THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

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Opinion No. 5388
Appellate Case No. 2014-000829
Circuit Court Case No. 2014-CP-32-00697

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Vivian Atkins, Robert P. Frick, and Kay Hollis, in their official capacity as members of the Town Council of the Town of Chapin, .... Appellants,

v.

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, and the Town of Chapin, ..... Defendants,

of whom

James R. Wilson, Jr., in his official capacity as Mayor of the Town of Chapin, and Gregg White, in his official capacity as a member of the Town Council of the Town of Chapin, are the ..... Respondents/ Petitioners.

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# PETITION FOR WRIT OF CERTIORARI

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July 25, 2016
Columbia, South Carolina

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## CERTIFICATION OF COUNSEL

Counsel for Mayor Wilson and Councilman White ("Petitioners") certify that they filed a petition for rehearing with the South Carolina Court of Appeals on March 24, 2016, and that it was finally ruled on by the Court of Appeals on June 29, 2016, by way of a substituted opinion.

## QUESTIONS PRESENTED FOR REVIEW

This case arises out of a political dispute within the Town of Chapin regarding control of the contents of Town Council's meeting agendas. This case involves a series of issues involving appellate jurisdiction, open government, and statutory interpretation, including:

1. **Appellate Jurisdiction:** The plaintiffs sued three defendants: the Town of Chapin, Mayor Wilson, and Councilman White. Judge Cooper entered two orders in favor of all three defendants. The plaintiffs, however, only appealed those rulings against Mayor Wilson and Councilman White, and they excluded the Town of Chapin from the appeal. Does an appellate court have jurisdiction to review an order when a party in whose favor the order was entered is not made a party to the appeal?

2. **Interpretation of Town Ordinances within FOIA's Boundaries:** At the trial level, Judge Cooper construed Chapin's ordinances to require the mayor's approval or disapproval of items on a meeting agenda, and held that the inclusion or rejection of agenda items was within the mayor's discretion under both the ordinances' plain language and Chapin's strong-mayor form of government. The Court of Appeals reversed that ruling and held that the process for creating a meeting agenda under the Town's ordinances does not apply to "special" meetings. Assuming *arguendo* that the Court of Appeals had jurisdiction to issue its ruling, did it err in its construction of the mayor's authority to approve agenda items for all types of meetings?

## STATEMENT OF THE CASE

### I. The plaintiffs filed a politically-motivated lawsuit, which Judge Cooper promptly and properly dismissed.

The Town of Chapin operates under a strong-mayor form of government, and this case arises out of a dispute over the mayor's powers. The case was filed on February 26, 2014, but it traces its roots to Election Day in November 2013 when Mayor Wilson defeated Stan Shealy, a 32-year incumbent and political ally of the plaintiffs. Within weeks after Mayor Wilson was sworn into office, and following an unsuccessful election protest by Mr. Shealy, the plaintiffs—who are members of Town Council—requested that Mayor Wilson place an item on a Town Council meeting agenda that would have given them an opportunity to adjudge Mayor Wilson's "qualifications" to be mayor. He refused, citing the authority to approve or reject items for inclusion on meeting agendas that Chapin Town Ordinance 2.206 vests in the mayor.

In response, the plaintiffs filed this case seeking declaratory relief regarding the mayor's authority under the Chapin Town Ordinances concerning meeting agendas. (Compl.; R. p. 19.)[1] The plaintiffs named three defendants: the Town of Chapin, Mayor Wilson, and Councilman White. All of the defendants moved for dismissal of the complaint. (Mot. to Dismiss; R. p. 92.)

On March 10, 2014, Judge Cooper heard the Motion to Dismiss the Complaint, as well as the plaintiffs' Motion for a Preliminary Injunction regarding the various issues on which they sought declaratory relief. By order dated March 18, 2014, Judge Cooper declared that the Chapin Town Ordinances vested the mayor with authority to approve or reject agenda items, and that this authority was to be exercised within the mayor's discretion. (Order (Mar. 18, 2014); R. p. 1.)

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[1] One of the plaintiffs, Ms. Atkins, is no longer a member of Chapin Town Council. Her replacement has not sought to intervene in this matter on either side of the case. Additionally, the plaintiffs included several other claims in their complaint, all of which were adjudicated in defendants' favor and either not appealed or abandoned on appeal.

Judge Cooper further noted that the ordinances created a process by which the plaintiffs could have attempted to add items to an agenda during a meeting, but that there was nothing alleged to suggest that they had ever attempted to utilize that procedure. (*Id.*; R. p. 6.) Accordingly, he dismissed the case.

On March 31, 2014, the plaintiffs sought reconsideration of Judge Cooper's March 18th Order. (Motion to Reconsider March 18, 2014 Order; R. p. 130.) Judge Cooper denied that motion by order dated April 8, 2014. (Order (Apr. 8, 2014); R. p. 10.) That, however, did not stop the plaintiffs.

## II. Despite having received an unambiguous declaration from the circuit court, the plaintiffs ignored Judge Cooper's rulings.

Despite Judge Cooper dismissing their case and specifically holding that Mayor Wilson "must sign off on the agenda prior to its distribution to Council, and there is no requirement that the Mayor place items on the agenda that he believes do not merit Council's consideration" (Order at 4 (Mar. 18, 2014); R. p. 4), the plaintiffs pressed forward as if no case had been filed and no ruling had been issued.

On April 6, 2014, the plaintiffs attempted to announce a "special meeting" of Town Council, but they did so without submitting the agenda for that meeting to Mayor Wilson for his consideration. (Announcement of Special Meeting for April 10, 2014; R. p. 139.) Because this was directly contrary to Judge Cooper's March 18th Order, the defendants filed a motion the next day to enforce that order. (Motion to Enforce Order and to Enjoin Contrary Conduct; R. p. 134.)

On April 8, 2014, Judge Cooper circulated a letter to counsel for all parties stating that he was hearing criminal trials and could not expeditiously convene a hearing on the defendants' Motion to Enforce the March 18th Order. However, his letter stated that the plaintiffs' Motion to

Reconsider the March 18th Order was denied, and it concluded with a warning that if the plaintiffs insisted on holding their "special meeting" in contravention of the Court's earlier order, that meeting "could be illegal and of no force and effect." (Letter from The Honorable G. Thomas Cooper, Jr. (Apr. 8, 2014); R. pp. 241–42.)

## III. Even after Judge Cooper warned the plaintiffs that their post-judgment misconduct was improper, they continued to ignore his rulings.

Judge Cooper's warning fell on deaf ears. Only 36 minutes after Judge Cooper circulated his letter to the parties, counsel for the plaintiffs emailed counsel for the defendants and stated that the plaintiffs would press forward with their "special meeting" notwithstanding Judge Cooper's letter. (Email correspondence from Andrew Syrett to Todd Carroll (Apr. 8, 2014); R. pp. 244–45.) And they did. (Aff. James R. Wilson, Jr. ¶¶ 9–10 (Apr. 14, 2014); R. p. 249.)

Because the plaintiffs held a meeting and attempted to address agenda items that were never submitted to the mayor for his consideration, as required by both the Chapin Town Ordinances and by Judge Cooper's March 18th Order, the defendants were forced to file a contempt motion to undo the plaintiffs' misconduct. (Motion for Civil Contempt; R. p. 237.)

The defendants filed that motion on April 14, 2014. Later that same day, the plaintiffs noticed a second "special meeting" in violation of the Town Code and Judge Cooper's March 18th Order. (Supplemental Aff. James R. Wilson, Jr. ¶ 3 (Apr. 21, 2014); R. p. 273.)

Recognizing the time-sensitivity of the circumstances, Judge Cooper's Chambers contacted the parties about holding a conference with the Court to address the situation. When the plaintiffs could not make themselves available, Judge Cooper set a hearing on the defendants' post-judgment motions for April 25, 2014. (Email correspondence from Brandon Reeser, Law Clerk to The Honorable G. Thomas Cooper, Jr., to Counsel (Apr. 15, 2014); R. pp. 264–71.)

Because a hearing had been set to address the propriety of the plaintiffs' post-judgment misconduct, the defendants requested that the plaintiffs cancel the second improperly-noticed "special meeting" until the circuit court had an opportunity to review the situation. (Letter from Todd Carroll to Andrew Syrett (Apr. 16, 2014); R. p. 276.)

Once again, the plaintiffs refused and attempted to hold another "special meeting" in violation of the ordinances and the March 18th Order. (Email correspondence from Andrew Syrett to Todd Carroll (Apr. 16, 2014); R. p. 278.) That meeting took place on April 17, 2014. (Supplemental Aff. James R. Wilson, Jr. ¶ 6 (Apr. 21, 2014); R. p. 274.)

## IV. Just as he earlier warned, Judge Cooper declared all of the plaintiffs' post-judgment misconduct to be unlawful and of no force and effect.

On Friday, April 25, 2014, the circuit court heard arguments regarding the plaintiffs' post-judgment motions. At 1:18 a.m. on the Saturday morning following the hearing, the plaintiffs notified the defendants that they intended to schedule yet another improper meeting designed to "explore whatever steps are available to remove him [*i.e.* Mayor Wilson] from office in the most expedient manner possible." (Email correspondence from Andrew Syrett to Todd Carroll (Apr. 26, 2014); R. p. 228.)

Judge Cooper put an end to the plaintiffs' misconduct on May 5, 2014:

> The Court finds Plaintiffs' post-judgment "special" meetings to have been unlawfully held because the proposed agendas for those meetings were never presented to the Mayor for his approval under Ordinance § 2.206(b) and the Court's March 18th Order. Any votes or actions Plaintiffs attempted to take or other business Plaintiffs attempted to conduct at all meetings held contrary to Ordinance § 2.206(b) and the Court's March 18th Order are hereby invalidated and deemed to be without any force or effect.

(Order at 6–7 (May 5, 2014); R. pp. 17–18.) An appeal followed.

## V. The plaintiffs appealed Judge Cooper's rulings to the Court of Appeals, but they excluded the Town of Chapin from their appeal.

The plaintiffs filed a notice of appeal following each of Judge Cooper's rulings: the first on April 22, 2014, and the second on May 22, 2014. Both times, the plaintiffs designated only Mayor Wilson and Councilman White—***but not the Town of Chapin itself***—as respondents on appeal. (Notice of Appeal (Apr. 22, 2014); Appx. p. 94; Notice of Appeal (May 22, 2014); Appx. p. 99.)

Briefing concluded on Friday, March 20, 2015, with the plaintiffs filing their final briefs with the Court of Appeals. On Monday, March 23, 2015, Mayor Wilson and Councilman White filed a motion to dismiss the appeal on grounds that appellate jurisdiction did not vest over the Town of Chapin, which rendered Judge Cooper's decisions unreviewable due to the law-of-the-case doctrine. (Mot. to Dismiss Appeal; Appx. p. 88.)

By order dated May 29, 2015, then-Chief Judge Few recognized that the Town of Chapin had been omitted as a respondent on appeal, but he denied the motion to dismiss on grounds that it "seek[s] dismissal on a substantive basis." (Order (May 29, 2015); Appx. p. 86.)

The Court of Appeals heard oral argument on this case on January 5, 2016, during which the plaintiffs withdrew their appeal as it related to Judge Cooper's March 18th Order. (Court of Appeals' Substituted Opinion at 2 (June 29, 2016); Appx. p. 2.)

On March 9, 2016, the Court of Appeals issued its initial opinion in this matter that did three things: (1) it affirmed Judge Cooper's March 18th Order; (2) it reversed Judge Cooper's May 5th Order; and (3) it held that the law-of-the-case doctrine is "discretionary" and explained that it would be "unreasonably harsh" to enforce it here and dismiss the appeal due to the plaintiffs' failure to appeal any of Judge Cooper's rulings as they relate to the Town of Chapin. (Court of Appeals' First Opinion (Mar. 9, 2016); Appx. p. 15.)

On March 24, 2016, Mayor Wilson and Councilman White sought rehearing of that opinion with respect to the Court of Appeals' analysis regarding appellate jurisdiction and construction of the Chapin Town Ordinances, the South Carolina Freedom of Information Act, and the South Carolina Municipal Code. (Pet. for Rehr'g (Mar. 24, 2016); Appx. p. 29.) On June 29, 2016, the Court of Appeals withdrew its March 9th opinion and substituted a substantially rewritten opinion in its place. (Court of Appeals' Substituted Opinion (June 29, 2016); Appx. p. 1.) That same day, it denied the petition for rehearing, making this petition for a writ of certiorari timely and ripe. (Order (June 29, 2016); Appx. p. 27.)

Petitioners seek a writ of certiorari to review the Court of Appeals' June 29, 2016 Opinion, its order denying rehearing, and it order denying dismissal of this appeal.

## ARGUMENT

The Court should grant this Petition and review the decision by the Court of Appeals because its ruling squarely conflicts with this Court's precedent on several issues: the limitations on appellate jurisdiction, the law-of-the-case doctrine, and principles of open government and statutory construction. Rule 242(b)(3), SCACR. Without this Court's intervention, the potential for gamesmanship in the appellate process could be limitless in cases involving multiple plaintiffs or multiple defendants. Moreover, the Court of Appeals has eliminated from the State Freedom of Information Act a provision that the Legislature specifically incorporated.

Accordingly, Petitioners request that the Court issue a writ of certiorari to review the substituted opinion of the Court of Appeals and either vacate it and dismiss this appeal for want of jurisdiction, or reverse that opinion with respect to its errant analysis of the underlying ordinances and statutes.

## I. By not dismissing this appeal, the Court of Appeals assumed jurisdiction that it did not have and ignored controlling precedent from this Court with respect to appellate jurisdiction and the law-of-the-case doctrine.

Respectfully, this appeal should have been dismissed because of fundamental limitations on an appellate court's jurisdiction, and the Court of Appeals should never have reached the issue of the mayor's authority to approve or disapprove of meeting agendas under the Chapin Town Ordinances, the Freedom of Information Act, and the Municipal Code. Simply put, the plaintiffs omitted an indispensable party from their appeal, and a party in whose favor the judgments below were entered; that omission pushed this case outside of the Court of Appeals' appellate jurisdiction.

As discussed above, the plaintiffs sought to have Section 2.206 of the Chapin Town Code declared "unenforceable to the extent that it grants the Mayor any control over the agendas for council meetings." (Compl. ¶ "Wherefore"(2); R. p. 22.) By law, the Town of Chapin was required to be a party to this litigation. *See* S.C. Code Ann. § 15-53-80 ("In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard."). And because the plaintiffs' claims involved the scope of mayoral authority and council authority, both Mayor Wilson and Councilman White were also required to be parties. *See id.* ("When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.").

After numerous motions and hearings, Judge Cooper issued three orders with respect to mayoral authority over meeting agendas for all types of Town Council meetings: an order declaring the law in favor of all three defendants and dismissing the complaint (Order (Mar. 18, 2014); R. p. 1); an order denying the plaintiffs' motion to reconsider the declarations and

dismissal (Order (Apr. 8, 2014); R. p. 10); and an order enforcing the prior declarations of law (Order (May 5, 2014); R. p. 12).

The plaintiffs appealed Judge Cooper's orders only as those rulings relate to Mayor Wilson and Councilman White. Perhaps they decided it was not worth the political risk to continue suing the Town of Chapin. Perhaps they grew tired of the electorate asking why members of Town Council were suing the Town of Chapin. But for reasons that only they know, the plaintiffs excluded the Town of Chapin from their appeal and designated only Mayor Wilson and Councilman White as "Respondents" in two notices of appeal and two proofs of services. (Appx. pp. 94–102.)

That decision should have been fatal to the plaintiffs' appeal. By not designating the Town of Chapin as a respondent, appellate jurisdiction did not and cannot now vest over the Town. *See Conner v. City of Forest Acres*, 348 S.C. 454, 460–61, 560 S.E.2d 606, 609–10 (2002) (dismissing from an appeal two trial-level defendants who were not identified as "respondents" in the notice of appeal or proof of service until nearly five months after the appellant attempted to serve an amended notice that, for the first time, designated those defendants as "respondents").

Because an unappealed ruling is the law of the case, the Court of Appeals had no authority to alter Judge Cooper's rulings as they relate to the Town of Chapin. *See Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (explaining that the law-of-the-case doctrine renders decisions unreviewable, "right or wrong").

And because those unreviewable rulings applied equally to all of the parties, the law-of-the-case doctrine should result in this entire appeal being dismissed; otherwise, there is an unavoidable risk in creating conflicting rulings. In fact, such an outcome is hornbook law:

> Generally, a proceeding to review a judgment, order, or decree will be dismissed if all parties who are essential to the review are not made parties to the proceeding, unless there has been a proper summons and severance or equivalent proceeding or unless the defect may be and is cured.

4 C.J.S. *Appeal and Error* § 353 ("Nonjoinder") (2007).[2]

The Court of Appeals ignored these established principles of law at every point in the analysis. In so doing, the Court of Appeals has created a precedent of ignoring jurisdictional boundaries and adjudicating the rights of parties not before it, which should be vacated by this Court.

### A. The Court of Appeals improperly disregarded the contents of the plaintiffs' notices of appeal, in direct contrast to *Conner v. City of Forest Acres.*

In rejecting the plaintiffs' decision to exclude the Town of Chapin from this appeal by not including the Town as a respondent, the Court of Appeals stated that Petitioners' argument is based "on merely the failure to designate the Town as a respondent in the case caption and in the text of the Proof of Service." (Court of Appeals Opinion at 13 (June 29, 2016); Appx. p. 13.) In that court's view, requiring an appellant to designate an adverse party as a "respondent" in the notice of appeal in order for appellate jurisdiction to attach "would place form over substance."

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[2] *See generally Jemison v. Brown*, 202 So. 2d 44, 45 (Ala. 1967) ("It is academic that all parties to an action whose interest will be affected by a reversal of the judgment or decree appealed from must be made parties to the appellate proceedings. Otherwise we cannot consider the case as to the non-joined appellees."); *Kirby v. Woods*, 90 S.E.2d 4, 5 (Ga. 1955) (holding that the court was without appellate jurisdiction and dismissing an appeal where a judgment was entered in favor of four defendants but was appealed only as it related to two of the defendants); *In re Estate of Johnson*, 279 P.2d 271, 275 (Kan. 1955) (dismissing an appeal for lack of appellate jurisdiction when a judgment was entered in favor of several defendants, including one who was sued both in his individual capacity and in his capacity as an executor of a will, but was only appealed against those defendants in their individual capacities, even though the dual-capacity defendant never filed any trial-level pleadings in his capacity as executor); *Bye v. Fed. Land Bank Ass'n*, 422 N.W.2d 397, 399–400 (N.D. 1988) (dismissing an appeal for lack of jurisdiction when the trial court issued summary judgment on "interwoven" issues in two separate orders in favor of two separate groups of defendants, but the plaintiff only appealed one order against one group of defendants).

(*Id.*) But this is ***precisely*** the test prescribed by this Court in *Conner v. City of Forest Acres*, 348 S.C. at 460–61, 560 S.E.2d at 609–10. The Court of Appeals never addressed or acknowledged the unmistakable conflict between its decision and this Court's controlling precedent.

### B. The Court of Appeals improperly assumed jurisdiction over a trial-level party that was never included in the appeal.

Compounding its error, the Court of Appeals then stated that the plaintiffs "have properly perfected their appeal of the circuit court's orders as to all parties in this case, including the Town." (Court of Appeals Opinion at 13 (June 29, 2016); Appx. p. 13.) It reached this conclusion despite the fact that the plaintiffs themselves have never argued that they perfected their appeal as to the Town of Chapin, nor have the plaintiffs ever suggested that they attempted to include the Town of Chapin in this appeal.

In short, the Court of Appeals simply assumed jurisdiction over a municipality that the parties themselves agree was never before the appellate court. This cannot possibly be the law, as appellate courts—or any court, for that matter—have no authority to extend their own jurisdictional boundaries. *See, e.g.*, *Elam v. S.C. DOT*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice."). Once again, the Court of Appeals failed to acknowledge that its decision directly contradicts this Court's precedent and basic norms of due process.

### C. The Court of Appeals improperly deemed the law-of-the-case doctrine to be discretionary.

From there, the Court of Appeals dismissed the argument that the law-of-the-case doctrine rendered Judge Cooper's rulings unreviewable by deeming that doctrine to be

"discretionary." (Court of Appeals Opinion at 12–13 (June 29, 2016); Appx. pp. 12–13.) This, too, is directly contrary to South Carolina law with respect to an appellate court's jurisdictional authority to review unappealed rulings:

> It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. An unappealed order, right or wrong, is considered the law of the case.

Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* 214 (3d ed. 2016) (collecting numerous South Carolina case; internal citations omitted). Just as before, the Court of Appeals did not explain its basis or reasoning behind ignoring this Court's controlling precedent on this third issue.

### D. Allowing the Court of Appeals' decision to stand will invite procedural gamesmanship over appeals in cases with multiple plaintiffs or defendants.

The Court of Appeals' analysis undoes numerous principles of established South Carolina jurisprudence that could invite untold mischief into the appellate process.

Consider, for instance, a plaintiff who sues two defendants—one with considerable resources, and the other with substantially fewer resources—for a single wrong and urges a finding of joint-and-several liability. Under the Court of Appeals' analysis, if the plaintiff loses her case at the trial level in a ruling applicable to both defendants, she could now choose to appeal that ruling only as it relates to the weaker of the two defendants with the hope that she will have a better chance of prevailing on appeal. And if she were successful on appeal, that plaintiff could now claim that her appellate success applies equally to the better-heeled defendant even though it was never actually made a party to the appellate proceedings, and even though the trial court's ruling as it relates to the better-heeled defendant was never before the appellate court.

This cannot be the law. Indeed, before this case, it was not the law. At no point in this litigation have the plaintiffs identified a single case that supports such a boundless view of appellate jurisdiction or the law-of-the-case doctrine: not in opposition to Petitioners' motion to dismiss the appeal, and not in opposition to Petitioners' request for rehearing before the Court of Appeals. Nor did the Court of Appeals identify any authority to support this expansive view of its own jurisdiction to adjudicate issues and parties not before it: not in its order denying Petitioners' motion to dismiss the appeal, not in its first opinion in this case, and not in its substituted opinion.

In order to correct these clear errors—which ignore this Court's core jurisprudence on questions of appellate procedure and appellate jurisdiction—Petitioners respectfully request that the Court issue a writ of certiorari, vacate the Court of Appeals' opinion, and dismiss this appeal for want of appellate jurisdiction.

## II. The Court of Appeals violated numerous tenants of statutory construction when it reversed Judge Cooper's interpretation of the Town of Chapin's ordinances.

In addition to improperly assuming jurisdiction over this appeal and ignoring this Court's binding precedent on a host of jurisdictional issues, the Court of Appeals misconstrued Chapin's Town Ordinances governing how meeting agendas are created and prepared as not applying to "special" meetings. In so doing, it relied on a demonstrably incorrect proposition of open-government law as the foundational support for its statutory construction. Its decision should be reviewed and corrected.

The ordinance that vests Chapin's mayor with the authority to approve or reject items on a meeting agenda is Town Ordinance 2.206(b), which provides in pertinent part: "The agenda shall be approved by the Mayor, prior to distribution." (R. p. 114.) Judge Cooper held that this ordinance gives the mayor discretion to approve or reject agenda items. (Order at 4 (Mar. 18,

2014); R. p. 4.) The plaintiffs withdrew all objections they had to this declaration of the law. (Court of Appeals Opinion at 2 (June 29, 2016); Appx. p. 2.)

Judge Cooper subsequently explained that his holding applied equally to agendas for all types of meetings in the Town of Chapin, including special meetings, and he arrived at this conclusion for several reasons. ***First***, on its face, Ordinance 2.206(b) does not distinguish among types of meetings with respect to the mayor's "approval" authority. (Order at 4 (May 5, 2014); R. p. 15.) ***Second***, construing the Town's ordinances that establish when a special meeting may be called to implicitly repeal the mayor's "approval" authority over meeting agendas violates the well-established principle that implied repeal is strongly disfavored. (*Id.* at 5; R. p. 16.) ***Third***, because agendas are required for all types of meetings in Chapin, the ordinances should be "construed harmoniously to produce a uniform result" regarding the preparation of meeting agendas. (*Id.*)

The Court of Appeals reversed Judge Cooper's declaration that the Chapin Town Ordinances give the mayor "approval" authority over agendas for all types of meetings. In its view, because Ordinance 2.206(a) requires an agenda to be prepared for regular meetings, the mayor's authority in Ordinance 2.206(b) to approve agendas must be limited only to that type of meeting, even though there are no ordinances in Chapin that address how to prepare agendas for other types of meetings. (Court of Appeals Opinion at 9 (June 29, 2016); Appx. p. 9.) The Court of Appeals then confirmed its conclusion by stating that it would incompatible for the mayor to approve an agenda for a special meeting because the only things that can be considered at a special meeting are those items for which the meeting is called. (*Id.* at 10–11; Appx. pp. 10–11.) In its view, an agenda is superfluous for special meetings because they are called for only an unalterable purpose. (*Id.*)

Based on its construction of Chapin's ordinances, the Court of Appeals held that Judge Cooper erred when he struck actions that the plaintiffs attempted to take at two mid-litigation special meetings that were held without submitting the meeting agendas to the mayor for his approval. (*Id.* at 12; Appx. p. 12.) Respectfully, the Court of Appeals' analysis is wrong on several basic points.

### A. The Court of Appeals' construction of Chapin's ordinances regarding meeting agendas creates a vacuum in the law where none previously existed.

The Court of Appeals' first analytical error was its assumption that because Ordinance 2.206(a) requires an agenda to be prepared for regular meetings, Ordinance 2.206(b) must also be limited to regular meetings. First, as Judge Cooper observed, there is no such limiting language within Ordinance 2.206(b) itself. (R. p. 114.) When one part of a law contains limiting language that is not included elsewhere in the same law, the omission should be understood as intentional. *See Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alerius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *Hodges v. Rainey*, 341 S.C. 79, 86, 553 S.E.2d 578, 582 (2000))).

Moreover, the Court of Appeals overlooked the fact that when the Town of Chapin passed Ordinance 2.206, the South Carolina Freedom of Information Act did not require agendas to be prepared for regular meetings, but did require them for all other types of meetings. *Lambries v. Saluda County Council*, 409 S.C. 1, 16–17, 760 S.E.2d 785, 793 (2014). By requiring an agenda for regular meetings in Ordinance 2.206(a), the Town of Chapin merely supplemented existing state law by requiring agendas for all types of meetings.

Because the Town required an agenda for all types of meetings, Ordinance 2.206(b)'s reference to "the agenda" only makes sense when understood to encompass all types of

meetings. Otherwise, the Town's ordinances would have prescribed how to create a meeting agenda only for the type of meeting that, as a matter of state law, was not required to have an agenda. Conversely, the Town's ordinances would have been silent about how to create agendas for all types of meetings that, as a matter of state law, actually were required to have an agenda. It is no surprise, then, that the Town entitled Ordinance 2.206 "AGENDA," ***not*** "REGULAR MEETINGS" or something similarly limited in scope. (R. p. 114 (all capitals in original).)[3]

By construing Ordinance 2.206(b) in a manner contrary to both its plain language and intent, the Court of Appeals created a gap in the law where none previously existed. This violates virtually all norms of statutory construction and should be reversed. *See generally Hodges v. Rainey*, 341 S.C. 79, 85, 553 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute."); *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 168, 447 S.E.2d 843, 846 (1994) ("In giving effect to legislative intent, we are constrained to avoid an absurd result."); *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 544 (Del. 2015) ("[I]t would be incongruous to create statutory gaps and apply judicial fillers when an alternative, equally compelling statutory construction does not require courts to do so." (citing *Pickett v. United States*, 216 U.S. 456, 460 (1910))).

### B. The Court of Appeals has written out of open-government law the process for amending meeting agendas that the General Assembly expressly created.

The Court of Appeals supported its construction of Ordinance 2.206(b) by explaining that an agenda is unnecessary for special meetings because they are called only for certain purposes,

[3] Chapin Ordinance 1.204 makes clear that this title, while not actually part of the ordinance itself, is designed "to indicate or emphasize the contents" of the ordinance. (R. p. 230.)

and those purposes cannot be altered. (Court of Appeals Opinion at 10 (June 29, 2016); Appx. p. 10.)

But this is not so. For one, the Freedom of Information Act specifically requires that an agenda be prepared for special meetings. S.C. Code Ann. § 30-4-80(A). As such, the Court of Appeals' assumption that notice of a special meeting is tantamount to creating that meeting's agenda is incorrect as a matter of law.

Likewise, the Freedom of Information Act expressly provides that an item can be added to an agenda by a two-thirds vote of those present and voting. *Id.* Accordingly, the notion that providing the mayor with the authority to approve or reject items on a special meeting's agenda would defeat the purpose of a special meeting is simply not true, as items can be introduced during a special meeting—even if the mayor rejected everything on that meeting's agenda.

There are political risks and calculations inherent in this process, but the responsibility for assessing and acting according to those risks belongs to the elected officials. That responsibility should not be taken away through the Court of Appeals' construction of unambiguous ordinances to eliminate authority that the Town of Chapin vested in its mayor under the strong-mayor form of government. *See Cox v. Bates*, 237 S.C. 198, 213, 116 S.E.2d 828, 834 (1960) ("Therefore plaintiff and others so minded may seek at the ballot box remedy for what they consider to be a wrong. Much of his argument here is, wittingly or not, concerned with legislative policy, with which the court has nothing to do.").

Accordingly, this Court should reverse the Court of Appeals' construction of mayoral authority in Chapin to approve agendas for special meetings, as that court's construction is based on a misunderstanding of the Freedom of Information Act's procedures for amending meeting agendas, among other errors discussed above.

## CONCLUSION

The Court of Appeals' decision contains a series of rulings that turn this Court's jurisprudence on its head with respect to appellate jurisdiction, appellate procedure, and statutory construction. The Court should grant this Petition, review the rulings below, and either vacate the Court of Appeals' decision and dismiss this case, or reverse the Court of Appeals' decision on its merits.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: _____

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Attorneys for the Respondents/Petitioners

July 25, 2016
Columbia, South Carolina

PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondents/Petitioners, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below via hand delivery to the following address(es):

Pleading: Petition for Writ of Certiorari

Parties Served: Spencer Andrew Syrett
712 Richland Street, Suite E
Post Office Box 7403
Columbia, SC 29202
*Attorney for Appellants*



Edwin T. Mathis

July 25, 2016

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July 25, 2016

**Via Hand Delivery**
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201



Re: Vivian Atkins v. James R. Wilson, Jr.
Appellate Case No. 2014-000829

Dear Ms. Kitchings:

Please find enclosed a copy of the Petition for Writ of Certiorari that is being filed with the South Carolina Supreme Court in regards to the case above. We appreciate you filing this Petition and returning a stamped copy to us via our courier.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

MTC/tm
Enclosure

cc: Spencer Andrew Syrett (via United States mail)