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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY
Court of Common Pleas

The Honorable Debra R. McCaslin
Circuit Court Judge

Appellate Case No. 2026-000514
Circuit Court Case No. 2024-CP-35-00086

Diane L. Shaffer and Daniel A. Higgins, …… Plaintiffs,

McCormick County Council and
McCormick County Office of Voter Registration and Elections, …… Respondents,

of whom Diane L. Shaffer is the …….. Appellant.

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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INTRODUCTION

Respondents' brief avoids the fundamental question on appeal: whether either Proposed Ordinance 23-10 or Proposed Ordinance 23-11 actually conflicts with state law. Instead of identifying a true conflict, they offer a series of generalized assertions—that the ordinances are "inconsistent" with state statutes, that they are "facially defective," and that the electorate has "no greater power" than Council—and treats those labels as if they decide the case. They do not.

Section 4-9-1230's command that an unpassed initiative ordinance *"**shall be submitted to the electors**"* is mandatory. S.C. Code Ann. § 4-9-1230. The narrow exceptions to that requirement are for appropriations or taxation, *id.* § 4-9-1210 ("The qualified electors of any county may propose ***any*** ordinance, ***except an ordinance appropriating money or authorizing the levy of taxes***, and adopt or reject such ordinance at the polls.") (emphasis added), and ordinances that actually conflict with state law. *Wilson ex rel. State v. City of Columbia*, 434 S.C. 206, 218, 863 S.E.2d 456, 462 (2021). An ordinance conflicts with state law, and is thus invalid under principles of conflict preemption, when (1) "the ordinance hinders the accomplishment of the statute's purpose" or (2) "the ordinance conflicts with the statute such that compliance with both is impossible." *Id.* (quoting *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 400–01, 629 S.E.2d 624, 630 (2006)). Neither proposed ordinance meets this high standard.

Proposed Ordinance 23-10's seven-day notice requirement for meeting agendas is not just consistent with FOIA's one-day requirement, ***it automatically complies with state law***. Similarly, Proposed Ordinance 23-11 neither frustrates the purpose of any state redistricting statute nor makes compliance with state law impossible: Map 3 was prepared under the same Revenue and Fiscal Affairs Office process that produced Map 2, leaves every applicable statutory requirement fully satisfiable, and operates within—rather than displaces—the framework Council itself used.

ARGUMENT

I. The Respondents misstate the two fundamental legal principles controlling this case: when a statutory directive is mandatory, and when conflict preemption arises.

A. The Respondents do not have the discretion to ignore the proposed ordinances.

Respondents devote an entire section of their return brief to arguing that "the initiative and referendum process is not mandatory." (Return Br. at 8.) But the governing statute says exactly the opposite. Section 4-9-1230 provides that when, as here, council fails to pass an initiative ordinance, the ordinance *"**shall be submitted to the electors**"* within one year of council's vote. S.C. Code Ann. § 4-9-1230. (emphasis added). This is an unambiguous statutory command: "The term 'shall' in a statute means that the action is mandatory." *Johnston v. S.C. Dep't of Labor*, 365 S.C. 293, 296-97, 617 S.E.2d 363, 364 (2005).

The General Assembly identified one express exception to the mandatory-submission requirement: ordinances "appropriating money or authorizing the levy of taxes." S.C. Code Ann. § 4-9-1210. The South Carolina Supreme Court has appended a narrow judicial exception for ordinances that conflict with state law in the strict sense of conflict preemption as defined by *Wilson*. Neither exception applies here. As discussed below, nether ordinance hinders the accomplishment of a state statute's purpose or makes compliance with a state statute impossible. The Respondents' apparent political desire not to have the citizenry consider these proposed ordinances is not a legitimate basis for ignoring a statutory command, and the Court should reject their fundamental misstatement of the legal principle that controls the outcome here.

B. Conflict-preemption arises when a local ordinance actually contradicts a state statute.

Respondents' brief uses "inconsistent with" and "in conflict with" interchangeably and treats any potential differences between a local ordinance and a state statute as enough to defeat

the initiative. (*E.g.*, Return Br. at 6–7, 10–12.) But conflict preemption requires much more than superficial differences to remove a local government's legislative authority.

As the Supreme Court explained in *Wilson*, true conflict preemption "occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible." 434 S.C. at 218, 863 S.E.2d at 462 (quoting *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 400–01, 629 S.E.2d 624, 630 (2006)). The test is impossibility or hindrance of purpose—not theoretical overlap or the bare assertion that an ordinance addresses the same subject matter as a statute.[1]

Proposed Ordinance 23-10 imposes a seven-day agenda-notice condition that already satisfies FOIA's twenty-four-hour requirement. Proposed Ordinance 23-11 substitutes one Revenue and Fiscal Affairs Office map for another within the same statutory framework Council used to adopt Map 2. Neither sets aside any "structure and administration" of state law. It is not impossible to comply with both the proposed ordinances and state statutes. The Respondents cannot make these proposed ordinances "facially defective" or "facially invalid" simply by labeling them so. (*E.g.*, Return Br. at 12–13.) Facial invalidity in the initiative context requires that the ordinance, as written, be irreconcilable with state law in its operation. Respondents never explain how either ordinance meets that standard, because neither does, as discussed below.

[1] Respondents suggest in a footnote that *Aakjer v. City of Myrtle Beach*, 388 S.C. 129, 694 S.E.2d 213 (2010), does not support Appellant because the ordinance there was preempted. (Return Br. at 6 n.1.) Appellant cited *Aakjer* for its analytical framework—the two-step inquiry asking whether the local government had power to enact the ordinance and whether the ordinance is consistent with state law—not for its outcome. *Id.* at 133, 694 S.E.2d at 215; *see* Opening Br. at 4. The framework is what governs here, and it confirms that Step Two—consistency with state law—is the dispositive question here.

II. Proposed Ordinance 23-10 advances, and does not conflict, with state law regarding transparency in government activity.

Proposed Ordinance 23-10 would allow any Council member to place items on the meeting agenda, and it requires agendas for regular Council meetings to be posted at least seven days before each meeting. Respondents argue that this conflicts with two statutes—S.C. Code Ann § 4-9-110, which provides that "[t]he council shall determine its own rules and order of business," and S.C. Code Ann § 30-4-80, which requires public bodies to post agendas at least twenty-four hours before meetings. (Return Br. at 9–11.) Neither statute creates an actual conflict.

A. South Carolina Code § 4-9-110 does not address preparation of agendas in advance of a public body's meeting.

South Carolina Code Ann § 4-9-110 is titled "Council shall select chairman and other officers; terms of office; appointment of clerk; ***frequency and conduct of meetings***; minutes of proceedings." *Id.* (emphasis added). It has two paragraphs. The first addresses the selection of officers, the appointment of a clerk, the frequency of meetings, special meetings, and the requirement that meetings "be conducted in accordance with the general law of the State of South Carolina affecting meetings of public bodies." *Id*. The second paragraph contains a single sentence: "The council shall determine its own rules and order of business." *Id.* Nothing in the title or text reaches what happens ***before*** a meeting, which is all that Proposed Ordinance 23-10 addresses.

"Rules and order of business" address internal parliamentary mechanics—how meetings are conducted, how members are recognized to speak, and how votes are taken. *See* McCormick County, SC, Code of Ordinances ch. 2 §§ 2-58 –2-60 (2023). Proposed Ordinance 23-10 does not displace any internal rule of Council: how members are recognized, items are debated, or votes are conducted. The proposed ordinance addresses only what notice the public receives before a meeting and does not touch Council's authority to determine its own rules once a meeting begins.

B. FOIA imposes a floor, not a ceiling, for notice of meetings of a public body.

FOIA requires public bodies to post meeting agendas "***at least*** twenty-four hours before meetings." S.C. Code Ann. § 30-4-80(A) (emphasis added). The phrase "at least" identifies a minimum, not a fixed point. A seven-day notice requirement does not hinder FOIA's purpose, it advances it. The General Assembly enacted FOIA to ensure that "public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials." *Id.* § 30-4-15. More notice obviously serves that purpose, and it is remarkable that a public body in South Carolina would argue that providing the citizenry with ***more notice*** of the public body's meetings is somehow inconsistent with state law and FOIA's open-government goals.

What is more, compliance with both the statute and the proposed ordinance is not just possible; ***it is automatic***. If Council posts its agendas seven days before meetings, as would be required by the proposed ordinance, then Council has, by definition, complied with FOIA's statewide minimum of providing notice "at least twenty-four hours before meetings." S.C. Code Ann. § 30-4-80(A). There is no scenario in which a council can comply with the seven-day rule and somehow violate the statewide twenty-four-hour rule.

Respondents argue the proposed ordinance "attempts to amend" Section 30-4-80 by "eliminating the language 'as early as is practicable but not later than twenty-four hours before the meeting.'" (Return Br. at 10-11.) This rings hollow. The seven-day notice that would be required by the proposed ordinance operates alongside Section 30-4-80, not in place of it.

At bottom, this proposed ordinance is a function of the electorate demanding more openness from the county council that governs them. This is precisely what FOIA is designed to do. The circuit court erred when it held that Proposed Ordinance 23-10—if adopted by a vote of the citizenry—would somehow conflict with state law.

III. Proposed Ordinance 23-11 advances, and does not conflict, with state law regarding self-government within a representative democracy.

Proposed Ordinance 23-11 would substitute Map 3 for Map 2 as McCormick County's reapportionment plan for the county council. Map 3 was prepared by the same State Revenue and Fiscal Affairs Office that prepared Map 2, satisfies the same population-variance requirements as Map 2, and operates within the same statutory framework as Map 2. Respondents' challenge to the ordinance rests on two faulty propositions: that S.C. Code Ann § 4-9-90 prohibits any further reapportionment until 2030 (despite saying nothing of the sort); and that *Elliott v. Richland County*, 322 S.C. 423, 472 S.E.2d 256 (1996), establishes a categorical "one-shot" rule applicable to the electorate (despite approving the county's "second shot" at reapportionment while rejecting a third attempt). Both arguments should fail as a matter of law.

But as the Court considers them, it should not lose sight of what's being requested: the very voters who can change their entire form of county government are simply asking for the chance to redraw district boundaries for the county legislative body that represents them. This is not the boogeyman that the Respondents pretend it is; it is the exact type of self-government the General Assembly vested with voters when it passed the County Code.

Nor should the Court be misled to believe the passage of time makes this appeal any less important. Every election matters. If the McCormick County electorate votes to change its district boundaries, those boundaries have the potential to be directly relevant for at least three elections between now and when the next decennial census is adopted: 2026, 2028, and 2030.

A. South Carolina Code § 4-9-90 only governs Council, not the electorate.

South Carolina Code § 4-9-90 provides that "all County Council districts must be reapportioned as to population by ***the county council*** within a reasonable time prior to the next scheduled general election which follows the adoption by the State of each federal decennial

census." *Id.* (emphasis added). The political actor governed by this statute is county council itself, not the electorate. The statute imposes a timing obligation on Council alone, and for an obvious reason: an incumbent whose district changed demographically could retain his or her seat by simply blocking reapportionment.

But the statute says nothing about the electorate, the initiative process, or South Carolina Code §§ 4-9-1210 and 4-9-1230. Respondents read the council-directed timing obligation of Section 4-9-90 as if it silently displaces the electorate's independent statutory rights preserved elsewhere in Title 4, Chapter 9 of the South Carolina Code. Nothing in the text of South Carolina Code § 4-9-90 explicitly or implicitly supports that reading.

Submitting Proposed Ordinance 23-11 to the electorate exposes Council to no risk of violating any South Carolina law under South Carolina Code § 4-9-90.[2] Council already discharged its Section 4-9-90 obligation when it adopted Map 2 on February 15, 2022. A referendum on Proposed Ordinance 23-11 would not require Council itself to reapportion again or to take any action of its own beyond the ministerial task of recognizing the results of the vote on Proposed Ordinance 23-11. The petition originates with the electorate under South Carolina Code §§ 4-9-1210 and 4-9-1230, and any resulting reapportionment would be the electorate's act, not Council's.

Council's actual breach of South Carolina law runs the other way. By refusing to submit Proposed Ordinance 23-11 to the electors after declining to enact it, Council has disregarded the clear and unambiguous command of Section 4-9-1230 that an unpassed initiative ordinance "shall

[2] To be sure, submitting Proposed Ordinance 23-11 to the electorate poses no threat of violating any redistricting-related statute. South Carolina Code § 4-9-1230 requires only that an unpassed initiative ordinance be placed on the ballot; it does not guarantee, one way or the other, whether McCormick County will ultimately be redistricted. Compliance with Section 4-9-1230 simply puts that decision in the hands of the electorate, where the General Assembly intended it to rest.

be submitted to the electors." That is the statutory violation at issue on this appeal—not any phantom conflict with South Carolina Code § 4-9-90.

And, ironically, Council's resistance to letting the citizenry take an up-or-down vote on Proposed Ordinance 23-11 manifests the very same incumbent-protection concern the General Assembly guarded against by ordering county councils themselves to promptly reapportion their districts following a federal census. The Court should reject such an outcome.

Respondents heavily rely on the statement in *Town of Hilton Head Island v. Coal. of Expressway Opponents* that "[a]n electorate has no greater power to legislate than the municipality itself." 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992). But *Hilton Head* does not support Respondents' position. The initiated ordinance in *Hilton Head* conditioned the collection of tolls on a town-wide referendum. Importantly, there was no legal basis for the referendum to be enacted by either Council or the electorate without colliding with state law. *Id.* at 456, 415 S.E.2d at 805. That conflict was with an entire statutory scheme that exhaustively defined the planning, construction, and toll-financing of state roads and that vested authority in the South Carolina Department of Highways and Public Transportation. *Id.* at 455–56, 415 S.E.2d at 805. In *Hilton Head*, compliance with both the ordinance and the statewide scheme was impossible, so if town council couldn't do it, neither could the voters.

Proposed Ordinance 23-11 bears no resemblance to the scenario in *Hilton Head*. It is entirely possible to comply with both the statute requiring the Council to reapportion itself promptly after the census and then let the voters decide for themselves if the Council's reapportionment decision is consistent with the citizenry's desire for its representative body. In short, the only party that could violate South Carolina Code § 4-9-90 is Council itself, and Council is not being tasked with any action: the electorate—not Council—is petitioning for redistricting

through the initiative and referendum process. *Hilton Head*'s generic observation about the authority of the voters has no applicability here.

B. *Elliott* does not establish a categorical "one-shot" rule and, in fact, does not even use this phrase that the Respondents assign that case.

Respondents read *Elliott* as holding that "[a] county council has one shot to reapportion council districts. Once a valid plan has been adopted, it cannot be changed until the next decennial census." (Return Br. at 13–14.) That reading both overstates *Elliott*'s holding and ignores its facts, which are nothing like the facts here.

Elliott addressed ***three*** successive reapportionment ordinances enacted by ***Richland County Council itself***. The ordinances were ***not*** initiated by the electorate, nor did they implicate the initiative and referendum process. 322 S.C. at 425–26, 472 S.E.2d at 257–58. The *Elliott* Court's narrow holding that Section 4-9-90 prevents ***council*** from repeatedly enacting reapportionment ordinances on its own initiative—a holding that addresses the same risk of incumbent self-protection at play here. Nothing in *Elliott* addresses, either explicitly or implicitly, the electorate's independent rights under South Carolina Code §§ 4-9-1210 and 4-9-1230.[3]

In the same way that South Carolina Code § 4-9-90 governs county council action and not electorate action, the focus of *Elliott* is council itself. Its holding therefore speaks only to council-

[3] Respondents twice claim that Appellant "concedes" *Elliott* prevents any further reapportionment until 2030. (Return Br. at 13–14 (quoting Plfs.' Mot. Summ. J. p. 9, lns. 8–9).) The full sentence from which the Respondents quote is conditional and council-specific: "*Elliott* ***may*** prevent McCormick County Council ***itself*** from reapportioning its single-member districts more than once every ten years." (Plfs.' Mot. Summ. J. p. 9, lns. 8–9 (emphases added).) Selectively picking that sentence to suggest a broader concession misreads it. Appellant's position throughout this litigation has been that, at best, *Elliott* addresses Council's lack of authority to reapportion itself over and over again. But *Elliott* does not address in any way the electorate's independent right to propose a different plan by initiative, which is the reapportionment mechanism at issue here.

initiated reapportionment, not to reapportionment proposed by the electorate through the initiative and referendum process that is specifically permitted by state law.

And *Elliott*'s policy rationale reinforces the council/electorate distinction. The risk *Elliott* addressed was a legislative body itself repeatedly redrawing its own districts. *See* 322 S.C. at 426–27, 472 S.E.2d at 258–59 ("[O]nce ***a county council*** has enacted a valid reapportionment ordinance, ***it*** may not subsequently enact another such ordinance until after the next regular apportionment period prescribed by § 4-9-90.") (emphasis added).[4] That risk is not merely absent here—it is inverted. Proposed Ordinance 23-11 is not about protecting incumbents; it is asks the voters whether they should select their representatives to Council through districts that Council itself rejected after a public hearing at which every speaker supported Map 3. Reading *Elliott* to bar that effort would convert a doctrine designed to protect voters from incumbent manipulation into one that wrongfully insulates incumbents from voters.

C. State law allows the electorate to alter districting more than once every ten years, all the way down to changing the entire form of county government.

Lastly, Respondents attempt to dismiss Appellant's discussion of South Carolina Code § 4-9-10 in two sentences: that the statute "concerns the form of government adopted by a county" and "has nothing to do with adopting an ordinance by initiative and referendum." (Return Br. at 14.) That non-response misses the point.

[4] It is notable that while Respondents throw around the term "one-shot rule" like it is a canon of black-letter law, the term itself exists nowhere in *Elliott*. In fact, Respondents' supposed "one-shot rule" is based on a two-word holding with no meaningful analysis from the Court. *See Elliott,* 322 S.C. at 426-27, 472 S.E.2d at 258 ("We agree."). And even then, that holding is directed at council action, not the acts of the electorate, as discussed above in the text.

The General Assembly assigned certain forms of government to each of the state's 46 counties, and then vested the citizenry with authority to change that form of government two years later and then again every four years if the voters so choose, and always by referendum:

> [T]he adopted form [of county government], number [of council member], and method of election [for council members] shall not be changed for a period of two years from the date such form becomes effective and then ***only as a result of a referendum*** as hereinafter provided for. Referendums may be called by the governing body or upon petition of not less than ten percent of the registered electors of the county. . . . After a referendum has been held and whether or not a change in the form results therefrom, no additional referendums shall be held for a ***period of four years***.

S.C. Code Ann. § 4-9-10(c) (emphasis added).

Consistent with the point that local government should be responsive to the citizens it serves, the General Assembly specifically authorizes the electorate to change the county's "form of government, number of council members, or methods of election" every four years, by referendum, on a ten-percent petition. *Id.*

Each of those changes necessarily affects districting. Reducing a five-member council to seven members, for instance, necessarily requires redrawing district boundaries. The General Assembly thus expressly authorized the electorate to make changes that ***require*** reapportionment more often than once per decade. Respondents' reading of South Carolina Code § 4-9-90 is incompatible with that framework. If the electorate is authorized to alter the entire structure of county government every four years by referendum, surely it can do something less drastic like adopt a different map within the same statutory framework Council itself used.

The structural argument is simple: the greater power includes the lesser. Respondents' reading would produce the absurd result that the electorate can dismantle the entire single-member-district system by referendum every four years but can never adjust the boundaries of those same

districts. The General Assembly did not draft South Carolina Code § 4-9-90 to produce that result, and nothing in *Elliott* requires it.

CONCLUSION

South Carolina Code § 4-9-1230's command that an unpassed initiative ordinance "shall be submitted to the electors" is mandatory, and the only judicial exception—actual conflict with state law—requires that the ordinance either hinder a statute's purpose or make compliance impossible. Neither Proposed Ordinance 23-10 nor Proposed Ordinance 23-11 comes close to that standard.

Accordingly, Appellant respectfully requests that this Court reverse the circuit court's January 6, 2026 order granting summary judgment to Respondents and remand with instructions to order Respondents to conduct a special election on Proposed Ordinances 23-10 and 23-11.

Respectfully submitted,

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