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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable William P. Keesley

Appellate Case No. 2025-002064

Ann Peets .....Appellant,

v.

South Carolina State Ethics Commission and Meghan Walker Dayson, in her official capacity as Executive Director of the South Carolina State Ethics Commission..... Respondents.

Initial Brief of Appellant

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2. Did the trial court err when it, applying the canon that a specific statute prevails over a general one, misapprehended that 30-4-70(b) an 8-13-320(10)(g) do not deal with identical issues and by failing to analyze these statutes as a whole?
3. Did the trial court err when it, applying the canon that a specific statute prevails over a general one, found a conflict between sections 30-4-70(b) and 8-13-320(10)(g) that did not exist and in failing to meaningfully attempt to harmonize these two statutes?
4. Did the trial court failed to recognize that if the Legislature intended the Commission to be exempt from FOIA, it would have passed a statute granting the exemption?
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6. Did the trial court err when it concluded that Appellant was required to exhaust administrative remedies on the ultra vires claim, i.e., the claim that the Commission exceeded its statutory and constitutional authority, in issuing extraterritorial subpoenas and in finding no exception to the exhaustion requirement existed?

Statement of the Case

On February 3, 2025, Appellant filed the Amended Complaint[1] and Petition for Writ of Prohibition and Temporary and Permanent Injunctive Relief.[2] **(R. pp.)** Am. Compl. The Amended Complaint consisted of six counts, two of which are at issue in this appeal: (1) a declaratory judgment that the Ethics Commission had violated FOIA and that it lacked the statutory authorization to proceed on the ethics complaints (Count One); and (2) a declaratory judgment that the Commission lacked the statutory authority to issue extraterritorial subpoenas, at least without complying with the Uniform Interstate Depositions and Discovery Act (UIDDA), S.C. Code Ann. §§ 15-47-100, *et. seq.* (Count Two). **(R. pp.)** Am. Compl.[3]

On March 7, 2025, Respondents answered the Amended Complaint. **(R. pp.)** Answer Am. Compl. In their Answer, the Commission acknowledged that it had "voted on probable cause [for the Peets complaints] in executive session." **(R. p.)** Answer Am. Compl. ¶ 30.

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[1] The initial complaint alleged only a FOIA violation.

[2] Contemporaneously with the filing of the Amended Complaint, Appellant filed a motion for a temporary injunction, seeking to prevent the Commission from acting outside its statutory jurisdiction and violating Peets' constitutional rights to privacy and due process with respect to her and her bank records" and seeking to prevent a contested case hearing from being held on February 20, 2025 where those bank records may be introduced as evidence. **(R. p.)** Am. Compl. ¶ 71. The Motion for a Temporary Injunction was resolved by agreement of the parties.

[3] The Amended Complaint also alleged (3) a declaratory judgment that the subpoenas violated Appellants' privacy rights under the Fourth Amendment to the U.S. Constitution and S.C. Const. art. I, § 10 (Count Three); (4) a declaratory judgment that the investigation violated Appellant's due process rights under S.C. Const. art. I, § 22 (Count Four); (5) a writ of prohibition directing the Commission not to move forward with any contested case proceeding on the ethics complaints until the issues in this case can fully be adjudicated (Count Five); and (6) a temporary injunction preventing the Commission from taking any action on the ethics complaints until the matter is resolved (Count Six). Appellant is not challenging Counts Three or Four on appeal. Although Appellant was informed and believed that the agreement of the parties mooted Counts Five and Six, Respondents still argued the merits of these matters in the summary judgment proceedings and the trial court ruled on them in its Order **(R. p.)** (Order at 17). For this reason, they are addressed *infra*.

Specific to the FOIA claim, the Answer also made clear that the Commission was relying on *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 423 S.C. 295, 814 S.E.2d 513 (2018), as a defense to the Appellant's contention that the Commission's probable cause vote violated South Carolina Code section 30-4-70(b) (prohibiting "public bodies" from voting in executive session). **(R. pp.)** Am. Compl. ¶ 26; Answer Am. Compl. ¶ 35. The Answer stated that because of *DomainsNewMedia.com*, "Plaintiff's reliance on FOIA for obtaining probable cause determinations is . . . misplaced." **(R. p.)** Answer Am. Compl. ¶ 35.

On March 18, 2025, the Court entered upon consent of the parties an Order of Assignment and Scheduling Order, assigning the matter to the Honorable William P. Keesley and agreeing to a briefing schedule where the parties would initially file cross-motions for summary judgment "[o]n the FOIA claim and any exhaustion arguments." **(R. pp.)** Order of Assignment and Scheduling Order. On April 17, 2025, after the parties had each filed separate motions, responses, and reply briefs, a hearing was held before Judge Keesley, who requested proposed orders from both parties. **(R. pp.) (Tr. 58:8–59:12).**

On May 29, 2025, the Court granted summary judgment in favor of the Commission, ruling, *inter alia*, that the Commission's voting on probable cause in executive session did not violate FOIA and that Appellant was required to exhaust her administrative remedies before bringing her non-FOIA claims to the circuit court. **(R. pp.)** Order.

On June 9, 2025, Appellant timely filed a Motion to Alter or Amend under Rule 59(e), SCRCP. **(R. pp.)** Rule 59(e) Motion. On September 10, 2025, the trial court denied the motion. **(R. pp.)** Form 4 Order. In the Form 4 Order, Judge Keesley stated, in part:

> [T]he decision to determine that the defendants did not violate FOIA in the unique circumstances presented here and that the plaintiff should be required to exhaust administrative remedies is justified. Having fully reconsidered the prior ruling and the issues raised in the pending motion, with the utmost respect to those who

> disagree with the analysis and conclusions reached by this court, the motion to alter or amend is denied.

(R. p.) Rule 59(e) Order, at 2.

Statement of Facts

1. Commission investigative process

The Commission is a state agency whose statutory authority is contained in S.C. Code Ann. §§ 8-13-100, *et. seq.*, and § 2-17-10, *et. seq*. (Ethics Act). Among other responsibilities, the Commission is charged with investigating and adjudicating complaints which allege violations of the Ethics Act. *See* S.C. Code Ann. § 8-13-320(9).

When a complaint is received, the Commission Executive Director reviews it,[4] and if she finds the complaint meets a "facts sufficient" threshold, an investigation is ordered. *See* S.C. Code Ann. § 8-13-320(10)(c); S.C. Code Regs. 52-203(6). As part of its investigation, "[t]he commission may . . . *issue subpoenas* for the procurement of witnesses and materials including books, papers, records, documents, or other tangible objects relevant to the agency's investigation by approval of the chairman, *subject to judicial enforcement*." *Id.* § 8-13-320(10)(f) (emphasis added). Once an investigation is concluded,

> [C]ommission staff, in a preliminary written decision with findings of fact and conclusions of law, must make a recommendation whether probable cause exists to believe that a violation of this chapter has occurred. . . . *If the commission determines, by an affirmative vote of six or more commission members*,[5] that there is probable cause to believe that a violation has been committed, *its preliminary decision* may contain an order setting forth a date for a hearing before a panel of three commissioners, selected at random, to determine whether a violation of the chapter has occurred . . . Probable cause is a finding that the allegations contained in the complaint are more likely than not to have occurred and constitute a violation of [the Ethics Act].

[4] Respondent Meghan Walker Dayson is the Executive Director of the Commission and was named in this case in her official capacity only. **(R. p.)** Pl.'s Mot. for Part. Summ. J., n.2.

[5] The Commission consists of eight members. S.C. Code Ann. § 8-13-310(A)(1).

Id. § 8-13-320(10)(i) (emphasis added).

2. Ethics Complaints at Issue

In the November 2023 general election, Appellant was a first-time candidate for a seat on Folly Beach Town Council. She ultimately lost in a runoff. In December 2023, the Commission received three complaints against Appellant alleging certain technical and/or procedural violations of the Ethics Act. **(R. p.)** Am. Compl. ¶ 4.

3. Commission Investigation

Pursuant to section 8-13-320(10)(c), Executive Director Dayson reviewed the complaints, determined that they met "facts sufficient" threshold, and ordered an investigation. *See id.* § 8-13-320(10)(c); S.C. Code Regs. 52-203(B)(6); **(R. pp.)** Am. Compl. ¶ 6; Answer Am. Compl. ¶ 9.

During the investigation, the Commission issued subpoenas to four entities that were not based in the State of South Carolina (extraterritorial subpoenas) for Appellant's personal bank records and the business bank records for an LLC she owned, without providing Appellant notice of the subpoenas or an opportunity to object to their issuance. *See* **(R. pp.)** Am. Compl. ¶¶ 8–11; Answer Am. Compl. ¶¶ 11–17. These extraterritorial subpoenas were issued to TD Bank (Cherry Hill, New Jersey), American Express Company (AMEX) (New York, New York), Venmo (San Jose, California), and First Citizens Bank (Raleigh, North Carolina). **(R. p.)** Am. Compl. ¶¶ 8–9. Although the UIDDA provides a procedure whereby the Commission can domesticate an out-of-state subpoena, the Commission did not attempt to domesticate through UIDDA or otherwise comply with its procedures.[6] *See* **(R. pp.)** Am. Compl. ¶ 34; Answer Am. Compl. ¶ 40.

[6] The subpoena to TD Bank, was worded to demand "[a]ny and all financial records from inception . . . ." **(R. p.)** Am. Compl. ¶ 9. The Commission investigator emailed this particular subpoena to an out-of-state email address. **(R. p.)** Am. Compl. ¶ 34. TD Bank responded with approximately 2,200 pages of Peets' personal bank records going back approximately a decade to 2014. **(R.pp.)** Am. Compl. ¶ 9; Answer Am. Compl. ¶¶ 15, 25.

4. Commission Meeting and Probable Cause Finding

The Commission met on July 18, 2024, with seven of the eight Commissioners present. **(R. pp.)** Am. Compl., Ex. A. The July 18, 2024 open Commission meeting minutes reflect that (1) the Commission took formal votes multiple times, with all of them passing by a 7-0 margin. **(R. p.)** Am. Compl., Ex. A.; (2) during the meeting, the Commissioners voted "to go into executive session to hear probable cause matters." **(R. pp.)** Am. Compl., Ex. A.; (3) that the Commissioners returned from Executive Session at 12:15 p.m. and adjourned at 12:18 p.m. **(R. pp.)** Am. Compl., Ex. A. The minutes for the July 18, 2024 Commission meeting reflect that no probable cause vote was taken in open session. **(R. pp.)** Am. Compl., Ex. A.

On August 20, 2024, Peets received a Notice of Hearing from the Commission, representing that the Commission voted to find probable cause against her on forty-five counts of violating the Ethics Act. **(R. p.)** Am. Compl. ¶ 13. According to the Commission, during the July 18, 2024 executive session, it voted to find probable cause on Appellant's ethics complaints based on staff's recommendation that it do so **(R. pp.)** Order at 3; Defs.' Mot. Summ. J. Ex. A ¶ 9–10; Answer Am. Compl. ¶ 30.

Standard of Review

"The standard of review in a declaratory action is determined by the underlying issues." *DomainsNewMedia.com*, 423 S.C. at 300, 814 S.E.2d at 516, 814 S.E.2d at 516 (citations omitted). Here, there were no disputed issues of material fact, and only legal issues were before the Court regarding application of various statutes, constitutional provisions, and the statutory authority and jurisdiction of the Commission and the courts.

"The interpretation of a statute is a question of law." *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) (internal citation omitted). Questions about "the statutory authority or jurisdiction of [a state agency or officer]" are "solely one[s] of law . . . ." *Ex*

parte Allstate Ins. Co., 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966). "The question of subject matter jurisdiction is a question of law." *Gantt v. Selph*, 423 S.C. 333, 338, 814 S.E.2d 523, 526 (2018). This Court "undertakes a de novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court." *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013).

Argument

1. The trial court erred when it concluded that the Commission, although admittedly a "public body" under FOIA, was allowed to enter executive session without complying with section 30-4-70(a) and to vote on probable cause matters notwithstanding section 30-4-70(b) and the lack of an explicit statutory exception.

A. *The trial court failed to apply the plain language of section 30-4-70(b) and an unbroken line of controlling case law when it determined the Commission was authorized to vote on "probable cause" on Appellant's ethics complaints in executive session.*

Section 30-4-60 mandates that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to Section 30-4-70 of this chapter." Section 30-4-70(a) prescribes the limited circumstances under which a public body may hold a closed meeting. Then, section 30-4-70(b) dictates that a public body may not take an action "in executive session except to (a) adjourn or (b) return to public session." Taken together, these provisions are simple enough: public bodies cannot vote in executive session.

"The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." *Perry v. Bullock*, 409 S.C. 137, 140,761 S.E.2d 251, 253 (2014) (cleaned up). Thus, courts "begin (and can often stop) statutory interpretation with the statute's text." *1 Dragon's Ascent Video Gaming Machine v. S.C. Law Enf't Div.*, 445 S.C. 252, 259, 912 S.E.2d 407, 411 (Ct. App. 2025), *reh'g denied* (Mar. 12, 2025), *cert. denied* (Sept. 9, 2025). "When the text is not ambiguous, then what the General Assembly said in the text is what the General Assembly meant." *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 196, 906 S.E.2d 345, 360–61

(2024), *reh'g denied* (Oct. 3, 2024). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, . . . the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

In the proceedings below, the Commission (1) did not deny it was a "public body" as defined in South Carolina Code section 30-4-20(a), nor did it deny that FOIA was applicable to the agency;[7] and (2) admitted that it voted to find "probable cause" against Appellant in executive session. **(R. pp.)** Answer Am. Comp. ¶ 30; Defs.' Mot. Summ. J. Ex. A ¶ 9–10. That should have been the end of the trial court's inquiry and should have led the court to a straightforward finding that the Commission had violated FOIA.

As this Court has held,

> FOIA "originally allowed formal action to be taken in executive session if the action was later ratified in public." "However, the 1987 amendments to [FOIA] deleted the language allowing ratification of votes taken in executive session and specifically prohibited voting while in executive session." "By affirmatively deleting the ratification language, the legislature made its intent clear. Ratification no longer validates a vote cast during an executive session."[8]

[7] Nor could it. FOIA is clearly applicable. *See, e.g.*, State Ethics Commission, Freedom of Information Act, https://ethics.sc.gov/freedom-information-act-foia (last accessed Feb. 8, 2026) (containing Commission's FOIA policy); State Ethics Commission, Meeting Minutes, https://ethics.sc.gov/about-us/meeting-minutes (last accessed Feb 8, 2026) (indicating "[a]ll meetings of the State Ethics Commission are held pursuant to the Freedom of Information Act, and all required notifications are made").

[8] Of further note, the last major legislative amendment to section 30-4-70, Act 423 of 1998, further narrowed this prohibition by "**DELET[ING] THE DEFINITION OF 'FORMAL ACTION', TO PROVIDE THAT *NO ACTION* MAY BE TAKEN IN EXECUTIVE SESSION EXCEPT TO ADJOURN OR RETURN TO PUBLIC SESSION . . . .**" https://www.scstatehouse.gov/sess112_1997-1998/bills/22.htm (last accessed Feb. 4, 2026) (emphasis added). This affirms a legislative intent, as of 1998, to *narrow* the actions a public body can take in executive session rather than enlarge them. "It is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999) (cleaned up).

Brock, 411 S.C. at 118, 767 S.E.2d at 209 (citations omitted). Indeed, numerous times and without exception since the 1987 Amendments, South Carolina courts have held that a public body may not vote in executive session and any such vote is invalid. *See Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 165, 547 S.E.2d 862, 866 (2001) ("FOIA prohibits any formal action to be taken in an executive session."); *Fowler v. Beasley*, 322 S.C. 463, 469, 472 S.E.2d 630, 634 (1996) ("So long as the vote is taken at an open public meeting, and the public is able to glean the results and how each member voted, there is no FOIA violation"); *Bus. License Opposition Comm. v. Sumter Cnty.*, 311 S.C. 24, 28, 426 S.E.2d 745, 748 (1992) ("We agree with the Master that the evidence of record demonstrates that the amendment to the ordinance was illegally adopted at the closed meeting" and therefore "find no abuse of discretion on the part of the Master in ordering the equitable relief of invalidation of the ordinance."); *Piedmont Pub. Serv. Dist. v. Cowart*, 319 S.C. 124, 128, 459 S.E.2d 876, 878 (Ct. App. 1995), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996).

Two recent decisions of this Court further illustrate the principle. In *Miramonti v. Richland County School District One*, the Court held that a school district had failed to comply with the "specific purpose" requirement in section 30-4-70(b) when it went into executive session for legal advice on how to respond to a parent's complaint. 438 S.C. 612, 616, 885 S.E.2d 406, 408 (Ct. App. 2023). Then, the Court held "[e]ven if the Board had complied with the FOIA's specific purpose requirement when it retreated into executive session, it could not have taken any vote except to adjourn or resume its public session." *Id.* at 616-17 (citing § 30-4-70(b)). In *Davis v. South Carolina Education Credit for Exceptional Needs Children Fund*, this Court applied *DomainsNewMedia.com* when it held that a non-profit entity receiving public funds was not a "public body" under FOIA. 441 S.C. 187, 204, 893 S.E.2d 330, 339 (Ct. App. 2023). As pertinent here, the *Davis* Court then stated that it

> [c]ategorically disagree[d] with the circuit court's conclusion that the meetings of a public body 'can be closed meetings' if aspects of the discussion at those meetings—even all aspects—are exempt from the FOIA. That is not what FOIA says. *See* S.C. Code Ann. § 30-4-60 (2007) ("*Every meeting of all public bodies* shall be open to the public unless closed pursuant to Section 30-4-70 of this chapter." (emphasis added)). Instead, the General Assembly has provided that certain issues may be discussed in closed session. *See* § 30-4-70(a) (listing reasons that may justify executive sessions). ***And the FOIA lays out a procedure for going into executive session that*** requires a public vote to do so and ***prohibits a vote in executive session to take action.*** *See* S.C. Code Ann. § 30-4-70(b) (2007) ("No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.")

Id. at 206, 893 S.E.2d at 340 (bolded emphasis added).

Despite this unbroken line of controlling cases, the trial court agreed with the Commission that—even though it was admittedly a "public body"—it could vote in secret on probable cause findings in ethics complaints. Failing to apply the statute as written and the controlling precedent was clear error.

B. ***The trial court erroneously relied on DomainsNewMedia.com and misapplied it to the inapposite situation here.***

The trial court order correctly states, "[t]o be sure, FOIA prohibits public bodies from voting in executive session." **(R. p.)** Order at 4. Nevertheless, the court determined that the Commission was exempted from the secret voting prohibition based on a misapprehension of *DomainsNewMedia.com*. More specifically, based on *DomainsNewMedia.com*, the trial court determined that the secret voting prohibition in section 30-4-70(b) was only a "general" statute which "conflicted" with the "more specific" statute, section 8-13-320(10)(g) (providing that "[a]ll [Commission] investigations, inquiries, hearings, and accompanying documents are confidential

and only may be released pursuant to this section.").[9] **(R. pp.)** Order at 4–5. For several reasons, this was clear error.

First, the trial court missed that section 8-13-320(10)(g) speaks to confidentiality with a much higher level of generality than the specific prohibition on voting in executive session in section 30-4-70(b). Section 30-4-70(b) unequivocally and without exception prohibits public bodies from voting in executive session, whereas section 8-13-320(10)(g) speaks in generalities about the confidentiality of "inquiries, hearings, and accompanying documents" during a Commission investigation. Notably, section 8-13-320(10)(g) does not state that *votes* are confidential. *See Hodges*, 341 S.C. at 87, 533 S.E.2d at 582 (holding that under the canon of *expressio unius est exclusio alterius*, "the enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed."). The trial court overlooked that.

Second, the trial court overlooked that *DomainsNewMedia.com* involved a very different analysis of a very different factual situation, namely whether an entity (a chamber of commerce) receiving public funds (Accommodations Tax or A-Tax funds) was even "a public body" that was subject to FOIA at all. 423 S.C. at 297, 814 S.E.2d at 514. Ultimately, the Court held "*the General Assembly did not intend the Chamber to be considered a public body for purposes of FOIA* as a result of its receipt and expenditure of these specific funds," *id.* (emphasis added), because the A-Tax statute and a budget proviso provided for the transparency of public funds along the lines of what FOIA would have offered. *Id.* at 302, 814 S.E.2d at 516–17. That analysis as to whether

[9] Oddly and inaccurately, the trial court order refers to section 8-13-320(10)(g) as "the operative statute in the State Ethics Act." **(R. p.)** Order at. 5.

the Legislature intended an entity to be covered by FOIA is completely inapposite to the question here, i.e., what the Legislature requires of an entity which is indisputably a "public body." Moreover, *DomainsNewMedia.com* itself held that "public bodies" are subject to the "full panoply of FOIA requirements. *Id.* at 305, 814 S.E.2d at 518; *see also Davis*, 441 S.C. at 204, 893 S.E.2d at 339. And as courts have recognized in other contexts, the Commission cannot be a "public body" for some FOIA purposes but not others. *Cf. Hodges*, 341 S.C. at 92, 533 S.E.2d at 585 ("Rainey argue[d] that Santee Cooper should be considered a state agency for some purposes and not for others . . . Rainey cannot choose which statutes will classify Santee Cooper as a state agency based upon how advantageous that classification will be to him.").

Third, as discussed *infra*, the trial court applied *DomainsNewMedia.com* but then failed to follow the contours of the specific versus general canon on which that case relied.

2. The trial court erred when it overlooked that the relevant statutes do not deal with identical issues and failed to analyze these statutes as a whole.

To be sure, "where there is one statute addressing an issue in general terms and another statute dealing with *the identical issue* in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Id.* at 304, 814 S.E.2d at 518 (emphasis added). However, the trial court missed that the Ethics Act and the FOIA do not deal with the identical issue, nor do section 30-4-70(b) and section 8-13-320(10)(g) deal with identical issues.

"The essential purpose of the FOIA is to protect the public from secret government activity."[10] *Pope v. Wilson*, 427 S.C. 377, 389, 831 S.E.2d 442, 448 (Ct. App. 2019) (internal

[10] The purpose of FOIA is more fully explained in the statute itself:

> The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions

citation omitted). The FOIA "is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *New York Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007) (citation omitted). "Indeed, consistent with FOIA's goal of broad disclosure, the exemptions from its mandates are to be narrowly construed." *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 348, 594 S.E.2d 888, 893 (Ct. App. 2004). As part of the Legislature's efforts to promote government transparency, FOIA "dictates the procedures by which public bodies must conduct their meetings." *Piedmont Pub. Serv. Dist.*, 319 S.C. at 128, 459 S.E.2d at 878. Included in those procedures is the unambiguous requirement in section 30-4-70 that "[n]o action may be taken in executive session except to (a) adjourn or (b) return to public session."

While both FOIA and the Ethics Act involve the protection of the public, their purposes are not the same. The legislative purpose of the Ethics Act (the statute the Commission was created to enforce) is best expressed by the Legislature in the Preamble to the Ethics Act of 1991, which states that the Act's purposes include, *inter alia*, "making public servants more accountable . . ., maintain[ing] the integrity of the political and governmental processes . . . , [and] help[ing] restore public trust in the governmental institutions and the political and governmental processes."[11] The Commission is charged with "enhanc[ing] public trust in the integrity of state and local government" and "[a]s such, the Commission must fairly and impartially enforce the Ethics

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> that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15.

[11] *See* Preamble, Act 248 of 1991 at https://www.scstatehouse.gov/billsearch.php?billnumbers=3743&session=109&summary=B (last accessed Feb. 9, 2026).

Reform Act of 1991."[12] In enforcing the Ethics Act, the Commission has the ability to impose enormous fines[13] and to refer individuals for criminal prosecution. *See* S.C. Code Ann. § 8-13-320(10)(h); *id.* § 8-13-320(10)(i). As section 8-13-320(g) has been interpreted in the Order, it enhances the ability of the Commission to act in secret. Given these lofty purposes, it is impossible to imagine that the Legislature would have intended that the Commission (least out of *all state agencies*) to be allowed to vote in secret and outside the procedures of the FOIA.

As noted, sections 30-4-70(b) and 8-13-320(10)(g) do not deal with identical issues either. As part of FOIA's overarching purpose to protect South Carolina citizens against secret government activity, *see Pope*, 427 S.C. at 389, 831 S.E.2d at 448, section 30-4-70(b) protects South Carolina citizens from a governmental body taking a "formal" action in secret. Section 8-13-320(10)(g) protects the name and investigatory status of an individual subject to regulation by the Commission from disclosure. *See Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 497, 685 S.E.2d 600, 607 (2009), *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009); *Gaffney Ledger v. S.C. Ethics Comm'n*, 360 S.C. 107, 111, 600 S.E.2d 540, 542 (2004); S.C. Code Ann. Regs. 52-718 (providing that the respondent may waive the confidentiality of the proceeding). While protecting respondents from publicity stemming from unfounded ethics complaints is undoubtedly an important feature of the Ethics Act, this individual protection in no way relates to the public protection from secret government activity served by section 30-4-70(b).

[12] *See* State Ethics Commission 2024 Accountability Report at https://ethics.sc.gov/sites/ethics/files/Documents/About%20Us/Reports%20and%20Policies/State%20Ethics%202024%20Accountability%20Report.pdf (last accessed Feb. 9, 2026), at p. 6.

[13] *See* State Ethics Commission Debtors information at https://ethics.sc.gov/debtors and https://ethics.sc.gov/sites/ethics/files/Documents/Debtors/Debtors%20List%20December%202024.pdf (last accessed Feb. 9, 2026).

It is also well-settled that "a court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law." *S.C. Dep't of Consumer Affs. v. Cash Cent. of S.C. LLC*, 435 S.C. 192, 202, 865 S.E.2d 789, 794 (Ct. App. 2021) (cleaned up). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Id.* FOIA itself was "an attempt to meet the demand for open government while preserving *workable confidentiality in governmental decision making*." *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (emphasis added) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979)). Plainly, an unequivocal directive from the Legislature that all public bodies vote in public (section 30-4-70(b)) cannot be overridden by the inclusion of the word "confidential" in a subsection statutorily governing an agency's procedures regarding "investigations, inquiries, hearings, and accompanying documents" (section 8-13-320(10)(g)). If that construction were correct, the FOIA's public voting prohibition would be drained of all its meaning.

3. The trial court found a conflict between sections 30-4-70(b) and 8-13-320(10)(g) that did not exist and failed to meaningfully attempt to harmonize these two statutes.

Again, assuming *arguendo* that FOIA is the more general statute, the trial court overlooked that this "rule of statutory construction [that a specific statute prevails over a general one] comes into play only when there is a conflict between the statutes." *Porter v. S.C. Pub. Serv. Comm'n*, 327 S.C. 220, 224, 489 S.E.2d 467, 469 (1997). A court must not "read[] a conflict into the statutes where none exists." *Charleston Cnty. Assessor v. Univ. Ventures, LLC*, 427 S.C. 273, 285, 831 S.E.2d 412, 418 (2019). "Statutes in apparent conflict should be construed, if possible, to allow both to stand and give effect to each." *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994); *see also Seago v. Horry Cnty.*, 378 S.C. 414, 425, 663 S.E.2d 38, 44 (2008) ("agree[ing] with the master that FOIA and copyright law can be read harmoniously"). And

"[w]here two statutes can be reconciled and are susceptible of a construction which will render both operative without doing violence to either, it is the duty of the court to so construe them." *Porter*, 327 S.C. at 224, 489 S.E.2d at 469.

Here, the trial court missed that FOIA and the Ethics Act can easily be reconciled. First, as noted *supra*, the court missed that section 8-13-320(10)(g) does not even apply to the act of voting.

Second, the trial court's order does not grapple with the FOIA in any meaningful way; among other problems, the Order does not even mention section 30-4-70(b), while it does discuss sections 8-13-1170, 8-13-1372, 8-13-510, and 8-13-540 of the Ethics Act, statutes that Appellant never raised and which have nothing to do with this case. **(R. pp.)** Order at 6–7. In any event, nothing in the order amounts to "harmonizing" the statutes. If the short shrift given to FOIA here counts as "harmonization," then the principle that a court must harmonize two conflicting statutes means nothing. Moreover, even though "the government has the burden of proving that an exemption applies," *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005), this trial court did not hold the Commission to any kind of meaningful kind of burden. See also *Newberry Pub. Co. v. Newberry Cnty. Comm'n on Alcohol & Drug Abuse*, 308 S.C. 352, 356, 417 S.E.2d 870, 873 (1992) (holding that "law enforcement agencies do not have carte blanche to deny all FOIA requests for criminal investigative reports.").

Rather than trying to harmonize the two statutes, the trial court instead accepted the Commission's *ipse dixit* conclusions as to how complying with FOIA would impose impossible impediments to its operations, and included that *ipse dixit* in its order. [14] In its order, the court

[14] Nothing in the record other than these conclusory statements by counsel (certainly no *evidence*) supported the notion that it was impossible for the Commission to comply with both FOIA and the Ethics Act. See *Castro v. Trump*, No. CV 3:23-4501-MGL-SVH, 2024 WL 1051115, at *6 (D.S.C. Feb. 12, 2024), *R&R adopted sub nom. Castro v. Knapp*, No. CV 3:23-4501-MGL, 2024 WL 1374720 (D.S.C. Apr. 1, 2024) ("However, saying it does not make it so").

never plausibly describes any real-world problems that would be make it impossible for the Commission to comply with both the Ethics Act and the FOIA, but makes various conclusory statements, including (1) finding it "legally impossible for the Commission to obey the confidentiality requirements of the State Ethics Act, while also complying with FOIA," **(R. p.)** Order at. 6; (2) "question[ing] how the Commission would know what to say in open session—without already knowing the outcome in executive session—to comport with the confidentiality requirement." **(R. p.)** Order at 7; and stating that (3) if the Commission complied with section 30-4-70(b) it would be forced to "take a straw poll in executive session," **(R. p.)** Order at 8.

The trial court missed that what it describes as an impossible situation is more accurately described at simply doing what the law requires. The same rules apply to that Commission as to the school board (Board) whose conduct this Court recently considered in *Miramonti*. As this Court held, even if that Board could have gone into executive session to discuss certain matters outside the public eye, "it could not have taken any vote except to adjourn or resume its public session." *Miramonti*, 438 S.C. at 616-17, 885 S.E.2d at 408. And the Board could not "decide[ ] how to respond to the [matter being discussed] during executive session." *Id*. at 617. If done consistent with FOIA's mandates, discussing matters in executive session and then making a decision in open session does not require the Commission or any other public body to "take a straw poll."[15]

Part and parcel of the larger issues with the court's failure to harmonize, it flatly disregarded the Appellants' demonstration that the Commission is one of *many* administrative agencies which regularly hears quasi-judicial complaints and have operative statutes that contain

[15] Notably, the Court held "[t]he Board's cavalier disregard of FOIA reflects a clear abuse of power." *Id*. at 618.

substantially similar confidentiality provisions. **(R. pp.)** Defs.' Mot. Summ. J. at 9–10.[16] As a real-world example of how the Commission can easily comply with both statutes, Appellant pointed out that the State Board of Medical Examiners discusses complaint matters deemed confidential in executive session but then publicly votes on the disposition of these complaints in open session, identifying the matter only using complaint numbers, and so can the Commission. **(R. pp.)** Defs.' Mot. Summ. J. at 11-12.[17]

Responding to this, the trial court erroneously dismissed the analogy to the State Board of Medical Examiners by stating that it "overlooks the conundrum" that would be created by forcing the Commission to comply with FOIA, **(R. p.)** Order at 7, without meaningfully explaining why the Commission should be subject to different rules than the State Board of Medical Examiners, or otherwise plausibly describing any real-world "conundrum" that compliance with FOIA would create.[18]

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[16] Relevant statutes and entities include section 34-30-590 (State Board of Financial Institutions), section 40-2-80(E) (Board of Accountancy), section 40-23-190 (Environmental Certification Board), section 40-33-190 (Nursing Board), and sections 40-47-110(D)(1)-(2); 40-47-114(C), 40-47-116(A) & (B), and 40-47-190 (State Board of Medical Examiners). Of further note, the Attorney General in 1994 issued an opinion requested by the South Carolina Real Estate Commission (REC) that the REC was required to comply with FOIA and not vote in executive session in disciplinary proceedings brought against licensees in its judicial or quasi-judicial capacity. Opinion to John A. Birgerson, Esq., 1994 S.C. Op. Att'y Gen. 54 (1994). Similarly, in 2001, the Attorney General determined that the Parole Board was required to comply with FOIA for parole voting decisions. Opinion to the Honorable Glenn McConnell, 2001 WL 790250, (S.C.A.G. May 22, 2001). While of course not binding on any court, these Attorney General opinions are "persuasive . . . authority" that squarely support Appellant's position. *S.C. Pub. Int. Found. v. Greenville Cnty.*, 401 S.C. 377, 383, 737 S.E.2d 502, 505 (Ct. App. 2013).

[17] Like the Medical Board, the Commission administratively assigns a case number to each complaint. The case numbers assigned to the complaints in this matter are C2023-137, C2023-138 and C2024-001. **(R. p.)** Defs.' Mot. Summ. J. Ex. A. ¶ 5.

[18] The trial court's ruling that "confidentiality" of an ethics complaint be breached by the Commission voting on a matter using the complaint number, citing to S.C. Code Ann. Regs. 52-718, **(R. pp.)** Order at 6, 7-8, runs headlong into the Supreme Court decision in *Sanford*, which (like the case) was in the investigative stage, and where the Court held that Regulation 52–718(F) "was not even implicated . . . because it addresses what would become the public record after the

Moreover, it should go without saying that disclosing a complaint number and only a complaint number does nothing to implicate *confidentiality* at all (how could it?). Obviously, "the Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act." *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008). Clearly, the Legislature intended section 8-13-320(10)(g) to protect the identity of individual respondents, not administratively assigned complaint numbers.[19] To adopt that interpretation is to endorse an absurd result. *See State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect").[20]

Accordingly, as a matter of law, the trial court erred in failing to harmonize the FOIA and the Ethics Act. As such, the trial court erroneously concluded that section 8-13-320(10)(g) conflicts with FOIA's requirement that the Commission conduct its necessary super majority vote

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final disposition of a matter where a violation is found." 385 S.C. at 499, 685 S.E.2d at 608, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120.

[19] Of note, the Supreme Court has recently ruled that, in the interest of public transparency, ordered summaries of otherwise confidential dismissed judicial complaints to be published which "shall be anonymous and must not identify the judge by name, but must include certain details" https://www.sccourts.org/media/courtOrders/PDFs/2025-06-25-02.pdf (last accessed Feb. 9, 2026); *see also Anonymous Mediator/Att'y v. S.C. Off. of Disciplinary Couns.*, 446 S.C. 196, 199, 919 S.E.2d 425, 427 (2025) (holding that there is no "blanket prohibition preventing a mediator from disclosing anything that may have occurred during the mediation").

[20] If the trial court's interpretation is correct regarding "existence of a complaint," then the Commission violates the Ethics Act every time it moves to go into executive session to discuss Staff's probable cause recommendations on pending complaints.

on probable cause for Appellant in public session. Furthermore, since the Commission voted in closed session, its alleged votes as to "probable cause" are null and void.

4. The trial court failed to recognize that if the Legislature intended the Commission to be exempt from FOIA, it would have passed a statute granting the exemption.

Within the FOIA, the Legislature has established exactly two narrow statutory exceptions to the requirement that a public body vote in open session: (1) for the Retirement Systems Investment Commission (RSIC);[21] and (2) for the Boards of Trustees of the respective institution of higher learning while acting as trustees over endowment funds.[22] These exceptions highlight what is missing in this case, that no public body is entitled to create an exemption to FOIA for itself. The trial court missed that the existence of these legislative exemptions strongly shows that the Legislature did not intend the Commission to be exempt. *See Hodges*, 341 S.C. at 86–87, 533 S.E.2d at 582 ("[T]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the

[21] *See* S.C. Code Ann. § 30-4-70(a)(6) (RSIC can "hold a meeting closed to the public … if the meeting is in executive session specifically pursuant to Section 9-16-80(A) or 9-16-320(C)."); S.C. Code Ann. § 9-16-80(A) ("Meetings … [to] … make tentative or final decisions on, investments or other financial matters may be in executive session if disclosure of the deliberations or decisions would jeopardize the ability to implement a decision or to achieve investment objectives."); § 9-16-320(C) ("The [RSIC] may discuss, deliberate on, and make decisions on a portion of the annual investment plan or other related financial or investment matters in executive session if disclosure thereof would jeopardize the ability to implement that portion of the plan or achieve investment objectives."); Act 371 of 1998 at https://www. scstatehouse. gov/billsearch.php?billnumbers=958&session=112&summary=B (last accessed Feb. 9, 2026).

[22] See S.C. Code Ann. § 59-153-80(A) ("Meetings by the board while acting as trustee of the endowment fund or by its fiduciary agents to deliberate about, or make tentative or final decisions on, investments or other financial matters may be in executive session if disclosure of the deliberations or decisions would jeopardize the ability to implement a decision or to achieve investment objectives."); § 59-153-320(C) ("The panel may discuss, deliberate on, and make decisions on a portion of the annual investment plan or relate financial or investment matters in executive session if their disclosure would jeopardize the ability to implement that portion of the plan or achieve investment objectives."); Act 122 of 1999 at https://www.scstatehouse.gov/bill search.php?billnumbers=3904&session=113&summary=B (last accessed Feb. 9, 2026).

general law and enumeration weakens it as to things not expressed.") (internal citations omitted). This was error.

5. The trial court erred in ruling that the Commission could not comply with section 30-4-70(a)(1) even though the Appellant did not even raise that as an issue in the case.

The order on appeal including a ruling that

> none of the exceptions in FOIA allow the Commission to "deliberate" in executive session. *See* S.C. Code Ann. § 30-4-70(a) (stating "[a] public body may hold a meeting closed to the public for one or more of the following reasons"). *The Commission derives this authority from the confidentiality provisions in the States [sic] Ethics Act*, not FOIA, which require the Commission to keep "all" information relating to an ethics complaint confidential until after a probable cause determination. *See* S.C. Code Ann. § 8-13-320(10)(g).

Order at 7 (emphasis added). Notably, this specific finding was made upon the Commission's insistence, *see* **(R. pp.)** Tr. 26:5-27:2, even though Appellant never argued in its Amended Complaint that the Commission had violated section 30-4-70(a) and contended the issue was not properly before the court.[23] The Commission's litigating posture on this point is known by the Latin term *ignoratio elenchi*, referring to "the mistake of one who, failing to discern the real question which he is to meet and answer, addresses his allegations or arguments to a collateral matter or something beside the point." *Black's Law Dictionary,* 6th ed.[24] *Cf. McCall v. Finley*, 294

[23] *See* **(R. pp.)** Am. Compl.; Pl.'s Mot. Partial Summ. J, n. 4 (recognizing that "public bodies are permitted to *deliberate* in executive session if 30-4-70(a) is properly invoked" and stating in a footnote that "Plaintiff did not challenge and thus takes no position on whether the Commission properly invoked [] § 30-4-70(a) to deliberate on probable cause in the underlying ethics complaints"); Mot. to Recons. ("The issue of the Commission's compliance with § 30-4-70(a) was not properly at issue and should not have been included in the Order."). Despite all this, the trial court erroneously stated in a footnote to the Order that "Plaintiff declined to take a position on which part of FOIA would allow" deliberation in executive session. To the contrary, at the hearing, Appellant's counsel stressed that she did not intend to make the Commission's compliance with section 30-4-70(a) an issue, but discussions about probable cause matters most likely fit under section 30-4-70(a)(1). *See* **(R. p.)** (Tr. 46:17-47:19).

[24] *See Klatt v. Klatt*, 654 P.2d 733, 738 (Wyo. 1982) ("[A] fallacy known as 'ignoratio elenchi' . . . in substance consists of supposing that an argument is proved by proving an utterly unrelated argument.")

S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter"). The trial court erred in accepting this argument (that was not properly before it) that the Commission was excused from complying with section 30-4-70(a).

In any event, the trial court's ruling on 30-4-70(a) was erroneous on the merits. The trial court was first incorrect that the Commission's authority to meet in executive session to discuss complaints against those that it regulates (including candidates for office) comes expressly from FOIA, not the Ethics Act. *See Miramonti*, 438 S.C. at 616, 885 S.E.2d at 408 ("A public body is forbidden from entering executive session without complying with section 30-4-70(b)"). Nothing in the Ethics Act could possibly be interpreted as giving the Commission the authority to vote in executive session, and the topic of meetings (whether executive session or not) is only relevant insofar as the Commission conducts meeting like many or most state agencies do. By contrast, the manner in which public bodies conduct their meetings is a central and driving purpose of the FOIA. The Title of FOIA, as originally enacted in 1978, provided that it was "An Act to Provide That All Meetings of Governmental Bodies of This State, *Except As Specifically Exempted*, Shall Be Open to the Public . . . ." 1978 Acts No. 593 (emphasis added). Section 30-4-70(a)(1) authorizes a public body to hold a closed meeting to discuss "a person regulated by a public body." The FOIA defines "meeting" as "the convening of a quorum of the constituent membership of a public body . . . *to discuss* or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code Ann. § 30-4-20(d) (emphasis added). "Executive session," as the title of section 30-4-70[25] indicates, is a meeting of a public body. In sum, the trial court erred in finding the Commission could ignore the FOIA's open meetings provisions because the Ethics Act mentions meetings as well.

[25] The title states, in pertinent part: "Meetings which may be closed."

The trial court further erred when it overlooked that the Commission's probable cause determinations unequivocally fall under section 30-4-70(a)(1). Section 30-4-70(a)(1) provides in relevant part that

> *A public body may hold a meeting closed to the public for* one or more of the following reasons . . . *Discussion of . . . discipline . . . of . . . a person regulated by a public body* . . .; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly . . . .

Indisputably, (1) the Commission's probable cause determination concerned "discipline." *See id.* § 8-13-320(10)(k) ("The commission panel, where appropriate, shall recommend disciplinary or administrative action . . . ."); *id.* § 8-13-1510 (setting forth potential civil and criminal penalties for a violation of the Ethics Act); and (2) Plaintiff is "a person regulated by" the Commission. *See* **(R. pp.)** Order at 4–5; Defs.' Mot. Summ. J. at 6; Defs.' Resp. at 5; Defs.' Reply at 3 (all pointing out that "the General Assembly has established a comprehensive statutory scheme for *regulating the behavior of* elected officials, public employees, lobbyists, and *other individuals who present for public service in the State Ethics Act*." (internal citations omitted) (emphasis added)).

The trial court also missed that section 30-4-70(a)(1) also must be read together with section 30-4-70(b), which shows how the FOIA specifically protects confidentiality in the disciplinary context:

> Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, *when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated.*

S.C. Code Ann. § 30-4-70(b) (emphasis added). Notably, the General Assembly recognized that many public bodies handle disciplinary matters, and thus section 30-4-70(a)(1) allowed

discussions of these matters to be in private. But it made no exemption for voting in executive session. Instead, it expressly provided that "the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated." *Id.* § 30-4-70(b).

In sum, so long as the requirements of section 30-4-70(a) are met, the Commissioners can discuss or deliberate "probable cause" issues to their hearts content. They just cannot vote. *See, e.g.*, *Miramonti*, 438 S.C. at 616–17, 885 S.E.2d at 408. As discussed *supra*, other South Carolina public bodies routinely discuss confidential matters in executive session and then vote in public session. So can the Commission.

Accordingly, the order is incorrect when it finds that the Commission cannot comply with section 30-4-70(b).

6. The trial court erred when it concluded that Appellant was required to exhaust administrative remedies on the *ultra vires* claim, i.e., the claim that the Commission exceeded its statutory and constitutional authority in issuing the extraterritorial subpoenas and in finding no exception to the exhaustion requirement existed.

The trial court erred when it denied summary judgment to Appellant and granted summary judgment to the Commission on Count Two of the Amended Complaint, which seeks a declaratory judgment that the Commission lacked the statutory authority to issue extraterritorial subpoenas, or, alternatively, the statute Defendants relied on to issue those subpoenas is unconstitutional. **(R. pp.)** *See* Am. Compl. ¶¶ 8, 30, 35, 40, and 49; Pl.'s Mot. Part. Summ. J. at 17, 18, and 19; Pl.'s Resp. at 6–8).[26] Importantly, the Commission does not dispute that it issued subpoenas to TD

[26] Appellant sought summary judgment on Counts Two through Four of the Amended Complaint, *see* **(R. pp.)** Pl.'s Mot. Summ. J. at 15–24, but it is only appealing the trial court's exhaustion ruling with respect to Count Two.

Bank, AMEX, First Citizens, and Venmo, *see* **(R. p.)** Answer Am. Compl. ¶ 12, and it cannot dispute that these companies are not based in the State of South Carolina. **(R. p.)** Am. Compl. ¶ 8.

A. *The trial court erred when it found the Commission had the authority to itself determine whether it could issue extraterritorial subpoenas.*

First of all, it is black letter law that the Commission only has the statutory authority to issue subpoenas only to persons and entities located within the State. *See Drs. Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Tr. Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006). Additionally, the Supreme Court has held,

> [a]lthough territorial jurisdiction is not a component of subject matter jurisdiction, . . . it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding . . . The exercise of extraterritorial jurisdiction implicates the state's sovereignty a question so elemental that … it cannot be waived by conduct or by consent."

State v. Dudley, 364 S.C. 578, 582 (2005) (internal citation omitted).

Secondly, the Commission is a creature of statute and agency of the executive branch whose powers derive from and are limited by statute. *See S.C. Tax Comm'n. v. S.C. Tax Bd. of Review*, 278 S.C. 556299 S.E.2d 489, 491–92 (1983). "As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. S. Carolina Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). "Any action taken by [the Commission] outside of its statutory and regulatory authority is null and void." *Responsible Econ. Dev. v. S.C. Dep't of Health & Env't Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (internal citation omitted). The power to rule on the statutory and constitutional issues at hand could arise only through a statute directly granting such power directly to the Commission.

These limiting principles are critical here because the Commission is not statutorily authorized to hear or answer the question of whether the Commission staff, as part of its

investigation prior to the probable cause hearing, acted *ultra vires* in issuing the extraterritorial subpoenas. As relevant here, the Ethics Act provides that after a probable cause vote of the full Commission, it may order "a hearing before a panel of three commissioners . . . *to determine whether a violation of the chapter has occurred*." S.C. Code Ann. § 8-13-320(10)(i) (emphasis added); *see also id.* § 8-13-320(10)(j) (using same verbiage). Importantly, section 8-13-320(f) requires that the Commission go to the court to enforce its subpoenas.

The trial court erred when it determined that the Commission had the authority to hear these claims under the Ethics Act, especially when it did not even discuss section 8-13-320(f) in its analysis. It misapprehended that the Commission in the complaint context is statutorily limited to deciding "whether a violation of the chapter has occurred," whereas the issues Appellant was trying to adjudicate in the trial court involved *the Commission's* statutory and constitutional authority. *See Gantt*, 423 S.C. at 340, 814 S.E.2d at 527 (rejecting an attempt to divest the court of jurisdiction and holding "there is no specific constitutional provision or statutory provision giving the Richland Election Board the exclusive authority—or any authority for that matter—to determine the qualifications of a candidate for election to the School Board."); *Stinney v. Sumter Sch. Dist. 17*, 391 S.C. 547, 551, 707 S.E.2d 397, 399 (2011) ("When an administrative remedy is not available for the injury suffered, the doctrine of exhaustion is not applicable." (citing *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 413, 563 S.E.2d 109 (Ct. App. 2002))); *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 39, 535 S.E.2d 642, 645 (2000) ("[P]ractically speaking, *requiring* a party to raise an issue which cannot be ruled upon by an ALJ makes little sense." (emphasis in original)); *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 102, 674 S.E.2d 524, 530 (Ct. App. 2009).

The trial court also erred in finding that a S.C. Code Ann. Regs. 52-713 which purportedly enabled the "Panel Chair [with] the authority to hear preliminary and interlocutory matters and take such other action as is necessary to conduct the hearing" enables a panel to hear the issues Appellant sought to raise before the trial court. **(R. pp.)** (Order at 11, 15). Fundamental claims about the Commission's authority are in no way "preliminary and interlocutory matters." But even if they were, the trial court missed that the Commission's authority is fixed by statute and cannot be expanded by any regulation. *See Soc'y of Pro. Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute." (citing *Banks v. Batesburg Hauling Co.*, 202 S.C. 273, 24 S.E.2d 496 (1943))); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction." (citations omitted)). Finally, even if the court could get past these fundamental issues, it also erred by deciding that a *Commission Panel* could hear these issues under the regulation, even though the regulation only refers to the *Panel Chair*.

In deciding the Commission had the authority to decide these issues, the trial court also overlooked that the questions raised here require the exercise of judicial power which the Commission does not have and cannot exercise. Under article 5, section 1 of the South Carolina Constitution, all judicial power is "vested in [the] unified judicial system," and the Commission is an agency of the executive branch of government. Article 1, section 8 requires that the legislative, executive, and judicial "powers of the government" shall be forever distinct and separate, i.e., no branch may exercise the power of another branch, and no person may exercise the power of more than one branch. In sum, the Commission has no judicial powers to rule on these specific issues and endeavoring to do so would exceed its statutory authority.

The trial court also erred in relying on *Robinson v. S.C. Dep't of Emp. & Workforce*, which considered exhaustion where the statutory language mandates that agency procedure "is the sole and exclusive appeal procedure." 443 S.C. 63, 76, 902 S.E.2d 41, 48 (Ct. App. 2024), *reh'g denied* (June 24, 2024), *cert. denied* (Nov. 14, 2024) (citation omitted). *See* **(R. pp.)** Order at 12-14. The trial court missed that *Robinson* is inapposite here because exhaustion is claimed to be required under section 1-23-380, and that statute explicitly provides that

> This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Thus, neither section 1-23-380 nor any other statute confers exclusive jurisdiction over these claims.

B. *The trial court erred in refusing to apply Ex parte Allstate and the ultra vires exception to exhaustion.*

The trial court erred in failing to apply *Ex parte Allstate Ins. Co.*, which held exhaustion of administrative remedies was inapplicable because "the issue [is] solely one of law as to the statutory authority or jurisdiction of the Commissioner." 248 S.C. at 567, 151 S.E.2d at 855 (cleaned up). In *Ex parte Allstate Ins. Co.*, the Supreme Court held that exhaustion was excused for an allegation that

> [T]he Insurance Commissioner was without authority to proceed with the investigation into purely political activities of the companies and their agents. *The issue was solely one of law as to the statutory authority or jurisdiction* of the Commissioner. *The facts in regard to that issue were undisputed.* Under the undisputed facts, the Commissioner was obviously without such authority. These circumstances afforded a sound basis for the action of the lower court in excusing the failure of the companies to first seek relief in the administrative proceedings.

Id. at 567–68, 151 S.E.2d at 855. "*Allstate* establishes that exhaustion will be excused when the plaintiff claims that agency action is plainly *ultra vires*, at least if that claim does not involve any

disputed facts." *South Carolina Administrative Practice and Procedure* 93, 94 (Randolph R. Lowell 3rd ed. 2013). *Allstate* also specifically stands for the principle that Commission's "powers to investigate and elicit information are . . . derived from and limited by the authorizing statutes." *Id.* at 563. *Ex parte Allstate* is on all fours with this case that exhaustion is not required on the claims that the Commission acted *ultra vires* in issuing extraterritorial subpoenas. *Ex parte Allstate* has never been overruled, and other cases are in accord with these principles. *See Responsible Econ. Dev.*, 371 S.C. at 553, 641 S.E.2d at 428 ("Any action taken by DHEC outside of its statutory and regulatory authority is null and void." (internal citations omitted)); *Brown v. James*, 389 S.C. 41, 54–55, 697 S.E.2d 604, 611–12 (Ct. App. 2010) (recognizing "exception to the exhaustion requirement is recognized when an agency has acted outside of its authority.").

The trial court gives short shrift to *Allstate* and erroneously characterizes Appellant's *ultra vires* claims by saying "[a]ccording to Plaintiff, exhaustion was not required because she is raising legal issues." **(R. p.)** Order at 12. As is clear from Plaintiff's filings with the Court, Plaintiff has argued that Defendants' issuance of extraterritorial subpoenas exceeds the Commission's statutory authority or, alternatively, the statute Defendants relied on to issue those subpoenas is unconstitutional. *See* **(R. pp.)** Am. Compl. ¶¶ 8, 30, 35, 40, and 49; Pl.'s Mot. Part. Summ. J. at 17, 18, and 19. While the issues raised are "legal," these legal claims all relate to Appellant's allegation *that the Commission exceeded its statutory authority in issuing and obtaining Plaintiff's personal bank records through extraterritorial subpoenas.* As a creature of statutes, regulatory bodies like DHEC have only the authority granted them by the legislature. Just so with the Commission.

Thus, the trial court erred in failing to apply *Allstate* and recognize that an *ultra vires* exception applied to Appellant's claims.

C. ***The trial court erred in applying exhaustion where only pure issues of law were involved.***

The trial court erred also in failing to recognize that exhaustion is inapplicable where pure issues of law are involved.[27] Importantly here, "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (citing *Ward v. State*, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000))); *see also Ex parte Allstate*, 248 S.C. at 567, 151 S.E.2d at 855 (stating exhaustion "is not an invariable rule.").

While citing *to Hyde v. S.C. Department of Mental Health*, 314 S.C. 207, 442 S.E.2d 582 (1994), and *Meredith v. Elliott*, 247 S.C. 335, 147 S.E.2d 244 (1966), to apply exhaustion in this case, **(R. p.)** (Order at 12), the court overlooked that both of these cases contemplated there was a question of fact for the court to decide. *See Hyde*, 314 S.C. at 208, 442 S.E.2d at 583 ("Where an adequate administrative remedy is available *to determine a question of fact*, one must pursue the administrative remedy or be precluded from seeking relief in the courts." (emphasis added) (citing *Meredith*, 247 S.C. 335, 147 S.E.2d 244)).

Exhaustion doctrine is based in part on deference to agency processes and expertise, but there is no need to defer to the Commission on pure issues of law. *See Video Gaming Consultants, Inc.*, 342 S.C. at 38, 535 S.E.2d at 644–45 (stating the purposes underlying the exhaustion doctrine "would not be served when the only issue is the validity of a statute."). Additionally, it is the province of courts to interpret statutes and constitutional provisions, not the Commission or any other administrative agency. *See Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 555, 725 S.E.2d

[27] In this case, the parties filed cross-motions for summary judgment, thus agreeing there were no issues of material question of fact in this case.

704, 706 (2012) ("The construction of a statute is a judicial function and responsibility,"); *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 632, 767 S.E.2d 157, 163 (2014) ("It is emphatically the province and duty of the judicial department to say what the law is." (citing *Marbury v. Madison*, 5 U.S. 137, 138 (1803))); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) ("Under the [federal] APA, it thus remains the responsibility of the court to decide whether the law means what the agency says." (cleaned up)).

Thus, for this additional reason, the trial court erred in requiring exhaustion.

D. ***Any administrative remedy before the Commission on keeping her personal bank records from the public eye would be inadequate if Appellant is required to resort to agency processes before going to court.***

If the trial court's Order stands, Appellant will have her personal bank records introduced in a public hearing before the courts can adjudicate whether those bank records were lawfully taken.[28] *See* Answer Am. Compl. ¶ 59. ("Plaintiff is not entitled to special treatment by way of interlocutory appellate review of her objections to what may or may not have been introduced at a hearing . . . ."). This is not an adequate remedy. It is actually no remedy at all because the reality is that the privacy claims will be moot as soon as the records are introduced in evidence at any merits hearing.

In the proceedings below, Appellant submitted to the trial court that she had "a here-and-now injury" akin to one brought by the plaintiffs in *Axon Enter., Inc. v. Fed. Trade Comm'n*, decided under the federal APA:

> The harm Axon and Cochran allege is "being subjected" to "unconstitutional agency authority"—a "proceeding by an unaccountable ALJ." . . . That harm may sound a bit abstract; but this Court has made clear that it is "a here-and-now injury." . . . And—here is the rub—it is impossible to remedy once the proceeding is over, which is when appellate review kicks in. . . . The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that

[28] Any merits hearing "must be open to the public." S.C. Code Ann. § 8-13-320(10)(i).

> grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone. Judicial review of Axon's (and Cochran's) structural constitutional claims would come too late to be meaningful.
>
> . . .
>
> Axon and Cochran will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over.

598 U.S. 175, 191–92 (2023). Indeed, if Appellant is correct on the merits of her claims, her personal bank records have been in the possession of a state agency which had no authority to seize them. Plaintiff submitted that this is an ongoing, continuous harm, which cannot adequately or fully be remedied at the end of the administrative process.

Among other problems, if Appellant's claims cannot be brought in court before the administrative process is concluded, then these or similar claims are effectively shielded from judicial review. *See also Williams v. Reed*, 604 U.S. 168, 174 (2025) ("[A] state court's application of a state exhaustion requirement [cannot] in effect immunize[] state officials from § 1983 claims challenging delays in the administrative process . . . .").

For these reasons, the trial court erred in not finding that Appellant lacked an adequate remedy to challenge the seizure of her personal bank records. [29]

E. ***The court erred in rejecting exhaustion because it involves matters of public interest.***

Finally, the trial court erroneously refused to apply an exception to exhaustion because it would promote the public interest. Without question, the public interest favors these issues be

[29] As noted *supra*, Appellant was informed and believed that Counts Five and Six, for injunctive relief, were moot because the object of the injunctive relief was to avoid having a contested case hearing until the issues were resolved by a court, and the Commission agreed that no hearing would go forward wile this matter was pending. Regardless, the Respondents still argued the merits of these matters in the summary judgment proceedings and the trial court ruled that Appellant was not entitled to injunctive relief because she had an adequate remedy in the Commission process. **(R. p.)** (Order at 17). For reasons stated in this section, the trial court erred in its finding that the Appellant had an adequate remedy.

resolved, not rendered moot by letting the Commission complaint process run its course. *See supra* section 2, para. 4. Moreover, they should be resolved by a Court, not an administrative body. *See Anderson*, 397 S.C. at 555, 725 S.E.2d at 706; *Loper Bright*, 603 U.S. at 392.

The public at large has a right to be secure about whether the Commission is adhering to the letter of the law in enforcing the Ethics Act. If the Commission is not, the public has a strong interest in the Court clarifying that it is legally noncompliant, so its practices can then be brought into compliance. Without judicial review, these practices are likely to continue and repeated in future ethics investigations, particularly given the Commission's adamant arguments regarding its statutory authority. It is difficult to imagine that Peets is an outlier, and this investigation is the only time the Commission has issued subpoenas to out of state banks for personal bank records. Any ruling from the Court on the declaratory claims will "settle and [] afford relief from uncertainty and insecurity with respect to rights status and other legal relations," S.C. Code Ann. § 15-53-130, not only for Peets but also for the Commission and the many, many people in the public under its jurisdiction.

For all of these reasons, the public interest demands a judicial resolution which will provide legal certainty on all the claims in the Amended Complaint. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.").

Conclusion

For the reasons stated herein, Appellant respectfully requests that the Court reverse the trial court decision and remand for further proceedings.

Respectfully submitted,

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