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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BARNWELL COUNTY
Court Of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-000428

James Jefferson Jowers, Sr., Andrew J. Anastos, Ben Williamson, Melanie Ruhlman and Anthony Ruhlman. . . . . Appellants,

v.

South Carolina Department of Health and Environmental Control . . . . . Respondent,

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BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF CONGAREE RIVERKEEPER, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT

The Amicus Brief of Congaree Riverkeeper includes no authority that would change the arguments of the Respondent Department of Health and Environmental Control. The Amicus appears to agree that Appellants lack constitutional standing and contends that they have not established a taking or a denial of substantive due process. The Amicus fails in its contention that Appellants have public interest standing, that they have a property interest at stake and that the Act violates the public trust doctrine.

Amicus also cites data and other information from various reports that appear to be outside the record. Even if, *arguendo,* such information could be judicially noticed (Rule 201, SCRE), Amicus has not requested that notice be taken. Amicus has also made some errors in its reporting or makes comparisons that are not pertinent.[1] Moreover, the information is clearly irrelevant and should be disregarded, because Appellants have no standing to bring this action, and they have no rights or other legally cognizable interests of which they have been deprived.

I

APPELLANTS LACK PUBLIC IMPORTANCE STANDING

> The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an

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1 For example, in the paragraph at the top of page 5 of the Amicus brief, the cited report shows that 63% of surface water is used for water supply rather than 61% as stated. As to that same paragraph, if the Court would like, DHEC can provide permits to this Court for judicial notice showing that four thermoelectic power users consume much more significant amounts of withdrawn water than Amicus indicates for thermoelectric water use generally. Rule 201, SCRE. In the paragraph at the bottom of page 6 of the Amicus Brief, Amicus cites withdrawals by an agribusiness of 3.2 trillion gallons when the figure should be 3.2 billion gallons. R. pp. 179 and 181. That business registered for water withdrawals rather than "obtained a right." Amicus also compares that withdrawal figure to water withdrawals of some smaller cities in the state rather than cities many times larger.

> issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 669 S.E.2d 337, 341 (2008). This standard is not applied lightly. In *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 71, 753 S.E.2d 846, 848 (2014), the Court emphasized that "the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived" or in other words, "whether the public interest requires resolution of a dispute for future guidance despite the lack of standing." *Id.* No showing has been made that resolution of this dispute is "required" now for future guidance so as to justify waiving the normal requirements of standing.

The only reason cited by the Amicus for public interest standing is that "Appellants should have their day in court to challenge the agricultural registration provision of the Act as violating their inalienable right to free and open use of navigable waters, as held in public trust by the State." Brief at page 16. Giving Appellants "their day in court" to assert "their right" does not demonstrate that this issue "transcends a purely private matter" and that "future guidance" is "required" under *ATC S.* and *Carnival.* The Amicus misunderstands and misapplies the *ATC S.* standards in arguing that the absence of prior legal challenges is irrelevant to public importance standing, but that the novelty of the issue affecting the public interest supports public importance standing. That the issues are alleged to be novel and affect the public interest" (emphasis added) are not the standards under *ATC.* "Public importance" (emphasis added) is the test under

that case, and the Amicus does not show that the issue is of such importance that future guidance is required and that lack of standing should be waived. The fact that no other parties have challenged a law in its now nearly six years of existence demonstrates that future guidance is not "required" now. Instead, Appellants have brought a case that is merely '"conjectural' or 'hypothetical'" (*ATC S.*), and such a claim is not one as to which future guidance is "required" and "public importance" attaches

II

APPELLANTS HAVE NO PROPERTY INTEREST THAT HAS BEEN TAKEN

The Amicus contends that Appellants possess "riparian property interests," but identify no South Carolina authority holding that they do. In fact, they cite *Omelvany v. Jaggers*, 20 S.C.L. 634, 638, 1835 WL 1419, at *3 (S.C.App.L & Eq. 1835) which expressly stated that "the proprietor of each bank of a [non-tidal] stream is the proprietor of half the land covered by the stream, but there is no property in the water. . . . He has no property in the water itself, but a simple use of it while it passes along." *Id* (emphasis added) quoting 3 Kent's Com. 353; *accord, White v. Whitney Mfg. Co.*, 38 S.E. 456, 459 (S.C. 1901)(proprietor "has no property in the water itself" quoting 3 Kent, Comm. 353). A right of use is not a property interest, and the Amicus cites no authority that rules otherwise.

The Amicus fails to distinguish *Rice Hope Plantation v. South Carolina Public Service Authority*, 59 S.E.2d 132, 144, 216 S.C. 500, 528 (1950) overruled in part on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) which plainly limited the right of use of navigable waters by adjacent landowners. "[A]n owner of land adjacent to navigable waters,

whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay.'" *Id.*

The Amicus does not even cite *White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 609 S.E. 2d 811, 817 (Ct. App. 2005), discussed in DHEC's Respondent's brief, which was a case about access to surface waters rather than Plaintiff's claims related to consumption of water. *White's Mill* does not recognize a property interest in consumption of water and instead says that "[u]nder the common law, owners of land along rivers, streams, lakes and other bodies of water possess a property right incident to their ownership of the bank and bed of a watercourse . . . In general, these special rights allow abutting landowners to make 'reasonable use' of the body of water for any lawful purpose, whether for commerce or recreation." This statement does not limit *Omelvany,* which plainly stated that an adjacent landowner has no property rights in the water itself.

Moreover, even if Appellants did have a property interest in the water, as argued by Amicus, they have not established a takings claim nor have they presented a substantive due process claim. Although Amicus suggests that a substantive due process claim could be based upon claims that the legislation is arbitrary and unreasonable, Amicus cannot establish a claim when Appellants have not done so themselves. Appellants' allegations that relate to their failed takings claims (fear of low water, etc., and limits on challenges to future uses) do not show that the legislation was arbitrary as to them. In fact, as noted in DHEC's final brief, the legislation does impose limits on agricultural water withdrawals that did not exist under a statute previously.

III

APPELLANTS HAVE NO CLAIM BASED UPON A PUBLIC TRUST INTEREST IN STATE WATERWAYS

The Amicus relies on cases and the Constitutional provision addressing navigation of waterways (S.C. Const. art. XIV, §4), but that authority does not establish a public trust interest in the consumption of the waters of non-tidal rivers. As explained in the DHEC's Respondent's brief, "[u]nder the public trust doctrine, the State holds presumptive title to tidal land below the high water mark to be held in trust for the benefit of all people of South Carolina." (emphasis added). *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). *Estate of Tenney v. S. Carolina Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011). The interest is different in non-tidal rivers in that "while the adjacent property owners hold title from their shoreline to the center of the stream bed, the public has an easement in use of the waterway." *State v. Head*, 330 S.C. 79, 86, 498 S.E.2d 389, 392 (Ct. App. 1997).

Even if Amicus was correct that public trust interests exist in the use of the non-tidal rivers, they are clearly in error in claiming that such interests are violated. Without citing any authority, Amicus contends that the failure to state that registrations do not convey property rights indicates that such rights are conveyed because permits do contain that limitation. Amicus overlooks the differences in permits for withdrawal and registrations for that purpose. A permit is required for withdrawals in excess of three million gallons per month as provided in §49-4-20(28) and §49-4-25, and the permit application must meet multiple requirements. §49-4-80. Although "[a] surface water withdrawal permit confers upon the permittee a right to withdraw and use surface water pursuant to the terms and conditions of the permit [, t]he permit does not convey a property

right in the water to the permittee." § 49-4-110. This granting of a right of use to permit holders but not a property right is similar to the state of the common law as discussed above. Under the Act at issue, statutorily defined "registered surface water withdrawers" ("water withdrawals for agricultural uses at an agricultural facility") are required to register surface water withdrawals , but they are not required to obtain a permit or meet requirements other than the "safe yield" determined by DHEC. S.C. Code Ann. §§49-4-20(23) and 49-4-35. When registered withdrawers do not have permits and are not granted a statutory "right of use," a statement that registered withdrawers are not conveyed property rights is unnecessary.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Orders of the Circuit Court. This case is based upon hypothetical and conjectural claims without any demonstrated need for future guidance or a violation of any legal rights of Appellants. Amicus has not shown otherwise.

Respectfully submitted,

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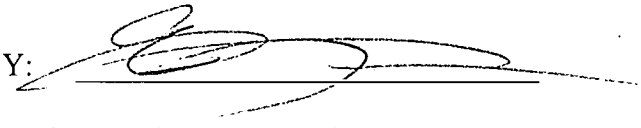
BY: 

November 28, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I have served the Appellants and Amicus with DHEC's Brief in Response to Amicus Brief by mailing copies to each of their attorneys at the address below via United States Mail this November 29, 2016.

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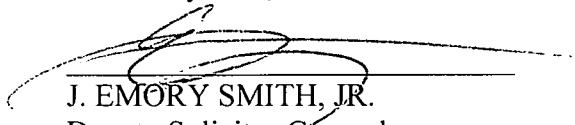

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