorized by law to represent her, or any person as heir, legatee or distributee of my said granddaughter in their right as such, attempt to invalidate it or attempt to change or alter it in any particular whatever, then it is my will and I do direct that such attempt or attempts to contest, alter, change or invalidate my said last will and testament, or codicil hereof, shall as soon as commenced work an absolute revocation of my entire and of all of my bequests to my said granddaughter, Floride Isabella Lee, as made in the fifth item of my said last will and testament, and then and in that case, my said granddaughter, Floride Isabella Lee, shall receive no part of my estate whatever, and the money and articles mentioned in the fifth item of my said will shall go to my executor and be held by him subject to the trusts and conditions contained in Items 1, 2 and 3 of my said last will and testament; provided, that my executor shall sell in manner as to him may seem proper any of the articles mentioned in the said fifth item of my said last will and testament, except the family pictures. These shall be held by my executor subject to the trusts and conditions of Items 1, 2 and 3 of my said last will, and kept with the other articles mentioned in the eighth item of my said last will and testament, to adorn the Fort Hill house.

Item 13. It is my will and I direct that my executor shall not be held liable for, or responsible for any losses to my estate by reason of my errors of judgment or mistakes, as I am fully aware of the varied and responsible duties I herein have required of him. This codicil is written in part on the fourth page of my said last will and testament to which this sheet is attached, and which is dated November 6th, 1886.

Item 14. I authorize and empower my executor to expend such sums of money as he may deem necessary to keep the Fort Hill dwelling house and premises in repair, and the Fort Hill farming good condition.

In witness whereof I have hereunto subscribed my name and affixed my seal before the witnesses below subscribing, this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-seven (1887).

Thos. G. Clemson (L.S.)

The above written instrument was subscribed by the said Thos. G. Clemson in our presence and acknowledged by him to each one of us and he at the same time published and declared the same to be his codicil to his last will and testament, and we, at his request and in his presence and in the presence of each other, have signed our names as witnesses hereto.

R. M. Jenkins
C. W. Young
J. H. Mounce

The foregoing paper bears this endorsement:

"This will was admitted to probate in common form on the 20th day of April, A.D., 1888, and recorded in 'Will Book, ' pages 234-244."

Richard
"Judge of Probate"

Lewis,

ACT OF ACCEPTANCE
STATUTES OF SOUTH CAROLINA VOLUME XX.
PAGE 277.

AN ACT TO ACCEPT THE DEVISE AND BEQUEST OF THOMAS G. CLEMSON, AND TO ESTABLISH AN AGRICULTURAL COLLEGE IN CONNECTION THEREWITH.

WHEREAS, the Honorable Thomas G. Clemson departed this life on the 6th day of April, A.D. 1888, leaving of force his last will and testament, which was duly admitted to Probate on the 20th day of April, 1888, in the office of The judge of Probate for the county of Oconee, in the State of South Carolina, wherein he devised and decreed to his executor, Richard W. Simpson, of Pendleton, South Carolina a tract of land situate, on Seneca River, in Oconee County, in said State, containing eight hundred and fourteen acres, more or less, known as the Fort Hill plantation, as well as all his other property, both real and personal, except certain legacies in the said will mentioned and provided for, all in trust to convey to the State of South Carolina, when the said State shall accept the same for the purpose of establishing and maintaining an Agricultural and Mechanical College upon the aforesaid Fort Hill plantation upon the terms and conditions of the said will; therefore,

Section 1. BE IT ENACTED by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same: That the State of South Carolina hereby expressly declares that it accepts the devise and bequest of Thomas G. Clemson subject to the terms and conditions set forth in said last will and testament, and the Treasurer of the State be, and he is hereby authorized and empowered to receive and securely hold the said property, both real and personal, and to execute all the necessary papers and receipts therefore as soon as the said executor shall convey and transfer the said devise and bequest to the said State.

Section 2. That upon the execution of the deed and transfer of said property to the State by the said executor in accordance with the provisions of said will, an Agricultural and Mechanical College shall be, and the same is hereby, established in connection with the aforesaid devise and bequest, to be styled "The Clemson Agricultural College of South Carolina," and to be situated at Fort Hill, in Oconee County, on the plantation so devised, in which college shall be taught all branches of study pertaining to practical and scientific agriculture and other industries connected therewith, and such other studies are not inconsistent with the terms of the said will.

Section 3. That said college shall be under the management and control of a board of thirteen trustees, composed of the seven members nominated by said will and their successors and six members to be elected by the Legislature in Joint Assembly every fourth year after the first election; said board to elect one of their number to be president, and to elect a secretary and fix his salary. They shall organize the college and put it in operation as soon as practicable after passage of this Act; shall prescribe the courses of study, shall declare the professorships, elect the professors, of whom the number shall not exceed ten, and define their duties and fix their salaries, and make all the rules and regulations for the government of the college. They may employ such superintendent, head workmen, laborers for the farm, shops and grounds as may be necessary, and

fix their compensation. They shall charge each student a tuition fee of forty dollars per annum; PROVIDED, That said fee shall not be charged until the funds out of the said bequest shall be exhausted in accordance with the terms of the said will; PROVIDED, further, That indigent students shall not be required to pay said tuition fee.

Section 4. That the said Board of Trustees is hereby declared to be a body politic and corporate under the name and style of the Clemson Agricultural and Mechanical College of South Carolina. They shall have a corporate seal, which they may change at their discretion; and in their corporate name they may contract for, purchase and hold property, for the purpose of this Act, and may take any property given or conveyed by deed, devise or bequest to said college and hold the same for its use and benefit; PROVIDED, That the conditions of such gift or conveyance shall in no case be inconsistent with the purpose of this Act, and shall incur no obligations on the part of the State. They shall securely invest all funds and keep all property which may come into their possession, and may sell any of the personal property not subject to the trust and reinvest the same in such way as they may deem best for the interests of said college. They may sue and be sued, plead and be impleaded, in their corporate name, and may do all things necessary to carry out the provisions of this Act, and may make by-laws for this purpose if they deem it necessary.

Section 5. That it shall require a two-thirds vote of the Board of Trustees to authorize expenditure of any monies appropriated to the said college by the State or to authorize the sale or transfer or re-investment of any property or moneys arising from the sale of any property under the provisions of this Act.

Section 6. That for the purposes of erecting on said Fort Hill plantation, and of purchasing stock and implements therefore, and paying expenses, as herein provided, the sum of three thousand dollars be and the same is hereby, appropriated, if so much be necessary, to be paid by the State Treasurer upon the order of the Board of Trustees of said college, signed by their president and secretary: PROVIDED, That not more than fifteen hundred dollars thereof to be used in erecting buildings, fixtures or permanent improvements on said Fort Hill plantation pending litigation in respect to said property: AND PROVIDED FURTHER, That all personal property purchased with money appropriated by the State shall be taken and held by the Board of Trustees as property of the State of South Carolina, and it shall be the duty of said Board of Trustees to make to the Legislature an annual report of the college and of all farming operations and tests and experiments, and of all receipts and expenditures, with a statement of the condition of the property and funds of said college and of all receipts and expenditures of money appropriated by the State.

Section 7. That all Acts or parts of Acts inconsistent with this Act be, and the same are hereby, repealed.

Approved November the 27th, A.D. 1889.

Opinion of Chief Justice

Statutes of South Carolina, Volume XX, Pages 781 and 782.

On December 6, 1889, the Chief Justice of the Supreme Court of South Carolina handed down the following:

It having been referred to me as Chief Justice of this State, by R.W. Simpson, executor of the will of the deceased, late Thomas G. Clemson, under the provisions of said will, whether or not this State had accepted the devise and bequest therein, I have this to state:

Whereas , the General Assembly of this State, at its last session, passed an Act entitled "Act to Accept the Devise and Bequest of Thomas G. Clemson and to Establish an Agricultural College in Connection Therewith," in which it is expressly declared that the State accepts the said devise and bequest of Thomas G. Clemson, subject to the terms and conditions set forth in the last will and testament of the said Thomas G. Clemson, and, whereas, this Act was duly approved by the Governor of the State on the 27th of November, 1889.

Now it is my opinion that this concurrent action of the Legislature and Executive Department of 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.

It is further my opinion that the provisions of the Act, supra, constitute Acts in the direction of practically carrying out the terms conditions of said will, and within the time limited therein.

W.D. Simpson,
Chief Justice of South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Edward D. Sloan, Jr., individually, and on)
behalf of all others similarly situated, and)
NOLAS Trading Co., Inc.,)
Plaintiffs,)
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,)
Defendants.)

IN THE CIRCUIT COURT
CASE NO: 2020-CP-23-03178

**PLAINTIFFS' FIRST
INTERROGATORIES**

SCRCP 33

NOW COME the Plaintiffs, by their undersigned attorney and submit these Interrogatories to the Defendants, pursuant to S.C.R.Civ.P. 33.

These Interrogatories are addressed to you as a *party* to this action, and your answer must be based on all information known to *you, your attorney, or any other representative*. These requests are to be regarded as *continuing*, and you are requested to provide by way of supplementation, such additional information as may hereafter be retained by you or by any person on your behalf, which will augment or otherwise modify any answer now given. Such supplementary answers are to be given within ten days of the receipt of such information but not later than the time of trial. The answers to these Interrogatories shall be produced at the office of the undersigned attorney within 30 days of service of these requests.

INTERROGATORIES

1. Give the names and addresses of persons known to the Defendant or counsel to have knowledge concerning the facts of the case and indicate whether written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of the Defendant or counsel that relate to any claim, or defense in the case.
3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.
4. List the names and addresses of any expert witnesses whom the Defendant or counsel propose to use as a witness at the trial of the case.

5. For each person known to the Defendant or counsel to have knowledge concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiff of the important facts known to or observed by such witnesses, and provide a copy of any written or recorded statements taken from such witnesses.
6. For each expert witness whom the Defendant or counsel proposes to use as a witness at the trial of the case, state:
 - a. the subject matter on which the expert is expected to testify;
 - b. the substance of the facts and opinions to which the expert is expected to testify; and,
 - c. a summary of the grounds for each opinion.
7. If the Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and complaint reflecting the correct information.
8. State the County of residence of each Defendant.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

May 24, 2021

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

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

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,
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2020-CP-23-03178

**PLAINTIFFS’ FIRST
REQUESTS FOR PRODUCTION**

SCRCP 34

NOW COME the Plaintiffs, by their undersigned attorney and submit these Requests for Production to the Defendants, pursuant to S.C.R.Civ.P. 34.

These Requests for Production are addressed to you as a *party* to this action, and your answer must be based on all information known to *you, your attorney, or any other representative*. These requests are to be regarded as *continuing*, and you are requested to provide by way of supplementation, such additional information as may hereafter be retained by you or by any person on your behalf, which will augment or otherwise modify any answer now given. Such supplementary answers are to be given within ten days of the receipt of such information but not later than the time of trial. The answers to these Interrogatories shall be produced at the office of the undersigned attorney within 30 days of service of these requests.

REQUESTS FOR PRODUCTION

1. Produce any written or recorded statements that have been taken from the witnesses and indicate who has possession of such statements.
2. Produce all photographs, plats, sketches, or other prepared documents in possession of the Defendant or counsel that relate to any claim, or defense in the case.
3. Produce the CV of any expert witnesses whom the Defendant or counsel propose to use as a witness at the trial of the case.
4. Produce any agreement among the Life Trustees or Successor Trustees relating or referring to their voluntarily termination of service.
5. Produce any communication from any Life Trustee or Successor Trustee, to the Board of Trustees or any other Trustee, dated from 1990 to the present, relating or referring to any

Life Trustee or Successor Trustee's voluntarily termination of service.

6. Produce a copy of any communication by or on behalf of the Board of Trustees, the Life Trustees or Successor Trustees to any State legislator addressing the length of the terms of service of the Life Trustees or Successor Trustees, and any response received from any State legislator.
7. Produce a copy of any communication between or among the Life Trustees or Successor Trustees addressing the length of the terms of service of the Life Trustees or Successor Trustees.
8. Produce a copy of any communication by or on behalf of the Board of Trustees, the Life Trustees or Successor Trustees to the Attorney General addressing the length of the terms of service of the Life Trustees or Successor Trustees, and any response received.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiffs

May 24, 2021

STATE OF SOUTH CAROLINA) IN THE COURT PROBATE COURT
) Case No. 2021-GC-39-00046
COUNTY OF PICKENS)

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

Plaintiffs,

V.

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

Defendants.

B E F O R E:

The Honorable David K. Allison, Judge

A P P E A R A N C E S:

James G. Carpenter, Esq.
Attorney for the Plaintiffs

Boyd B. Nicholson, Jr., Esq.
Attorney for Clemson University

Blake T. Williams, Esq.
Attorney for Will Trustees

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
Case Called/The Court	4
Motion/Mr. Nicholson	4
Motion/Mr. Williams	12
Response/Mr. Carpenter	19
Reply/Mr. Nicholson	28
Reply/Mr. Williams	30
Response/Mr. Carpenter	31
Queries by The Court	33
Certificate Page	41

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID</u>
------------	--------------------	-------------	-------------

NO EXHIBITS ENTERED

1 THE COURT: This is the matter of Clemson University
2 Trust, is what our file says, 2021-GC-39-00046. These are
3 motions to dismiss from the Defendants in the action, and
4 Mr. Nick Nicholson is here on behalf of Clemson University.
5 Mr. Blake Williams is present via video teleconference on
6 Zoom. He represents the Defendant life trustees. Mr. Jim
7 Carpenter's here on behalf of the Plaintiff, Mr. Edward
8 Sloan, Jr., and I think there's another Plaintiff as well.

9 MR. CARPENTER: Well, Mr. Sloan, Edward D. Sloan, Jr.,
10 passed away during the course ---

11 THE COURT: Yes.

12 MR. CARPENTER: --- of the litigation.

13 THE COURT: This is John.

14 MR. CARPENTER: And this is John, his son, who's been
15 substituted in as Plaintiff.

16 THE COURT: My apologies, John.

17 PLAINTIFF: Yeah.

18 THE COURT: All right. Well, thank y'all for letting
19 me get the preliminaries on the record, but Mr. Nicholson -
20 -

21 MR. NICHOLSON: Yes, sir.

22 THE COURT: -- I appreciate -- you may proceed.

23 MR. NICHOLSON: Thank you, Your Honor. May it please
24 the Court. As you said, we're here to argue a motion to
25 dismiss that both the Defendants have filed in this case,

1 both sets of Defendants. If it's okay with Your Honor, I'm
2 gonna argue the standing portion primarily. Mr. Williams
3 is gonna argue the remaining justiciability and the failure
4 to state a claim arguments for us.

5 THE COURT: Yes, sir.

6 MR. NICHOLSON: And then I'm happy to do however you
7 want to do it after I finish standing. If you want Mr.
8 Carpenter to go or whatever you want to do is fine with me.

9 THE COURT: All right. Yes, sir.

10 MR. NICHOLSON: But I -- if it's okay, Your Honor, I
11 will give just a little bit of background. You did
12 accurately read the caption and say "Clemson University and
13 Life Trustees," of course. We say that the Plaintiff
14 incorrectly identified them as "life trustees. We call
15 them "successor trustees."

16 Again, the gravamen of this suit the Plaintiffs are
17 challenging the composition of that board of trustees of
18 Clemson that was created as a part of the will of Thomas
19 Green Clemson in his gift to the State of property that
20 formed the basis of what is now the university. The
21 General Assembly, after review by the Chief Justice of the
22 Supreme Court at the time, accepted Mr. Clemson's gift; and
23 in doing so, approved of the board's composition which the
24 will specifies must include at least seven trustees named
25 in the will and their successors; and again, the successor

1 trustees that Mr. Williams and his law firm represents.

2 Over a 130 years later, the Plaintiffs are now
3 challenging the composition of the board by claiming that
4 the General Assembly's acceptance of the will, as it
5 relates to the successor trustees and the service of these
6 trustees themselves, is unconstitutional. They ask, among
7 other things, that the Court declare the General Assembly's
8 acceptance unconstitutional and that the Court terminate
9 the service of each successor trustee. We argue, Your
10 Honor, the Plaintiffs simply do not have standing to
11 challenge this long established act of the General
12 Assembly.

13 Of course, standing is a prerequisite for any party to
14 bring a lawsuit in an action to give the Court subject
15 matter jurisdiction. Standing may -- and it's a threshold
16 inquiry that has to be made before the merits can be
17 reached. That's one of the reasons we filed this motion to
18 dismiss.

19 Standing can -- may be required by three ways:
20 Through statute, through the (inaudible) of constitutional
21 standing or the public importance exception; and it's the
22 Plaintiff's burden, it's the Plaintiff's burden to prove
23 that they have standing.

24 Let's talk first about statutory standing. Plaintiffs
25 point to no statute whatsoever that will give them

1 standing. There is -- they do make reference to the
2 declaratory judgement statute, but as the Court in *Bodman*
3 stated, the declaratory judgement statute does not give
4 standing itself. *Bodman* rejected, quote, "any averment
5 that the fact *Bodman* is proceeding under declaratory
6 judgement has any impact on our standing analysis." So
7 declaratory judgement act is just there as a vehicle to
8 come into the Court to decide a justiciable action. It
9 does not determine standing.

10 So the second thing they have to look is
11 constitutional standing. They don't have that either. To
12 have constitutional standing the Plaintiff must show that
13 they suffered an invasion of a legally protective interest
14 which is concrete and particularized in actual or imminent.
15 There also must be a causal connection between the injury
16 and the challenge conduct -- conduct, and it is likely that
17 either will be redressed by favorable decision. *Evins vs.*
18 *Richland County Preservation Commissions* Supreme Court
19 stated it a little bit differently, but they said (as
20 read): "A private person may not invoke the judicial power
21 to determine the validity of the executive or legislative
22 action unless he has sustained or is in immediate danger of
23 sustaining prejudice there from." Been no allegation
24 whatsoever of any particularized harm that the Plaintiffs
25 say they're going to suffer here.

1 Now, they do cite several tax payer cases in their
2 brief in which they say that based upon these -- this line
3 of precedent, that they are entitled to tax payer standing.
4 The Court in *Bodman* foreclosed that, Your Honor, and also
5 in prior cases as well. In *Bodman*, the Supreme Court said
6 very clearly to the extent Bodman has suffered or will
7 suffer any harm as a result of this tax scheme, this harm
8 is shared by all tax payers in the state. In the ATC case
9 (as read): "We unanimously close the door to a litigant
10 asserting standing simply by virtue of his status as a tax
11 payer." In *Freemantel vs. Preston*, which we also cite,
12 they also found that an injury to a tax payer is common to
13 all citizens and tax payer, and thus no constitutional
14 standing.

15 The Plaintiffs in this case have shown no sort of
16 particularized harm that they have as opposed to the -- all
17 other tax payers in this state, and so we would say the tax
18 payer standing is not, is not appropriate here.

19 So that leaves us with public importance, and I would
20 probably argue that's -- I would probably anticipate that's
21 what Mr. Carpenter is going to rely on mostly is public
22 importance. And so public importance is an exception to
23 the standing doctrine and it is where the litigant must --
24 that the public importance exception is concerned with
25 whether a case is of such public importance that

1 requirement of standing should be waived.

2 I -- Your Honor, we would argue that it should not be
3 waived here. We quote the case of *Sloan vs. Sanford* where
4 standing was found, I'll say, but they talked about having
5 a balance between compelling policy concerns underlying the
6 issue of standing, versus having access people to the
7 courts, with also having -- making sure that there was not
8 a floodgates and -- where anybody could come to court about
9 anything. That would be -- that would -- not be good for
10 judicial economy, would not be for our legal system.

11 And so the Courts say we had to be cautious, you have
12 to determine whether the party presents an issue of public
13 importance, and so they say future guidance needs to be
14 needed -- needs to be -- needs to be needed in order to
15 have public importance.

16 In addition, in *Jowers vs. South Carolina Department*
17 *of Health and Environmental Control*, the Court said there
18 must be no other adequate remedy for addressing the issue
19 raised in the action, and neither of those are -- apply
20 here, Judge. Neither is there a need for future guidance,
21 and neither is there an inadequate remedy.

22 Let's talk about the adequate remedy first. Here
23 we're talking about a trust basically. That's why we're in
24 Probate Court. We're talking about a will that created a
25 trust that -- for the purpose of the State and to establish

1 Clemson University. The Attorney General has been
2 designated by statute to be the one to look after trust, to
3 be -- look after charitable trust. We cite the *Epworth*
4 *Children's Home vs. Beasley* where the Supreme Court said
5 the Attorney General is the proper party to protect the
6 interest of the public at large in the matter of
7 administering or enforcing charitable trust. We also cite
8 the *Wilson vs. Dallas* case which says that the AG is
9 granted the authority to act as protector, supervisor, and
10 enforcer of charitable trust. And even in -- with those
11 cases stated even more forcibly in the case of *Furman vs.*
12 *McLeod*, dealing with Furman University back in the early
13 1960's, the opinion of the trial judge, which the Supreme
14 Court adopted as its opinion and its holding, states (as
15 read): "I find and hold that Daniel R. McLeod, as Attorney
16 General, is the only proper and necessary party defendant
17 to this proceeding. The public interest is properly
18 represented by the defendant, that is the Attorney
19 General."

20 And so this idea, this requirement for the public
21 importance exception that there's no adequate remedy
22 without the Court stepping in is not applicable here. The
23 Attorney General is there. He has been designated by
24 statute to oversee and look after charitable trust and the
25 Supreme Court has affirmed that.

1 The second component that they have to show for public
2 importance is need for future guidance and that's not here
3 either, Your Honor. First of all, Chief Justice of South
4 Carolina, back in 1889, looked at this, ruled on it, said
5 it passed muster, and the deal went forward, so to speak.
6 As the Attorney General cited, 1978 Attorney General
7 opinion, the Attorney General's opinion notes that the
8 will, Mr. Clemson's will has been opined on several times
9 over the year. I'm gonna quote a little bit from that
10 opinion.

11 Thomas Green Clemson's will, quote, "was considered in
12 *Hopkins vs. Clemson Agricultural College*, in a decision
13 from the United States Supreme Court in 1910, and has been
14 subsequently considered in other cases by the State Supreme
15 Court and by the Federal District Court. All of these
16 cases recognized the binding nature of the trust
17 established by Clemson and accepted by the State. The
18 terms of such a trust, when accepted by the State, are
19 binding upon the State."

20 The whole concept or the whole -- the makeup of
21 Clemson University and its board of trustees has been
22 looked at several times. So there's no need for any
23 further -- any further guidance from the Courts. So we
24 would argue, Your Honor, that there is no need for the
25 public importance exception here, and given that there's no

1 constitutional standing or statutory standing, there is no
2 standing, and the case ought to be dismissed.

3 I'm happy to answer any questions you have.

4 THE COURT: All right. I don't have any questions.
5 Mr. Carpenter, this -- I'm happy either way as far as you
6 responding to that ---

7 (Mr. Carpenter and the Court speak simultaneously.)

8 MR. CARPENTER: I would --

9 THE COURT: --- issue or just ---

10 MR. CARPENTER: I'd prefer to hear from Mr. Williams
11 because my argument kind of ---

12 THE COURT: Sure.

13 MR. CARPENTER: --- runs together addressing all of
14 that.

15 THE COURT: I -- either way is fine.

16 MR. CARPENTER: Okay.

17 THE COURT: All right.

18 MR. WILLIAMS: All right, Judge.

19 THE COURT: Thank you, Mr. Williams.

20 MR. WILLIAMS: Can y'all hear me all right?

21 THE COURT: Yes, sir.

22 MR. WILLIAMS: All right. Kind of tied in to what Mr.
23 Nicholson (inaudible), first I want to touch on the
24 requirement there be a justiciable controversy.

25 So the standing doctrine is the *Jowers* case that Nick

1 cited details is different from justiciability. So even if
2 you can establish public importance standing, that doesn't
3 get you over the hurdle showing that there's an act of
4 controversy that needs the Court's resolution. That case
5 detailed and justiciability doctrine requires a real and
6 substantial controversy appropriate for judicial terminate
7 -- determination, as opposed to a contingent or
8 hypothetical controversy.

9 And critically, there must be an injury in fact and
10 that's very important here because if you take a close look
11 at the complaint that -- invite Your Honor to do that
12 because I read through it three or four times this morning.

13 The only allegations are about the structure of the
14 board under the act of acceptance and how Clemson came to
15 be and then the constitutional provisions that they're
16 alleging that this board structure violates; and then a
17 very generalized, vague allegation that Clemson gets public
18 -- publically appropriated funds and that's it. So I'm --
19 there's no injury in fact alleged in this complaint, no
20 harm alleged. It just that you have these constitutional
21 arguments and then the -- that Clemson happens to get
22 public appropriations, but there's no allegation that there
23 was any misappropriation of the funds, improper spending,
24 anything along those lines. So there's no injury in fact
25 alleged here, and that's fatal on justiciability.

1 And again, I will quote from *Jowers*. The Court said
2 (as read): "First, as we have already explained as a
3 theory" -- and I'm adding justiciability -- "depends on the
4 possible occurrence of unknown future circumstances that
5 might -- or might not -- cause the loss of trust assets" --
6 in that case. "Claims that depend on contingent, future
7 harm are not justiciable." So you have to have some injury
8 in fact pled which hasn't occurred here.

9 It's also important to note that the appropriated
10 funds from the State are subject to additional requirements
11 under the South Carolina Code. So we're -- for the State
12 appropriated money, it requires a two-thirds vote of the
13 board. We need at least nine votes here. So that's not --
14 the seven successor trustees don't get to dictate what
15 happens with that. It's a collaborative effort between the
16 successors and the State appointed trustees.

17 And also the board must obtain approval from the State
18 Fiscal Accountability Authority or Department of
19 Administration to borrow money via bond issue, and that
20 issue must be reviewed by the Joint Bond Review Committee
21 that's on also in the Code. So the defer -- the two-thirds
22 is in 59-119-80, and the JBRC requirement is 59-119-740.

23 The Clemson board is also required to submit an annual
24 report of all receipts and expenditures to the General
25 Assembly, and that's in SC Code 59-119-140.

1 They do have these additional oversight requirements
2 with the publically appropriated funds in addition.

3 And so, Your Honor, again, the justiciability doctrine
4 is not met here. Even if they could show public importance
5 standing, which is argued, it is not met here under these
6 facts. I'll quote from *City of Columbia vs. Sanders*, 231-
7 SC-61 (as read): "The Uniform Declaratory Judgement Act
8 does not require the Court to give a purely advisory
9 opinion which parties might, so to speak, put on ice to be
10 used if and when the occasion might awry -- arise or
11 license litigants to fish in judicial ponds for legal
12 advice," and that's precisely what's occurring here.

13 So standing fails, justiciability fail, but even if
14 they got across those hurdles, the Plaintiffs, you still
15 have a failure to state a claim upon which relief can be
16 granted here.

17 The starting point for that analysis should be that
18 legislative acts are construed in favor of
19 constitutionality, when we presume constitutional absent of
20 a showing to the contrary. So that's the starting point
21 for the analysis of how these statutes interact in the
22 constitutional provisions.

23 And of course, we dispute the factual allegations
24 quoted for 12(B)(6) purposes. We'll presume they're
25 correct; however, even under the facts as alleged by the

1 Plaintiffs, their claims fail as a matter of law.

2 And there's two critical reasons and (inaudible) I'll
3 highlight for the Court. First, the operative
4 constitution, when Clemson came into being, was the
5 Constitution of 1868, and that constitution is recorded in
6 our brief (inaudible) a provision saying that there should
7 be no term of office for longer than good behavior and by
8 the plain allegations of Plaintiff's complaint, this is a
9 lifetime appointment, which is necessarily longer than just
10 a term of good behavior. So that's direct evidence that
11 the General Assembly and the Chief Justice, that reviewed
12 the Act of Acceptance to ensure it complied with the terms
13 of the will, viewed Clemson as something different and
14 unique and not subject to that provision. So the changes
15 to add the additional language in the Constitution of 1895
16 that said there should be no office for life or (inaudible)
17 good behavior, but the terms of all officers must be for
18 some specified period is irrelevant. Clemson's already
19 unique and separate and distinct under the operative
20 constitution. So the 1895 constitution didn't change that.

21 However, even if you assume that it did and that the
22 General Assembly, only six years after creating Clemson,
23 intended to completely upend it, which nobody has alleged
24 in 130 years, even if you take that as true, it's -- their
25 claim still fails as a matter of law.

1 First, as -- first, as pRthe Court said in *South*
2 *Carolina Department of Mental Health vs. McMaster*, that's
3 372 South Carolina 175, the General Assembly lacks the
4 power (inaudible) and only a court of equity can do so. So
5 the General Assembly couldn't even do it in the first
6 place; however, even if they could, the legislative
7 interference with the charitable trust that was created via
8 the State's acceptance of the will's terms, flagrantly
9 violate both the Federal and State constitutional contracts
10 with laws (inaudible.) Both of those provide that a state
11 shall not make any law impairing the obligation of
12 contracts.

13 Coincidentally, twice, in the 1970s, the General
14 Assembly inquired to the Attorney General as to whether
15 they could interfere and change the structure of Clemson's
16 board. In 1971, the Attorney General expressly opined that
17 any attempt by the General Assembly to enlarge Clemson's
18 board would violate the constitutional (inaudible) against
19 impairment of the obligation of a contract; and that's
20 exactly what I detailed with the cons -- with the contracts
21 clauses.

22 And Your Honor, I'm gonna send copies of the AG
23 opinions and the citings of some other authorities, and
24 I'll send -- cc Mr. Carpenter on that of course.

25 And Nick already referenced this, but in 1978, the

1 Attorney General reaffirmed this position and explained
2 that the General Assembly could not add board members
3 (inaudible) binding nature of the trust established by
4 Clemson and accepted by the State; and as the AG opined,
5 the terms of such trust, when accepted by the State, are
6 binding upon the State.

7 Finally, a leading treatise on trust law has a section
8 explaining that statutes attempting to alter a trust, with
9 regard to the method of selecting successor trustees, have
10 been held unconstitutional, and that's Bogerts, the law of
11 trust and trustees, section 3097, explain that -- precisely
12 that and if the statute attempts to alter a trust with
13 regard to that successor trustee selection, that the --
14 it's unconstitutional.

15 So even assuming that -- as I noted, that the General
16 Assembly did intend to upend the entire structure of
17 Clemson only six years after passing the act of acceptance,
18 those constitutional provisions and the statute cited by
19 the Plaintiff would be unconstitutional as applied to the
20 successor trustee position under the contract (inaudible.)

21 So again, even if Plaintiffs could establish public
22 importance standing and even if the Court found a
23 justiciable controversy exists, which neither are satisfied
24 here, Plaintiffs have failed to state facts sufficient to
25 constitute a cause of action and the complaint should also

1 be dismissed for that reason. Thank you.

2 THE COURT: All right. Thank you, Mr. Williams. Mr.
3 Carpenter?

4 MR. CARPENTER: Thank you, Your Honor. Jim Carpenter.
5 I represent John Sloan.

6 The individual defendants are life trustees or
7 successor trustees. For a hundred years or more, they were
8 called "life trustees." In recent years, they've changed
9 that terminology to "successor trustees," probably because
10 they recognize the very problem that we're talking about
11 here.

12 They are named in their official capacities. Under
13 the South Carolina Code Annotated 59-119-60 (as read):
14 "The Board of Trustees is hereby declared to be a body
15 politic and corporate, under the name and style of Clemson
16 University. It may be -- it may sue and be sued and plead
17 and be impleaded in its corporate name." So there's
18 nothing wrong with suing Clemson University and the board
19 of trustees.

20 In 2018, Clemson University received 123 million
21 dollars in public funds. In 2019, they received 136
22 million dollars in public funds. Those were the years
23 which were the most recent when this case was filed. It's
24 been on hold for some period of time.

25 Under the South Carolina Code Annotated 8-1-10, public

1 officers include trustees of the various colleges of this
2 state, that's in the statute. Now, since the constitution
3 of 1895, which was several years after Mr. Clemson died and
4 established his will and trust and so on, any person
5 elected or appointed to office in this state, after the
6 constitution of 1895, the terms of all officers must be for
7 some specified period. That's in the constitution twice:
8 Article VI Section 1, and Article XVII Section 1(b).

9 These life trustees are not appointed for, quote,
10 "some specified period." They are appointed for an
11 interminable -- in -- an unspecified period. It could be
12 life, it could be whatever; but it's not some specified
13 period, in direct contradiction to the language of the
14 constitution of 1895; and therefore, their appointments and
15 their service are both unconstitutional. They violate the
16 constitution.

17 The life trustees are overseeing the expenditure of
18 more than a 100 million dollars a year of tax payer money,
19 and they've been doing it for a long, long time.
20 Accordingly, we believe the Plaintiffs have raised an issue
21 of great public importance when they're spending over 100
22 million dollars a year and serving in violation of the
23 constitution. That's an issue of great public importance;
24 and when a party raises an issue of great public
25 importance, then the Court can and should grant public

1 importance standing to that party.

2 Couple years ago, in 2020, in the case of *Adams vs.*
3 *McMasters*, where the Governor tried to send 32 million
4 dollars of public money to private educational
5 institutions, the Supreme Court ruled a party is not
6 required to show he has suffered a concrete or
7 particularized injury in order to obtain public importance
8 standing. So all that argument about particularized injury
9 doesn't have a thing to do with the issue that brings us
10 here today.

11 In addition, in the *Adams vs. McMaster* case, the
12 Supreme Court said that a party also need not show that he
13 has an interest greater than other potential plaintiffs.
14 Anybody can bring an issue of great public importance. You
15 don't have to be anybody in particular.

16 And then two weeks ago, in the case of *South Carolina*
17 *Public Interest Foundation vs. Wilson* -- now, this was the
18 case where the Attorney General paid 75 million dollars to
19 his former law firm for losing four cases, and the South
20 Carolina Public Interest Foundation and John Crangle
21 brought suit alleging that it was illegal for them to do
22 that. The Supreme Court ruled on September 14 (as read):
23 "This Court has consistently acknowledged that even without
24 an allegation of particularized injury, standing may be
25 conferred upon a party when an issue is of such public

1 importance as to require its resolution for future
2 guidance." And in this case, we have an issue that
3 requires resolution for future guidance.

4 This case involves the conduct of a governmental body
5 and public officers, it involves a huge expenditure of
6 public funds, and it's likely that this will recur in the
7 future, which was a factor in the *Adams vs. McMaster* case.
8 In this case, they've been doing this every year for 125
9 years, and there's no indication they're gonna stop.
10 They're gonna keep on doing this every year until the Court
11 rules on whether the service of these life trustees is
12 constitutional or unconstitutional. So there's a need for
13 judicial guidance in this case.

14 In the *Wilson* case, just a couple of weeks ago, the
15 Supreme Court said (as read): "By claiming Wilson
16 improperly dispersed state settlement funds, Appellants
17 indisputably allege an issue of public importance;
18 therefore, the linchpin of our analysis is whether a need
19 for future guidance exists."

20 So when Mr. Wilson distributed 75 million dollars, the
21 Supreme Court said that indisputably raised an issue of
22 great public importance. In this case, they're dispersing
23 over 100 million dollars a year and they've been doing it
24 for years.

25 So we've issued -- we have raised an issue of great

1 public importance; and therefore, we should be granted
2 public importance standing.

3 Now, as to whether we've stated a cause of action,
4 over and over again the Supreme Court has ruled that an
5 allegation of a constitutional violation states a cause of
6 action. In *Adams vs. McMasters*, the -- that's the -- where
7 they spent 34 -- 32 million dollars, the Supreme Court
8 ruled (as read): "We hold the Governor's allocation of 32
9 million dollars in GEER funds to support the SAFE grants
10 program constitutes the use of public funds for the direct
11 benefit of private educational institutions within the
12 meaning of and prohibited by Article IX Section 4 of the
13 South Carolina constitution."

14 So all that the Plaintiffs had to do in that case was
15 raise an issue -- raise a claim that this expenditure
16 violated the constitution, and the Supreme Court said
17 that's enough to state a claim; and furthermore, we rule
18 that they're right and it's just declared unconstitutional.
19 So alleging an act of a government officials violates the
20 constitution is sufficient to state a cause of action.

21 Again, another case was *South Carolina Public Interest*
22 *Foundation vs. South Carolina Department of Transportation*.
23 In that case, the Plaintiffs alleged that the Department of
24 Transportation had spent public funds to go out and inspect
25 bridges in a private gated community, and the Supreme Court

1 ruled that spending public money for private purposes was a
2 violation of the constitution, and alleging that
3 constitutional violation was sufficient to state a cause of
4 action.

5 *South Carolina Public Interest Foundation vs. Lucas.*
6 The Court ruled that there was an unconstitutional proviso
7 in the appropriations act, and stating and alleging an
8 unconstitutional proviso was sufficient to state a valid
9 cause of action.

10 *South Carolina Public Interest Foundation vs. South*
11 *Carolina Transportation Infrastructure Bank.* The
12 Foundation alleged that the State Transportation
13 Infrastructure Bank board was unconstitutionally comprised
14 -- composed, and that was sufficient to state a valid cause
15 of action.

16 Several cases have alleged that the General Assembly
17 violated the constitutions One Subject rule. There's a
18 rule that says each act of the General Assembly must relate
19 to but one subject, and that shall be stated in the title
20 of the act; and there were several cases that have ruled
21 that allegation was sufficient to state a constitutional --
22 a valid cause of action.

23 *American Petroleum Institute vs. South Carolina*
24 *Department of Revenue, South Carolina Public Interest*
25 *Foundation vs. Harrell, Sloan vs. Wilkins;* and then one

1 case alluded to by Mr. Nicholson, *Sloan vs. Sanford*, Mr.
2 Sloan, his -- John Sloan's father, alleged that the
3 Governor Sanford had received a commission from the Air
4 Force Reserve, and the constitution says that the Governor
5 shall not have a commission from any other power; and that
6 allegation of an unconstitutional commission was sufficient
7 to state a valid cause of action.

8 Similarly, as to justiciable controversy, in *Adams vs.*
9 *McMaster*, the Court again found that justiciable
10 controversy in the expenditure -- unconstitutional
11 expenditure of 32 million dollars.

12 The constitution of 1895 says all laws now in force in
13 this state, and not repugnant to this constitution, shall
14 remain and be enforced until altered or repealed by the
15 General Assembly or expire by their own limitations. The
16 implication being that laws that are not -- that are
17 repugnant to the constitution are not going to remain, and
18 that's what we've got right here.

19 We've got a law that was fine in 1888, but when 1895
20 came and the new constitution was passed, that law was
21 repugnant to the 1895 constitution; therefore, it's
22 unconstitutional and this Court needs to rule that the
23 lifetime trustees, who are appointed without some specified
24 period of service, are serving unconstitutionally.

25 Now, we don't bear any personal ill will toward any of

1 them, we don't think they're doing a bad job, but there is
2 a constitutional provision and there's -- they were
3 appointed in violation of it and they're serving in
4 violation of it and this Court needs to make a ruling to
5 make sure that all of our public officials follow the
6 constitution.

7 And justiciable controversy, *Adams vs. McMaster* (as
8 read): "Petitioners contend the program violates our
9 constitutional mandate prohibiting public funding of
10 private schools. We hold the Governor's decision is
11 prohibited by Article VII -- Article XI Section 4 of the
12 constitution." So finding a violation of the constitution
13 states a justiciable controversy.

14 In *Adams vs. McMaster*, the Court also said (as read):
15 "... no matter the circumstances, the Court has a
16 responsibility to uphold the constitution." And that may
17 seem to be pretty elementary, but it's sure good to hear
18 the Supreme Court say that. And then the holding was that
19 the spending of 32 millions dollars was prohibited by
20 Article XI Section 4.

21 As to whether we have asked for a remedy that states a
22 judicial -- justiciable controversy, our prayer for relief,
23 we ask the Court to declare that those parts of the
24 acceptance act accepting and authorizing life trustees are
25 incompatible with the South Carolina Constitution of 1895,

1 Article VI Section 1 and Article XVII Section 1(b); and
2 therefore, they're invalid and void.

3 We also asked the Court to declare that each
4 individual defendant is holding office as a Clemson
5 University life trustee in violation of the South Carolina
6 Constitution.

7 Third, we asked that the Court enjoin or terminate the
8 service of each individual defendant of Clemson University
9 as a life trustee; and fourth, we ask that the Court enjoin
10 any election or appointment of any Clemson University life
11 trustee in violation of the South Carolina Constitution.

12 Again, this is not personal against these members of
13 the board. This is a matter of upholding the provisions of
14 the constitution, and we think that the Court has
15 jurisdiction to do that.

16 We've presented justiciable controversy and we
17 certainly state a cause of action for violation of the
18 constitution and we raise an issue of great public
19 importance; therefore, we ask the Court to deny these
20 motions to dismiss and let the case move forward.

21 Incidentally, we served discovery requests long ago.
22 The other side asked for a protective order so they don't
23 have to respond to our discovery requests while these
24 motions are pending. And if the Court denies the motions
25 to dismiss, we ask that the Court direct the Defendants to

1 respond to the discovery requests we served a couple of
2 years ago. Thank you.

3 THE COURT: Yes.

4 MR. NICHOLSON: May I --

5 THE COURT: Yeah, Mr. Nicholson, absolutely.

6 MR. NICHOLSON: Okay. Just briefly, Your Honor, but
7 first of all, I understand where we are, the type of
8 proceeding this is on the briefs only; but I don't want to
9 -- I don't want to let the record go unaddressed.

10 Clemson and its successor trustees disagree mightily
11 with the statement that successor trustees have an
12 indefinite term of office. I just want to put that on the
13 record. I get where we are with this proceeding. We're
14 not doing a factual --

15 THE COURT: Right.

16 MR. NICHOLSON: -- investigation.

17 What Mr. Carpenter did not address in his argument on
18 public importance is the *Jowers* case, and where *Jowers* said
19 if there's no other adequate remedy for addressing the
20 issue, then yes, public important stand -- public
21 importance applies.

22 As we've stated, there is an adequate remedy here and
23 it's through the Pffice of the Attorney General. The
24 Attorney General's the one vested with the authority to
25 basically look after charitable trusts to make sure they're

1 operating properly, they're operating legally. We cited
2 three very straightforward cases I believe that state that
3 the Attorney General is the one who -- that's his or her
4 job, whoever's in the office, and again I'll quote the
5 Furman University case which I think states it the best is
6 that (as read): "The public interest is properly
7 represented by the Attorney General."

8 And so that's it -- Mr. Carpenter didn't address that
9 because I don't think he can because that is present here.
10 That was not present in the *Adams* case. *Adams* case, first
11 of all, was a new statute that they were dealing with, with
12 some new grant monies, and there was no other vehicle, no
13 oversight vehicle to look over the governor there, no legal
14 law (inaudible) Attorney General. And the same thing
15 applies in this new case that he cites, the -- concerning
16 the Attorney General and the fee agreements. The Attorney
17 General obviously can't step in there because that's his
18 agreements there, and so the *Jowers* point that we have here
19 was not present in the -- in either *Adams* case or in the
20 case involving Attorney General Wilson.

21 Here we have oversight from the Attorney General
22 because the Attorney General's been specifically given the
23 duties from that statutorily, and the Supreme Court has
24 affirmed that on at least three occasions. Thank you,
25 Judge.

1 THE COURT: Mr. Williams, anything further?

2 MR. WILLIAMS: If I may, Your Honor --

3 THE COURT: Yes, sir.

4 MR. WILLIAMS: -- first, as Nick noted, we're not --
5 we won't get into the facts, but we would maintain that the
6 term -- there is a term. The will and the act of
7 acceptance (inaudible) the term is until death,
8 resignation, refusal of the act, or otherwise. So there is
9 a term; and as we noted in the brief, there's an agreement
10 (inaudible) to step down at age 75, and that played out
11 recently with (inaudible) Wilkins reaching 75, stepping
12 down, and Governor Haley (inaudible.)

13 But anyway, that point aside, there is a term and it's
14 specified in the act and the will itself.

15 And to Mr. Carpenter's point about alleging a
16 constitutional violation is enough for (inaudible), I'll
17 have to look at those cases. That may be accurate, but as
18 we've laid it out in our brief and I argued here, as a
19 matter of law, there is no constitutional violation here.
20 So that -- I think that's fatal to that claim, but there's
21 not facts sufficient to constitute a cause of action pled
22 here. So it is appropriate for disposition under 12(B)(6).

23 And on the justiciable controversy point, I just heard
24 them say, the Plaintiffs say that they're not saying the
25 successors have done anything wrong. So seems to be fatal

1 if there's no injury in fact. All that, you know, seems to
2 be a very compelling point not hearing any injury that
3 would support justiciable controversy. That's all, Your
4 Honor, unless you have any questions for us.

5 THE COURT: All right. Thank you. Mr. Carpenter.

6 MR. CARPENTER: Thank you, Your Honor. The opposing
7 counsel have brought up a couple of times this alleged
8 private agreement, which is not mentioned in the complaint.
9 This is our motion to dismiss; therefore, that's improperly
10 brought up; and even if it were, I would respectfully
11 submit there's case law, and we've cited in our briefs,
12 that a private agreement can't change a statute and
13 certainly can't change the constitution. So the matter of
14 -- and no matter what the nature of this private agreement,
15 it can't be effective to change a statute or the
16 constitution, and it shouldn't be brought up at a motion to
17 dismiss.

18 Second, as to Mr. Nicholson's point about the Attorney
19 General having jurisdiction over trusts, the Attorney
20 General also could have brought an action under the bridge
21 inspection case for, you know, expending public money for
22 private purposes. The Attorney General could have brought
23 an action alleging an unconstitutional proviso, like in the
24 *Lucas* case. The Attorney General could have brought a
25 cause of action alleging the unconstitutional composition

1 of the State Transportation Infrastructure Bank board. The
2 Attorney General could have brought several causes of
3 action alleging violations of the constitutions One Subject
4 rule when the General Assembly repeatedly bobtailed and
5 bobtailed and bobtailed and tagged on this and tagged on
6 that, and he didn't do it. He could have done it. The
7 Attorney General has power to enforce all the laws, not
8 just trust laws.

9 So the fact that the Attorney General has a potential
10 right to bring this cause of action is not something that
11 would prohibit a public importance case; and in fact, we
12 cited the ruling from the *Adams* case just two years ago,
13 *Adams vs. McMaster* (as read): "The party need not show
14 that he has an interest greater than other potential
15 plaintiffs," acknowledging that there are other potential
16 plaintiffs out there who could have brought it and didn't,
17 but that's not something the Plaintiff has to show.

18 Anybody can bring up an issue of great public
19 importance and should be granted public importance standing
20 if the issue involves public officials and public money and
21 a need for future guidance and an -- and we've alleged the
22 need for future guidance is they're spending 100-and-some
23 million dollars a year and they're doing it in violation of
24 a pretty clear provision of the Constitution of 1895 and
25 they've been doing it for a long time.

1 Therefore, we ask the Court to grant public importance
2 standing and deny the motion to dismiss.

3 THE COURT: Anything further from anyone else?

4 (No audible answer.)

5 THE COURT: Let me get -- this is a -- I think this is
6 pretty basic, but let me just ask Mr. Nicholson and Mr.
7 Williams something.

8 I'm just -- the very basic starting point of Mr.
9 Carpenter's outline that -- I'm just -- and this was
10 repeated in the argument today, kind of gave the background
11 of the board of trustees from the South Carolina Code.
12 Obviously public money's being expended.

13 As far as the public officers, there's a statute, 8-1-
14 10 (as read): "Public officers include trustees of the
15 various colleges of the state." I assume all that is
16 accepted. Like the basic framework of the -- of the --
17 trustees are officers of the state and was that -- is that
18 something that ---

19 MR. NICHOLSON: I let Mr. Williams deal that. We did
20 deal with that in our brief on -- I mean, so it's a -- I
21 shouldn't be standing, Your Honor.

22 THE COURT: Yeah.

23 MR. WILLIAMS: I apologize.

24 THE COURT: You're good.

25 MR. NICHOLSON: -- because the -- these trustees -- I

1 mean, in many respects, this is -- I mean, this is why
2 we're in Probate Court, Judge. You know, we're dealing
3 with trustees of a -- we're dealing with the trustees of a
4 trust, and so ---

5 THE COURT: Right.

6 MR. NICHOLSON: And so they were never elected, they
7 were -- you know, they were appointed by -- you know, they
8 were appointed by their predecessors as set forth in the
9 will, and so I know what the statute says. I don't
10 disagree the statute says what it says, but on the other
11 hand, we are -- I think that's one of the -- again, one of
12 the fundamental disagreements we have in the case with Mr.
13 Carpenter and with Mr. Sloan is that we're talking about a
14 trust here, and he's the one that turned this into some
15 sort of governmental-type action when what we're really
16 dealing with is a trust. And that's why I think it's so
17 important -- number one, that's why I'm glad we're here in
18 the Probate Court because it's so important when we talk
19 about the specific statute when we talk about the Attorney
20 General's oversight.

21 Mr. Carpenter's -- when he talks about that the
22 Attorney General never stepped in to challenge all these
23 other cases, well, those are -- the Attorney General can do
24 a lot of different things here. He's been directed or
25 she's been directed by the General Assembly to look at

1 trusts. It's not just some sort of Attorney General may do
2 something to challenge the law. Here Attorney General's
3 directed to look after, make sure trusts are being
4 operated.

5 So Mr. Williams may have something else to add about
6 the public nature of these trustees. It -- certainly --
7 certainly they are serving in the public. They've been
8 appointed -- they've been appointed through a trust, and so
9 they are -- they are, I think, distinctly different from,
10 say, the Clemson trustees who are elected by the General
11 Assembly.

12 THE COURT: All right. Thank you.

13 MR. WILLIAMS: I think Nick answered -- Your Honor, I
14 didn't quite hear a full question (inaudible.)

15 MR. CARPENTER: I think he said he didn't hear the
16 question.

17 THE COURT: Oh, I'm sorry. I was just giving -- or
18 asking for, like, a basic acknowledgment that -- was there
19 a really any dispute as to the fact that the successor
20 trustees or life trustees or whatever the correct term is
21 are, in fact, public officers under the South Carolina Code
22 8-1-10, as they include trustees of the various colleges of
23 this state. I'm just -- as a very basic starting point,
24 was there any dispute about that element, that was my
25 question.

1 MR. WILLIAMS: Your Honor, I can't hear. I'm sorry.

2 THE COURT: Okay.

3 MR. WILLIAMS: I can hear the attorneys, but can't
4 pick you up.

5 THE COURT: Okay. Let me step around. We're kind of
6 getting to the wrapping up stage. Let me step around.
7 I'll -- I can step in front of them.

8 MR. NICHOLSON: Great.

9 (Brief pause.)

10 THE COURT: Hey, my apologies.

11 MR. WILLIAMS: I got you now.

12 THE COURT: What -- yeah, we got -- our -- we have
13 limitations.

14 MR. NICHOLSON: You mind if I come up here, Judge,
15 just so I can hear better?

16 THE COURT: Yeah, sure.

17 MR. NICHOLSON: Okay.

18 THE COURT: And I --

19 MR. NICHOLSON: Okay.

20 THE COURT: I couldn't hear perfectly well.

21 MR. NICHOLSON: Yeah. Yeah.

22 THE COURT: I heard it, but we -- I had to -- we had
23 to be silent in here for -- wanted to make sure I heard Mr.
24 Williams, but -- so this is our problem, but ...

25 Okay. Mr. Williams, I had just asked as a basic

1 starting point, Mr. Carpenter lays out in his outline of
2 arguments today -- it's some obvious things, like, you
3 know, the board of trustees, South Carolina Code 59-119-60,
4 it's a public body, they expend public funds or a part of
5 the entire board that -- and you referenced into that, how
6 that overlaps. I understand that, but they're a part of
7 the board that expends public funds and these things are --
8 I guess we all agree are obvious.

9 I -- my question was when you get to the point of the
10 South Carolina Code 8-1-10, which says public officers
11 include trustees of the various colleges of the state, is
12 there any question about that point, that was where I was
13 at?

14 MR. WILLIAMS: Whether (inaudible.)

15 THE COURT: Yeah. At -- in other words, the
16 constitution -- the 1895 constitution states that -- and
17 you referenced this a moment ago whether there's a term or
18 not, an unspecified term. This is one of the main
19 arguments that Mr. Carpenter presents that all officers,
20 according to the Constitution of 1895, must be for some
21 specified period. There's no question, I guess, I'm asking
22 you and Mr. Nicholson, that the successor trustees of that
23 portion of the board that are the life trustees in the
24 complaint, are, in fact, public officers per statute.
25 That's my question.

1 MR. WILLIAMS: I don't think so ---

2 THE COURT: There -- that's an argument that you're --
3 that -- that's --

4 MR. WILLIAMS: That's --

5 (The Court and Mr. Williams speak simultaneously.)

6 THE COURT: That's not conceded.

7 MR. WILLIAMS: No, sir. I think ---

8 MR. CARPENTER: Yeah.

9 MR. NICHOLSON: Correct. That's not -- yeah.

10 THE COURT: Right.

11 MR. NICHOLSON: Because again, they are appointed by
12 the trust.

13 THE COURT: Right.

14 MR. NICHOLSON: And so -- and it's -- yeah.

15 MR. WILLIAMS: They are trustees of the charitable
16 trust that is Clemson University.

17 THE COURT: Right. The main thing I was doing was,
18 you know, at some first level, second level, obviously
19 we're all agreeing that these things are obvious. I'm
20 trying to get to the first point where we're kind of
21 starting to --

22 MR. NICHOLSON: Yes, sir.

23 THE COURT: -- break apart on what we agree on.
24 That's where I was at on that, but ...

25 And I was able to hear everything you said. So I

1 appreciate you hanging in there with us with this method.

2 But anything else for the record that anybody wants to
3 put is fine.

4 MR. CARPENTER: The -- addressing your point there --

5 THE COURT: Yes, sir.

6 MR. CARPENTER: -- if you look back at 59-119-60, in
7 which -- in the outline is one point above it, it says the
8 board of trustees is hereby declared to be a public body
9 and corporate, and the name and style of Clemson University
10 may be sued -- sue and be sued and plead and impleaded in
11 its corporate name.

12 So the board of trustees, not just those six appointed
13 by the General Assembly, but the entire board is a public
14 body, and we believe that the statute 8-1-10, that declares
15 public officers to include trustees of the various colleges
16 of the state, is pretty clear, and it would include all 13
17 of the trustees.

18 THE COURT: Mr. Nicholson, Mr. Williams, anything
19 further?

20 MR. NICHOLSON: I'm fine, Your Honor. Thank you.

21 MR. WILLIAMS: No, Your Honor.

22 THE COURT: Mr. Carpenter?

23 MR. CARPENTER: That's it.

24 THE COURT: Well, of course, I appreciate everybody
25 being here. I have all the filings and pleadings in the

1 file. I have -- we now have a transcript of the motions
2 today and I will consider those and be getting back with
3 you. I have your emails, obviously, been emailing this
4 week about everything. So we use the same level of
5 communication to get in touch with y'all in that regard.

6 Anything y'all have as far as a time frame or is there
7 anything y'all need to add before we adjourn?

8 MR. CARPENTER: Can I say one more thing:

9 THE COURT: Yes, sir. Absolutely.

10 MR. CARPENTER: Blake, I gave Nick and I gave the
11 Judge a copy of my outline today. I'll send a copy to you
12 by email.

13 MR. WILLIAMS: Okay. That's fine. And Judge, do you
14 mind if I just send those couple of authorities I
15 referenced, like the Attorney General's ---

16 THE COURT: Right. Yes. Yeah, you said you'd email
17 that to us.

18 MR. WILLIAMS: All right.

19 THE COURT: Yeah, that's good.

20 MR. WILLIAMS: And I'll cc everybody on that, too.

21 THE COURT: All right. Hey, thank you very much, man.

22 MR. WILLIAMS: Thanks, Judge.

23 MR. NICHOLSON: Thank you, Judge.

24 THE COURT: So we're adjourned.

25 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, CVR, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
TRANSCRIPT OF RECORD OF THE AUDIO FILES I WAS
PROVIDED.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

E/ Bonnie H. Kelly, CVR

BONNIE H. KELLY, CVR

COLUMBIA, SOUTH CAROLINA

MAY 3, 2023

1 There were no witnesses.

2 » > ○ < «

3 Certificate of Reporter 47

4 There were no exhibits.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: All right, first matter up is, Sloan
2 vs. Clemson University, 2023-CP-23-00416. This is an
3 appeal from probate court. All right, if each of you
4 would identify yourself and who you represent for the
5 record. We'll start with, I guess, The Plaintiff,
6 petitioner.

7 I believe that would be you, Mr. Carpenter?

8 MR. CARPENTER: Yes, Your Honor.

9 THE COURT: All right, if you would, for the
10 record, state your name and who you represent.

11 MR. CARPENTER: Yes, Your Honor, my name is Jim
12 Carpenter and I represent The Plaintiffs in this
13 action, John Sloan.

14 THE COURT: All right.

15 Yes, sir.

16 MR. NICHOLSON: May it please The Court, Your
17 Honor, Nick Nicholson representing Clemson
18 University.

19 THE COURT: All right.

20 MR. WILLIAMS: Yes, Your Honor, Blake Williams,
21 I represent the individuals Mike McKissick, David
22 Dukes, Cheri Phyfer, Mark Richardson, Bill Smith, Kim
23 Wilkerson and David Wilkins.

24 THE COURT: Thank you, sir.

25 All right, I'll hear from you.

1 MR. CARPENTER: Thank you, Your Honor. As The
2 Court noted, this is an appeal from a decision by the
3 probate court in Pickens County. The Court may be
4 familiar with the history of the case.

5 THE COURT: I read the file. I'll let you tell
6 me whatever you want to tell me.

7 MR. CARPENTER: All right, thank you, Your
8 Honor. This case comes to this court as an appeal
9 from the probate court. Plaintiffs filed suit
10 against Clemson University and the life trustees.
11 The life trustees were sued in their official
12 capacity. The life of trustees are -- a majority of
13 the board of directors, who oversee the expenditure
14 of more than a million dollars a year from state
15 funds. In response to the complaint, both the
16 university and the trustees filed no answer, they
17 made a motion to dismiss.

18 The Plaintiffs served discovery on the
19 Defendants but they received no substantive answers
20 other than objections. We served the standard
21 interrogatories and they objected to the standard
22 interrogatories. We served some basic request for
23 production and they objected to those. They objected
24 to everything, they answered nothing, they produced
25 nothing. And then move for protection from having to

1 respond to the discovery requests.

2 In response to the motion to dismiss, the
3 probate court held a hearing on the motion, which was
4 brief. And the probate court dismissed the case with
5 prejudice in response to a motion to dismiss. That
6 was before there was any answer filed, there was no
7 amendment of the complaint, it was just a basic
8 complaint and a motion to dismiss and a dismissal
9 with prejudice. As the case comes to this court, the
10 standard for this court is the same as the standard
11 was at the trial court because this court is
12 reviewing the granting of the motion to dismiss.

13 When there's a motion to dismiss, if the facts
14 alleged an inferences reasonably deductible
15 therefrom, state allegations viewed in the light most
16 favorable to the Plaintiff, may entitle him to relief
17 on any theory, a dismissal is inappropriate. The
18 complaint should not be dismissed merely because the
19 court doubts the Plaintiff will prevail in the
20 action. Pleadings must be construed liberally and
21 the well-pled facts must be presumed as true.

22 And that's from Doe vs. Bishop of Charleston.
23 That's a statement of the case.

24 The statement of facts, In 1889, Mr. Clemson,
25 Thomas G. Clemson, his Will became effective, he give

1 the land and money to The State to create an
2 agriculture college, which became, eventually,
3 Clemson University. The Will named seven
4 self-perpetuating trustees that had no limit on their
5 terms of service. In 1895, South Carolina adopted a
6 new Constitution and one of the provision in that
7 Constitution stated twice, is that no person may be
8 elected or appointed to an office in this state for
9 life or during good behavior, but the terms of all
10 officers must be for some specified period.

11 The trustees are a self-perpetuating group so
12 that when one dies or resigns, the other remaining
13 life trustees will appoint and elect a new trustee to
14 take that person's place. But neither the original
15 nor the successor trustees are appointed for some
16 specified period, they serve for life or until they
17 resign or die. Therefore, we contend their
18 appointments and their service are both
19 unconstitutional. In violation of this
20 constitutional provision that says you can't be
21 appointed for life or good behavior. The term must
22 be for some specified period.

23 When the probate court dealt with the motion to
24 dismiss, it made some rulings which we believe were
25 correct. The Court granted Plaintiff's public

1 important standing. Based on some important issues,
2 we have public officials, allegedly, serving in
3 violation of the Constitution and spending more than
4 a hundred million dollars a year of taxpayer money,
5 allegedly, while serving unconstitutionally.

6 The probate court ruled, we believe properly,
7 that the Plaintiff's have stated a justiciable
8 controversy. There have been many cases some brought
9 by the father of this Mr. Sloan, Ned Sloan, and the
10 South Carolina Public Interest Foundation, among
11 others, that have challenged conduct alleged to be
12 unconstitutional on part of many, many public
13 officials over the last 20 or 25 years. We believe
14 that when you allege a constitutional violation, that
15 states a justiciable controversy and we believe that
16 the probate court got that right. We believe,
17 however, that the probate court erred in its
18 definition of office and officer. There is a statute
19 that defines what a public officer is. And that is
20 South Carolina Code Annotated 8-1-10. And that
21 explicitly says that public officers includes all
22 trustees of the various colleges of the state. So we
23 believe that that statute defines the word officer.
24 And office.

25 In addition, in preparation for this hearing, I

1 came across a case from the South Carolina Supreme
2 Court that addresses that particular constitutional
3 provision. And with The Court's consent, I'd like to
4 hand up a copy to The Court.

5 THE COURT: All right.

6 MR. CARPENTER: It's called Evans vs. Beatty. I
7 have copies for counsel, as well.

8 Evans vs. Beatty is from the South Carolina
9 Supreme Court, 1926. And it's a lengthy opinion and
10 it deals with a group of people appointed to oversee
11 the creation of a highway in six counties over the
12 eastern part of the state. And the issue came up,
13 they were appointed for three years or until the job
14 was finished. And somebody sued alleging that that
15 appointment violates the provision of the
16 Constitution that we're talking about here today.
17 And if you look over on Page 19 -- and I've
18 highlighted the part that seems important to me. It
19 references a different citation to the Constitution
20 but the text of it is the same as what we're dealing
21 with today. It's in the right column on Page 19,
22 Your Honor.

23 THE COURT: All right.

24 MR. CARPENTER: No person shall be elected or
25 appointed to office in this state for life or during

1 good behavior but the terms of the offices shall be
2 for some specified period, except notaries, public
3 and officers in a militia. The Court then went on
4 over the next couple of pages to define what that
5 provision means. And right below that quotation The
6 Court ruled the term office as used in this
7 constitutional provision means a public station,
8 permanent in character. The term officer means as
9 person holding such a station.

10 The Court then cites another case. And it says,
11 The elements of a public station, permanent in
12 character, were created by law, which incidents and
13 duties were prescribed by law. That's another
14 definition of the word Officer. And that's in
15 Metcalf vs. Mitchell, cited by The Court.

16 If you go on down to column -- the left column
17 on Page 20, again, we have another case defining the
18 term officer, as used in the Constitution Article
19 XVIII, Section 1, applies when refers to such
20 officers had some degree of permanency and are not
21 credited by a temporary nomination for a single and
22 transient purpose. And then at the bottom there,
23 there's another case. One who is charged by law with
24 duties involving the exercise of some part of the
25 sovereign power, either small or great, and the

1 performance in which the public is concerned, and
2 which are continuing and not occasional or
3 intermittent, is a public officer.

4 So this case that I, candidly, found in
5 preparation for this hearing today, is the best
6 judicial interpretation, the only significant
7 judicial interpretation of this constitutional
8 provision that I've been able to find. And the
9 characteristics as set out by the Supreme Court are
10 exercising some part of public power. It's a
11 permanent and not a temporary office. And it's
12 utilizing some element of public station. And all of
13 those elements are present in the issue that we're
14 talking about today, the trustees of Clemson
15 University.

16 Clemson University, the land is now owned by The
17 State, it's funded primarily by The State and they're
18 exercising a part of The State sovereignty when
19 they're acting as trustees. It's certainly a
20 permanent office and not some sort of temporary or
21 provisional office. And they're exercising some of
22 the sovereignty of The State of South Carolina.

23 So we think that both the statutory definition
24 and the definition provided by the South Carolina
25 Supreme Court in Evans vs. Beatty, demonstrate that

1 these trustees are public officers and they're
2 holding a public office. And the constitutional
3 provisions, stated twice in our Constitution of 1895,
4 the same thing, Constitution provisional that says,
5 No person may be elected or appointed to office in
6 this state for life or during good behavior, but the
7 terms of all officers must be for some specified
8 period. That applies to these trustees. Both by the
9 statutory definition from 1901, originally. And this
10 case from 1926 that defines officer, as I mentioned a
11 few minutes ago. So we believe, respectfully, that
12 when the probate court ruled that these trustees were
13 not public officers, that they erred. And that that
14 ruling should be overturned by this court.

15 Now, one of the problems that the Defense raises
16 is the fact that we're dealing with a situation that
17 arose out a Will and they claim it is property held
18 in trust. So what obligations does the fact that the
19 nature of the -- holding the property in the nature
20 of a Trust, what -- how does that impact what we're
21 looking at today? As I, again -- well, as -- as I
22 wrote the briefs, I realized that the Defendants had
23 raised the issue of equitable deviation in their
24 brief on Page 14. But then as I looked at it more
25 closely, in preparation for this hearing, I realized

1 they were quoting what the probate court had said.

2 It was the probate court that raised the issue of
3 equitable deviation on Page 10 of its order.

4 And equitable deviation is a doctrine that
5 governs trust and what to do about trust when
6 something from the language of how the Trust was set
7 up. Because it changed circumstances, starts to work
8 at cross purposes with the purposes of the trustor
9 establishing the charitable trust. And there have
10 been a number of cases that have dealt with the
11 doctrine of equitable deviation. And we cited them
12 in our brief. One of them had to do with the South
13 Carolina Home for the Mentally Ill, commonly known as
14 Bull Street, the property there in Columbia. And
15 that case is called, South Carolina Department of
16 Mental Health vs. McMaster when he was the attorney
17 general. And if I could hand that up to The Court
18 and I have copies for the other side.

19 THE COURT: All right.

20 MR. CARPENTER: The issue in that case was the
21 general assembly was wanting to make some efficiency
22 changes in the way that The State of South Carolina
23 owned and operated real estate. The general assembly
24 had come to believe, based on expert opinion, that
25 putting all the people suffering from mental illness

1 together in a big campus, like Bull Street, was not
2 the best way to help them with their mental
3 illnesses. Rather, they should be disbursed more
4 into society and helped that way. So the question
5 was, we've got this 180 something acres there in
6 Columbia and a lot it has been acquired in various
7 parcels and sometimes there are deed restrictions in
8 there and there are things in the deed that says it's
9 got to be used for the purpose of treating people for
10 mental health and so on.

11 So -- and it's held in Trust by The State -- or
12 by the department of mental health. And the question
13 is, how do we address the fact that this is held in
14 trust when what we want to do is sell this and use
15 the money for the purposes that they set up the Trust
16 for but it's not holding the land anymore. And we --
17 when the land was given to them for mental health
18 purposes and now they want to sell it and use it for
19 something else, how do we deal with that.

20 THE COURT: That's what they are doing; aren't
21 they?

22 MR. CARPENTER: Absolutely. Bob Hughes is
23 developing it. I'm not sure if he owns it all but
24 he's developing it with their office buildings and so
25 on. They're doing that but this was back in 2007.

1 This was 17 years ago that they were wrestling with
2 this idea. And this is a case from the Supreme
3 Court. And the Supreme Court dealt with this
4 doctrine of equitable deviation. And it's a
5 equitable doctrine and it says that it's a court of
6 equity that can make a decision about how best to
7 handle property that is owned by a Trust. And the
8 effect of owning it is not in keeping with the
9 purposes for which the Trust was set up. And changes
10 happened since the founding of the Trust that make it
11 so the purposes for which the Trust was set up would
12 be better served by making changes to the Trust. And
13 the doctrine of equitable deviation allows a court of
14 equity to make those kinds of changes to continue to
15 fulfill the purpose for which the Trust was set up.

16 If you look at Page 4 on the printout, the
17 Supreme Court recites that the attorney general noted
18 that properties conveyed by a public charity, are
19 also impressed with the charitable trust. And the
20 charitable intent of the donor is ascertained by
21 reference to charitable purposes of -- purposes of
22 the donee. But what they -- what The Court decided
23 in that case was that in keeping with the purposes
24 for which the department of mental health was
25 established, it would be equitable to allow the sale

1 of that property and the using of the proceeds for
2 continuing to provide help to the people with mental
3 illnesses of the State of South Carolina. So they
4 engaged in a instance of equitable deviation and the
5 Supreme Court found that to be something that was
6 appropriate.

7 I've got three more cases that deal with the
8 issue of equitable deviation here. Just so The Court
9 knows where I'm going. The second case that deals
10 with the issue of equitable deviation is the Epworth
11 Children's Home vs. Beasley. I have copies for The
12 Court and counsel. This case is a little bit
13 contrasting to the last one. Epworth Children's Home
14 was the trustee but, also, was the beneficiary of the
15 Will. And --

16 THE COURT: I'm listening.

17 MR. CARPENTER: Okay.

18 Some of the -- some of the beneficiaries wanted
19 to -- what was set up was annual payments to the
20 trustee and to a Methodist church. And then there
21 was a line in the Will that said that the trustee had
22 the power to do certain things with selling the
23 property. The probate court and the circuit court
24 said, well, that means that the trustee can then sell
25 it all and cash it all out. And the attorney

1 general, on behalf of the beneficiaries, appealed in
2 the Supreme Court. And the Supreme Court said, no,
3 doing that would not be in keeping with the purposes
4 of the Trust. And so that you can't do it. And,
5 also, there have been no change in circumstances that
6 would justify the doctrine of equitable deviation.
7 It has to be a change in external circumstances that
8 make it so the purposes of the Trust are frustrated
9 and need to be -- and the Trust needs to be modified
10 to continue to serve the purposes of the trust.

11 So the Supreme Court there refused to apply the
12 doctrine of equitable deviation because the
13 children's home continued to operate, the church
14 continued to operate, the annual payments to both
15 organizations would have been in keeping with the
16 testator's purposes and intent. And The Court
17 refused to allow the beneficiaries, some of them
18 being contingent beneficiaries, to cash it all out,
19 take the money themselves. That would not be in
20 keeping with the purpose of the Trust so equitable
21 deviation was denied in that circumstances.

22 Two more and I'll move on quickly. The next one
23 is called South Carolina National Bank vs. Bonds.
24 This has to do with the Greenville school system.
25 Back in the 40s, J.D. Sirrine had a lot of money and

1 he wanted to set up a Trust for the benefit of high
2 school students graduating from schools in The City
3 of Greenville. Back in the 40's, when he set it up,
4 there were 86 separate school districts in Greenville
5 County. And one of them was the City of Greenville
6 School District. And then throughout the county
7 there was 85 others.

8 Well, when this came up in 1973, a lot had
9 changed in the interim. The City of Greenville had
10 grown, its boundaries had expanded, The City of
11 Greenville's boundaries expanded, the school district
12 expanded. There were 14 different high schools in
13 Greenville County. Back in the 60's, I believe,
14 Greenville County School Board said we're going to
15 consolidate all these school districts into one. So
16 as a consequence, the Greenville County School
17 District is now the largest in the state. So instead
18 of having 86 school districts, we have one school
19 district in Greenville County.

20 But the Will and the Trust said I want to use
21 this money for the graduates of the City of
22 Greenville School District, which no longer existed.
23 Plus, in the late 60's, early 70's, you had the
24 forced busing to bring about immigration of the
25 different schools. So you had some students who

1 lived in Greenville being bussed to schools outside
2 The City of Greenville and vice versa. So The Court
3 looked at all the changes that had happened between
4 1940, when the Trust was set up, and 1970 when they
5 were trying to distribute it, said that with all
6 these changes, plus the Trust had grown immensely, so
7 it had lots and lots and lots of money. A lot more
8 money than they ever anticipated and they still
9 wanted to be selective on how they distributed the
10 money to the students. Deserving students was the
11 language of the Trust.

12 So the Supreme Court decided that with all these
13 external changes, equitable deviation would be an
14 appropriate remedy to handle this Trust. And they
15 would say that the students who were eligible for the
16 scholarships, would not be just those who graduated
17 from high schools in the City of Greenville, but all
18 the students who graduated from high schools in the
19 school district of Greenville County. So that was a
20 equitable deviation that was in keeping with the
21 purposes of Mr. Sirrine when he established the
22 Trust. That's what The Court approved.

23 One last one deals with Furman University. As
24 The Court may know, Furman University started off in
25 The City of Greenville. Then back the 40's or 50's

1 they bought land out north of Greenville and moved
2 the men's campus out there. They still had women's
3 campus in The City of Greenville. And the issue was
4 can they sell those pieces of property that were
5 donated to the university, some of them with deed
6 restrictions that said this has got to be used for
7 the university. And the litigation arose.

8 And the upshot of it is that when The Court
9 looked at all the changes that had happened, both to
10 The City of Greenville, that changed from a small
11 village to a large, striving metropolis. The fact
12 that we now have automobiles and so on that we're not
13 traveling by horse and buggy. That there were safety
14 issues where the campus was located and the school
15 had bought several hundred acres out north of
16 Greenville, the university -- The Court decided that
17 the university could use the doctrine of equitable
18 deviation, sell the property in downtown Greenville
19 and use that and apply it for campus or buildings out
20 at its current campus out on Poinsett Highway.

21 So how does that apply to the case we have in
22 front of us? I think that we have a situation where
23 the circumstance have changed. The biggest changes
24 is that in the 1880's, when they established the
25 Trust and nominated the trustees, The State was

1 governed by the Constitution of 1868. Which allowed
2 trustees to be -- have terms where that served during
3 good behavior. The Constitution of 1895 changed
4 that. Said you can't have a term of service for life
5 or good behavior, it has to be for some specified
6 period. I think that the probate court got that a
7 little bit wrong. But in our brief we cited cases
8 from the early 1900's that set out that change that
9 the Constitution of 1898, they allowed term of
10 service for during good behavior, but after 1895 it
11 was not allowed. So that's the biggest change or
12 circumstance, which I think would justify application
13 of the doctrine of equitable deviation.

14 Your Honor, one of the things I noticed in
15 preparation for this is, if you read the Will, as
16 it's set up, it doesn't foreclose the idea that the
17 term could be for a term of years. It doesn't
18 address it one way or the other. I think they used
19 the lack of the definition to -- to call them life
20 trustees and they call them several things, so. For
21 years they called them life trustees and for whatever
22 reason they started changing them to successor
23 trustees and a couple other names. But for a hundred
24 years or more, they were calling them life trustees.
25 And utilizing them as life trustees. But there's

1 nothing in the Will that says that these trustees
2 serve a term of life. There's nothing in the Will
3 that says they serve a term of good behavior. It's
4 not addressed one way or the other. So it would not,
5 in my judgment, violate the Will to have a equitable
6 deviation that says the successor trustees must serve
7 a term of years. The trustees appointed by the--

8 THE COURT: The Will doesn't say one way or the
9 other; correct?

10 MR. CARPENTER: That's right. That's right.

11 THE COURT: All right.

12 MR. CARPENTER: And this would be a equitable
13 deviation to say this needs to be applied to be in
14 keeping with the language of the Constitution. The
15 trustees employed -- elected by the legislature are
16 elected for four year terms, they're elected every
17 four years. So I got to thinking about, you know, we
18 have some judges that have scattered terms. Some of
19 them I think are four, some of them six, some of them
20 eight, some of them 10, something like that.

21 Something similar to that, I think, would be an
22 appropriate equitable deviation that would allow the
23 appointment and service of the trustees to comply
24 with both the language of the Will, there's nothing
25 in the Will that says they can't do this, and it

1 would be in keeping with the specific language of the
2 Constitution that says there must be a specified
3 period as far as the length of term.

4 We have argued that it's both the appointment to
5 the lifetime terms and the service of a lifetime
6 term. Both of which are two separate violations.
7 And, obviously, it's the same person, the same
8 service. But the appointment is unconstitutional and
9 the service is unconstitutional. But if we did this
10 equitable deviation, assigning a term of six years or
11 eight years, then that would be a way that the
12 trustees could continue to serve, they could continue
13 to serve in keeping with the terms of the Will.
14 Also, in keeping with the terms of the constitutional
15 provision.

16 I'll be happy to address any issue that The
17 Court would like to hear about.

18 THE COURT: I'll hear from Clemson.

19 MR. WILLIAMS: Your Honor, if we can, throughout
20 the case, I'll be arguing 12(b) grounds and
21 Mr. Nicholson will be arguing our additional
22 sustaining grounds of standing and justiciable
23 controversy. Are you fine if we continue to split
24 that up?

25 THE COURT: That's fine.

1 MR. WILLIAMS: All right.

2 Again, thank you, Your Honor, I'm here on behalf
3 of the individual trustee defendants. I want to
4 start first by addressing this equitable deviation
5 argument that they raised in this appeal, Your Honor.
6 The first time those words have been mentioned are in
7 their reply brief. We did not raise equitable
8 deviation in our response brief, we didn't raise it
9 in our motion to dismiss, we're not asking for that.
10 We're not -- we're the Defendants. It wasn't pled in
11 their complaint. And again, this--

12 THE COURT: Didn't the probate raise that in
13 their order?

14 MR. WILLIAMS: It did not. The only thing in
15 the probate court's order, the reference that
16 Mr. Carpenter is talking about, is the probate court
17 was detailing who has the power to alter a charitable
18 trust. And that is a court of equity. We agree with
19 that. We did say that in our brief. We're not
20 saying the court of equity should alter the
21 charitable trust, we're just saying the general
22 assembly lacks the power to do so. So through these
23 constitutional provisions and the public officer
24 statute, it would have been improper for them to try
25 to alter it. So that's the point we're making, not

1 that there should be equitable deviation.

2 And certainly, now that we're on a reply brief
3 in an appeal posture, being raised the first time,
4 that's not appropriate. Plus, I think the proper
5 party to raise that would be a trustee, a direct
6 beneficiary to the Trust, that's who could ask for an
7 equitable deviation. Not just a random citizen and
8 taxpayer who's arguing that they just have public
9 interest in the general function of state government.
10 Like we have in this case. I, also, want to note
11 that what they've pled in their complaint is they
12 want termination of the successor trustee positions.
13 And that they're to vacate their office. Not just
14 equitable deviation and hold them to a term of years.
15 So that's what's in the complaint that's before The
16 Court. So they're modifying a pleading through,
17 again, a reply brief on appeal.

18 So I wanted to address that briefly before I
19 turn to the merits of our arguments. I'll try to be
20 brief. We, of course, addressed all this in our
21 response brief. But I do think there's some
22 important background that I do need to bring up and
23 layout for The Court. And I do want to hit our four
24 main arguments as to why the probate court properly
25 dismissed these claims.

1 So, as Mr. Carpenter noted, Clemson University
2 came to be through a bequest made by Thomas Green
3 Clemson to The State of South Carolina. He agreed to
4 bequeath most of his fortune and property to The
5 State, if The State agreed to accept certain terms
6 and conditions as part of that. And one of those key
7 terms was that he wanted to establishment -- he
8 nominated seven individuals and gave them the right
9 of power, alone with their successors, which the
10 legislatures shall never take away or abridge to fill
11 all vacancies which may occur, and they're numbered
12 by death, resignation, refusal to act or otherwise.

13 The State, after he died, there was a
14 contentious battle, general assembly passed by one
15 vote, the act of acceptance. The governor signed it
16 in the law. And according to the Will, the Chief
17 Justice was to take a look at what The State did and
18 make sure that it properly accepted the bequest
19 subject to those critical terms and conditions,
20 relevant to here, the terms of office, for the
21 successor trustees. The Chief Justice looked at it,
22 Chief Justice Simpson, and said yes, The State had
23 done so, subject to the terms and conditions of his
24 last Will and Testament. So Clemson came into
25 operation in 1889 and has been operating in this

1 fashion ever since, 130 plus years. You have
2 successful operation.

3 On two occasions -- well, the first -- on one
4 occasion the Supreme Court had an opportunity to
5 comment on the structure of Clemson and this board
6 structure. And that was in the Rice Hope Plantation
7 case that we cited in our brief. And the attorney
8 general also looked at it twice in the 70's and we
9 cited both of those opinions, looking at the
10 structure. And both The Court and the attorney
11 general concluded that the structure was appropriate
12 and there couldn't be any alterations to it.

13 I hate to do this, I should have printed copies,
14 but I want to read what The Court said. I don't want
15 to, like, just quote something for The Court but this
16 is very important. This is from that Rice Hope
17 Plantation case, 216 S.C. 500. The court -- this was
18 [indiscernible] but they were looking at Santee
19 Copper's board structure, the public service
20 authority and comparing it to how Clemson's is set
21 up.

22 And The Court noted that, Santee Cooper is quite
23 different from that of Clemson college. Which,
24 although, most highly useful and most valuable to The
25 State, is not a institution or corporation, wholly

1 owned and controlled by The State. Especially, in
2 view of the Will of Thomas Green Clemson, its
3 founder, pursuant to which seven of the board of 13
4 trustees were two consistent members nominated by the
5 testator, with continuing right to fill vacancies in
6 their own number, the remaining six trustees to be
7 elected by the legislature and joint assembly. And,
8 of course, this method of trust of trustees prevails
9 under the law. That's the Supreme Court in 1950.
10 And again, the attorney general looked at the
11 structure as well and concluded very similarly to
12 what the probate court held here.

13 What the Appellants have alleged in their
14 complaint is two constitutional provisions, as they
15 noted, that provide that no person may be elected or
16 appointed to office in this state for life for during
17 good behavior, but terms of all officers must be for
18 some specified period. And I think they're skipping
19 over by going to this public officer statute that
20 defines what public officers are. They're skipping
21 over the key point of our argument, which is the
22 elected or appointed portion of the constitutional
23 provisions. What they're arguing is that it's
24 unconstitutional. The case isn't about whether they
25 fall within the public officer statute, it's whether

1 they are public officers and their office violates
2 the term -- violates the constitutional prohibitions
3 in these two sections.

4 And we note that, as the probate court found,
5 the unique structure and how Clemson came to be,
6 that's the successor trustee position, separate and
7 apart from your traditional state office. These
8 individuals are not elected by the populous or
9 general assembly. They're not appointed by any
10 governmental body. And I noticed -- I think all of
11 the cases that the Appellants have cited, they were
12 the individuals at issue were appointed by some
13 governmental body. And here we have the seven
14 original individuals and their successors, as
15 nominated by the remaining successor trustees.

16 I think it's important, also, that in the act of
17 acceptance it says those nominated by the Will.
18 Doesn't use the word elected or appointed. The
19 general assembly's act of acceptance refers to it as
20 nominated. So there was contemplation at the very
21 beginning that Clemson's unique and it's separate and
22 apart from these constitutional provisionals.

23 I noted the Rice Hope case. I also -- so
24 that's, again, like I said, we would say they're
25 separate and apart. Also, the probate court didn't

1 rely on this in reaching its conclusion. But I would
2 say that the Constitution terms of office for life or
3 good behavior, there is a specified term, it's the
4 death, resignation, refusal to act or otherwise. So
5 there is some specified term. But again, that wasn't
6 what the probate court held, it didn't reach that
7 issue. But we'd also assert that's a basis for
8 finding that the office does comply with the
9 Constitution, assuming those provisions would--

10 THE COURT: Death and life, though, is that
11 defined? Can you define that as a specified term?

12 MR. WILLIAMS: I think the refusal to act or
13 otherwise gives it -- it's not -- it doesn't just say
14 until their death or resignation. So you do have
15 that refusal to act or otherwise. And it's beyond
16 the scope of--

17 THE COURT: Even refusal to act, is that a
18 specified term?

19 MR. WILLIAMS: I think it's more than just good
20 behavior or life. But again, that wasn't essential
21 to the probate court's finding and it's not our
22 central argument. So I'm willing to move on.

23 THE COURT: Okay.

24 MR. WILLIAMS: The next point is, even assuming
25 they're correct on their legal conclusions, that this

1 successor trustee position is subject -- is a public
2 office, it's subject to the constitutional
3 protections -- or prohibitions on the statutes. I
4 mean, the constitutional sections they cited, as
5 applied, they would be unconstitutional. And there's
6 two points here. So the bargain between
7 Mr. Clemson's estate and The State of South Carolina,
8 it was a contract, the result of which was a
9 charitable trust. The attorney general looked at it
10 in the 70's, reached these same conclusions.

11 South Carolina law is clear that the general
12 assembly cannot terminate or alter a charitable
13 trust. That's Department of Mental Health vs.
14 McMaster, we cited that in our brief, 372 S.C. 175.
15 And, also, any legislative interference would run a
16 foul of both The State and federal contract laws,
17 which prohibits impairments, contracts. In the 70's,
18 the legislature were wondering if they could increase
19 the board size and the AG opined that any attempt to
20 alter the board structure and the binding nature of
21 the trust established by Clemson, accepted by The
22 State, would run a foul on those impairment of
23 contract provisions.

24 And we'd, also, note -- and I'll try not to get
25 too convoluted with this. But they've grieved that

1 the position when first -- when that acceptance was
2 first passed under the Constitution of 1868, the
3 position was constitutional. And taking them at
4 their allegations that this is a term of life, you
5 already had a prohibition against good behave -- a
6 term longer than good behavior. Life's necessarily
7 longer than good behavior. That's accepting their
8 pleading is true, shows the general assembly already
9 viewed this position as separate and apart. Because
10 otherwise, it would run a foul of that constitutional
11 provision. The change is in 1895 and the statute in
12 1901, are just not relevant. To again, this unique
13 position.

14 Finally, I would note -- and this ties into
15 Nick's standing argument that he'll make. The
16 attorney general is who has the power to address any
17 concerns regarding charitable trusts. And it sounds
18 like they're not disputing the charitable trust
19 resulted from this transaction. That Epworth
20 Children's Home vs. Beasley case provided that the
21 attorney general is the proper party to protect the
22 interest of the public at large, and the matter of
23 administration or enforcement of the charitable trust
24 and the AG has the duty to represent unspecified
25 charitable beneficiaries, serves as the protector,

1 supervisor and enforcer of charitable trust. That's
2 Wilson vs. Dallas, 403 S.C. 411.

3 It's not the AG's who's across from us at
4 counsel's today, that's who would have standing to
5 bring this suit if there was some problem. No other
6 governmental official has ever challenged Clemson's
7 structure. Again, just a citizen -- concerned
8 citizen is not the proper party to try to address a
9 purported improper Trust on structure administration.
10 So again, for those four reasons, we assert the
11 probate court properly granted the motion to dismiss.

12 I also note, and we cited some of those case law
13 in our brief, that you have long acquiescence to this
14 structure, 130 plus years where the state government
15 has approved Clemson's operation. And that should
16 carry some weight. One more point before I sit down,
17 unless The Court has questions, I meant to note at
18 the outset, it's important that under the statutory
19 and constitutional interpretation framework from the
20 Supreme Court, The Court must harmonize, as best it
21 can, to try to presume constitutionality, not reach a
22 strain reading to try to find that something's
23 unconstitutional. And also, there's a
24 well-established principle that repealed by
25 implication in this, assuming you adopt the

1 appellate's position, would be repealed by the act of
2 acceptance that adopted the Will's terms and
3 conditions which included the trustee position -- the
4 trustee term.

5 I'll turn it over Mr. Nicholson.

6 THE COURT: All right.

7 Yes, sir.

8 MR. NICHOLSON: May it please the Court, Your
9 Honor, again, Nick Nicholson on behalf of Clemson.
10 Judge Allison ruled that The Plaintiffs neither had
11 statutory nor constitutional standing. The
12 Plaintiffs haven't really raised that in their brief
13 and they never pressed that in their below -- the
14 court below. The Plaintiffs did argue and Judge
15 Allison accepted that The Plaintiffs have public
16 importance standing here. I'm here to argue, as an
17 additional sustaining ground, that The Plaintiffs do
18 not have that standing. And for the following
19 reasons.

20 First, Mr. Carpenter made the statement, he said
21 that -- he said, well, when you allege a
22 constitutional violation, that gives you standing.
23 That's just not the case. The Supreme Court has very
24 carefully said that the whole concept of standing can
25 be swallowed up by the public importance exception,

1 if you let it. So there's a balancing act. We've
2 got to look at -- we've got to look at, basically,
3 the needs of The Court to control access to real
4 cases and controversies versus the public's right to
5 know when true public important issues come up, the
6 key that the Supreme Court has talked about, Your
7 Honor, the key is that there must be need for
8 guidance for the future.

9 And we would argue, Your Honor, there is not
10 need for guidance for several reasons. First, as
11 Mr. Williams has already discussed, we have the
12 vetting by the chief justice, when the act of
13 acceptance was passed, the Chief Justice had to come
14 in and look at that, make sure did the general
15 assembly do it properly? The Supreme Court commented
16 in the Rice Hope case that Mr. Williams quoted here
17 to The Court, talked about that the trustee statute
18 and talked about it, the very nature of it. We
19 have -- Mr. Williams, also, alluded to an attorney
20 general opinion. The cite to that opinion, Your
21 Honor, is 1978 WL in Westlaw 34673, it's a
22 January 26, 1978 attorney general opinion.

23 There in part, it's discussing a lot of opinions
24 that courts have made with respect to Clemson and its
25 board set up. And concluding statement it says, All

1 of these cases recognize the binding nature of the
2 Trust established by Clemson and accepted by The
3 State. The terms of such a Trust, when accepted by
4 The State, are binding upon The State.

5 And so, Your Honor, we would argue that there is
6 simply no need for a further guidance because there
7 is guidance already in the case law.

8 The second point, with respect to standing, Your
9 Honor, and we cite in our case -- excuse me, we cite
10 in our brief, the case of Jowers, let me find that
11 cite. Here we go, case of Jowers vs. South Carolina
12 Department of Health and Environmental Control. The
13 cite there is 423 S.C. 343, that's a 2018 case. In
14 Jowers, one of the aspects that The Court, with
15 Justice Few writing the opinion, stated that When
16 there's a adequate remedy for the public, then there
17 is no public important statute. In the statute
18 there, what The Court said is you've got DHEC that
19 can step in and protect the public for the concerns
20 that are being raised by The Plaintiffs in this case.

21 Same thing here, Your Honor. Mr. Carpenter
22 cited to you the case of the Furman University case.
23 We've got the attorney general who can step in. And
24 I would -- and in that case, this is the opinion of
25 the trial court, which the Supreme Court adopted in

1 total. But Page 482 and 483 of the South Carolina
2 Reporter, The Court says -- and this is talking about
3 the attorney general.

4 I find and hold that Daniel R. McCloud, as the
5 attorney general, is the only proper and necessary
6 party defendant to this proceeding, the public
7 interest is properly represented by the defendant.

8 So we have the attorney general who can step in
9 if they foresee a problem with the Will, that is who
10 is protected the public. Therefore, because of that
11 under the Jowers case, there can be no public
12 importance. That's a second ground that I would also
13 argue that we've had plenty of decisions, plenty of
14 discussions of the courts about the Clemson Trust, so
15 there is no more need for public importance.

16 I'll be happy to answer any questions that Your
17 Honor may have about this topic. Thank you.

18 THE COURT: All right, any brief response,
19 Mr. Carpenter?

20 MR. CARPENTER: Yes, Your Honor. On the issue
21 of public importance, there's a case from 2020 from
22 the Supreme Court, that I think is a lot more current
23 than the one Mr. Nicholson was talking about, if I
24 can hand that up to The Court. It's called Adams vs.
25 McMaster. This is when McMaster was the governor.

1 And this is when he -- he was trying to give that 30
2 or 40 million dollars to the private schools that
3 came from, I think it was [indiscernible] funds. And
4 a bunch of people brought an action to the Supreme
5 Court alleging that it was unconstitutional. And the
6 Supreme Court granted public important standing to
7 the plaintiffs, took the original jurisdiction of the
8 case and made some rulings about the
9 unconstitutionality of the governor's proposed
10 conduct. And also, clarified some, I think, long
11 standing principles about standing. The standing
12 discussion starts at the bottom of Page 5 on this
13 opinion.

14 Petitioner's claim standing under the public
15 importance exception. Unlike, with Constitutional
16 standing, a party is not required to show he has
17 suffered a concrete and particularized injury in
18 order to obtain public importance standing. The
19 party also need not show that he has an interest
20 greater than other potential plaintiffs.

21 Opposing counsel is trying to argue that because
22 the attorney general could do something that nobody
23 else can. And that's just not what public important
24 standing's about.

25 THE COURT: Couldn't you argue, though, this is

1 more of a grievance versus an injustice? If you look
2 a little bit further in that opinion, that's where,
3 really, The Court looks at it is every citizen, just
4 because you've got a grievance, you can't be filing
5 these lawsuits. Because, otherwise, we're going to
6 be in here everyday, somebody is going to be filing
7 some kind of grievance against whoever. Whether it's
8 Clemson, South Carolina or any other issue. Does the
9 court look at it and say it's got to be some kind of
10 injustice? So what is the injustice that your client
11 has in this matter versus a grievance? Because it
12 seems like he more has a grievance, in reading your
13 briefs, their briefs and looking at the file, it
14 seems more along the lines of a grievance. I mean,
15 he's not involved at Clemson, there's nothing in the
16 brief that I saw that he has any relationship or any
17 issue or any injustice as a result of that -- of
18 these actions. What is the injustice?

19 MR. CARPENTER: Well, Your Honor, I would
20 respectfully disagree that injustice is the key when
21 you're looking at public important standing. I think
22 the Adams case, the Adams vs. McMaster case
23 addresses--

24 THE COURT: Well, I mean, if you look at Adams
25 vs. McMaster, The Court then says, Whether -- and

1 discussing right after the sentences that you just
2 mentioned, it then goes on to state and analyze that
3 very same argument that you're making. It says,
4 Whether an issue of public importance exists,
5 necessitates a cautious balancing of the competing
6 interests presented. This Court has explained an
7 appropriate balance between the competing public
8 concerns underlying the issue of standing must be
9 realized. Citizens must be afforded access to the
10 judicial process to address alleged injustices. On
11 the Other hand, standing cannot be granted to every
12 individual who has a grievance against a public
13 official. Otherwise, public officials would be
14 subject to numerous lawsuits at the expense of both
15 judicial economy and the freedom from frivolous
16 lawsuits.

17 So I think I take issue with your argument there
18 that that's not what it says because I believe it
19 does, looking at this.

20 MR. CARPENTER: And it does and there have been
21 courts that have raised those competing issues.
22 Because just they're competing issues doesn't mean
23 that the issues that counsel raised against granting
24 standing, outweigh the ones that should grant
25 standing.

1 And then The Court goes on and it says, The key
2 to public important analysis is whether a resolution
3 is needed for future guidance.

4 That's the highlighted section right below what
5 The Court just read. The Court must take these
6 competing policy concerns into consideration.
7 Absolutely.

8 And in the McMaster -- Adams vs. Ms. McMaster
9 case, The Court found public important standing. And
10 in the -- if you look at the right side of that page,
11 toward the top, it tells why, I think, The Court
12 found public important standing. Resolution that --
13 the first full paragraph.

14 THE COURT: All right.

15 MR. CARPENTER: Resolution of future guidance is
16 needed here because this case involves the conduct of
17 government entities and the expenditure of public
18 funds, a prompt decision is necessary, and it is
19 likely the situation will occur in the future.

20 And what this case dealt with was allegedly
21 unconstitutional conduct on the part of public
22 official, the expenditure the public monies. And we
23 have those three elements -- and the need for future
24 guidance. And we have those elements in this case.
25 We have, allegedly, unconstitutional conduct, where

1 they're serving in violation of the Constitution,
2 they're serving something other than for a specified
3 term, they're serving for life. That's
4 unconstitutional conduct.

5 Number two, they're expending over a hundred
6 million of dollars in public funds every year through
7 that board. So they're dealing with public funds.
8 And then this has been a issue for 125 years. And
9 it's going to continue to be an issue because even
10 though they may have taken informal actions to
11 address it, they still are serving year, after year,
12 after year on life terms. And un -- not a specified
13 term as required--

14 THE COURT: Address my issue, though, with The
15 Court's language that the balancing The Court must
16 consider is citizens who have or claim injustice show
17 access versus those that just have grievance. What
18 is the -- and not withstanding your argument that the
19 issue going down and the issue being that well
20 resolution is needed for future guidance. The Court
21 also discussing the injustice versus the grievance
22 issue and the balancing. What is the injustice that
23 your client is suffering as we speak right now?

24 MR. CARPENTER: The injustice is the continued
25 violation of the Constitution. If you look at the

1 top of that column on Page 5 of the printout, unlike
2 constitutional standing, which is like what The
3 Court, I think, is thinking of, a party is not
4 required to show that he has suffered a concrete or
5 a--

6 THE COURT: I agree with that but isn't there a
7 difference in arguing that he -- I'm not -- I
8 didn't -- my question was not addressed what his
9 particularized or concrete injury was, I want to know
10 what is the injustice that he is sustaining as a
11 result of this?

12 MR. CARPENTER: It's a constitutional violation.
13 And over the last 20 or 25 years, we have brought a
14 number of cases that have alleged that constitutional
15 violation, whether it be the general assembly having
16 a bunch of things cobbled together in one bill, or
17 whether we talk about DOT commissioners serving more
18 than one consecutive term. Or failure to follow
19 competitive seal bidding and spending public money.
20 Or using a emergency exception when there was no
21 emergency. A public official violating the
22 Constitution or violating the law and using public
23 money in the process, is -- has been, I think, found
24 repeatedly to constitute sufficient grounds to be --
25 to grant public important standing. These are issues

1 of great public importance. Enforcing the
2 Constitution.

3 The Court says in this Adams case, toward the
4 end of it, Page 9, toward the bottom of the page,
5 However having accepted this matter in our original
6 jurisdiction, we must fulfill our duty to review the
7 Governor's decision to expend the GEER Fund grant
8 monies on the SAFE Grants Program. Even in the midst
9 of a pandemic, our State Constitution remains a
10 constant and current circumstances cannot dictate our
11 decision. Rather, no matter the circumstances, The
12 Court has a responsibility to uphold the
13 Constitution.

14 And that's the nature of these public interest
15 cases. That the Constitution and the state law be
16 upheld in the face of conduct by public officials to
17 the contrary. And that has been held repeatedly to
18 be sufficient to grant public important standing.
19 And the probate court found public important
20 standing. So I think this is a add on argument by
21 them. But I think The Court made the right
22 determination on that. Where you got a
23 constitutional violation and expenditure of hundreds
24 of millions of dollars. And the action of public
25 officials.

1 I think getting back to the heart of this case
2 is the definition of office and officer and does that
3 constitutional prohibition of a term for a officer or
4 office, to be unlimited or life when that is
5 prohibited by the Constitution. And they're saying
6 well these are not officers. The statute says all
7 the trustees of all the colleges are officers. We
8 have the case that we mentioned earlier, the Evans
9 vs. Beatty from '26 that says if there's a public
10 element to it, then they're exercising part of the
11 sovereignty of The State. When it's a permanent
12 office and not a temporary office, that meets the
13 definition of office. And that is what this
14 constitutional section means when it says the term
15 can't be unlimited and must be for some specified
16 period.

17 So if we get back to the definition of office,
18 then I think that gets us to the heart of what this
19 case is about. All the stuff about equitable
20 deviation and so on, that's kind of the remedy, after
21 we go through the process that says these people are
22 officers and what they hold is the trustee is an
23 office and the constitutional prohibition applies to
24 that. And that was the fundamental error that the
25 probate court made.

1 I'd also like to remind The Court that this was
2 in response to a motion to dismiss. All we did was
3 file a complaint. We didn't get any discovery, we
4 didn't get any answer, we never amended the case.
5 You know, this is at the very, very beginning,
6 procedurally, of the case. And we are out and we are
7 out with prejudice. We can't ever bring this up
8 again based on one complaint that I wrote and filed
9 and maybe I should have written it better. But to
10 throw the whole case out with prejudice, when you got
11 a, we think, a misinterpretation of the office and
12 officer language from the Constitution as shown by
13 the Evans vs. Beatty and by the statute, I think
14 there needs to be -- the case needs to be reversed
15 and remanded for a more fully developed record and
16 through the normal process of litigation, through
17 discovery and so on. And we'd ask that The Court
18 reverse and remand it to the probate court. Thank
19 you.

20 THE COURT: All right, thank you.

21 I'll review the file, I've already read the file
22 and reviewed it but I will look at it again and
23 consider your arguments and take it under advisement
24 and I'll let you know my decision. Thank y'all.

25 MR. WILLIAMS: Thank you, Your Honor.

1 THE COURT: Yes, sir.

2 MR. CARPENTER: I have an extra copy of my
3 outline, if that would assist The Court.

4 THE COURT: I've got your briefs, I read your
5 briefs and record on appeal, so that's all I need.
6 Thank you, though.

7 MR. CARPENTER: All right.

8 MR. WILLIAMS: Thank you, Your Honor.

9 MR. NICHOLSON: Thank you, Your Honor.

10 THE COURT: Thank y'all.

11 (WHEREUPON, the proceedings were concluded.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Pickens County, South Carolina, on the
14th day of June, 2024.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

November 24, 2024

April P. Herron

APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

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

Plaintiffs,

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,

Defendants.

IN THE CIRCUIT COURT

Case No. 2023-CP-39-_____

Notice of Appeal from
the Probate Court

NOW COMES the Plaintiff John Sloan, individually, and on behalf of all others similarly
situated, and gives Notice of Appeal of the Order of the Probate Court entered April 3, 2023, by
The Honorable David K. Allison, Pickens County Probate Judge, (**Exhibit 1**).

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

/S/ James G. Carpenter

James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Plaintiff

April 13, 2023

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

G.D. Morgan, Circuit Court Judge

Case No. 2023-CP-39-00416

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

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,

NOTICE OF APPEAL

John Sloan, individually, and on behalf of all others similarly situated, and NOLAS Trading Co., Inc. appeal the Form 4 Order entered June 27, 2024 (Exhibit 1), and the Order entered July 25 2024 (Exhibit 2), and the Order entered July 31, 2024 (Exhibit 3), all by the Honorable G. D. Morgan. Appellants received written notice of the entry of the final Order on July 31, 2024.

August 23, 2024

/S/ James G. Carpenter
S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269
Attorneys for Appellants

Other Counsel of Record:

Boyd B. Nicholson, Jr.
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29602

C. Mitchell Brown
Blake Williams
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia, SC 29211

Certificate of Service

The undersigned attorney hereby certifies that he has served a copy of the foregoing Notice of Appeal on counsel for Defendants by US Mail, postage prepaid on Friday, August 23, 2024, to the following persons:

Boyd B. Nicholson, Jr.
Haynsworth Sinkler Boyd, PA
PO Box 2048
Greenville, SC 29602

Six

/s/ James G. Carpenter
S.C. Bar No. 1136
THE CARPENTER LAW FIRM, P.C.
819 E. North Street
Greenville, South Carolina 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorneys for Appellants

Aug 19 2025

SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a copy of the foregoing Record on Appeal
Accompanying Initial Reply Brief upon counsel for the Respondents by electronic AIS email only,
this August 20, 2025, addressed as follows:

Boyd B. Nicholson, Jr.
nnicholson@hsblawfirm.com

C. Mitchell Brown
mitch.brown@nelsonmullins.com

Blake Williams
blake.williams@nelsonmullins.com

/s/ James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, South Carolina 29601
(864) 235-1269 Tel.
(864) 242-5500 Fax.
jim@carpenterlawfirm.net