

THE STATE OF SOUTH CAROLINA  
In the Supreme Court  
Appellate Case No. 2016-002150

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APPEAL FROM CHARLESTON COUNTY  
The Honorable J. C. Nicholson, Jr., Circuit Court Judge  
Case No. 2009-CP-10-7399

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Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League  
Petitioners,

v.

Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Respondent.

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**S.C. SUPREME COURT**

**LYNNE VICARY, KENT PRAUSE, AND SOUTH CAROLINA COASTAL  
CONSERVATION LEAGUE'S AMENDED REPLY TO RETURN IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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## INTRODUCTION

In seeking certiorari, Petitioners Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League raise novel issues regarding public importance standing in South Carolina and the applicability of Supreme Court precedent, specifically *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E. 2d 647 (2002) and *Ex Parte ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 70, 707 S.E. 2d 402 (2011), to annexations that do not follow proscribed procedures and are carried out in bad faith. Respondent fails to address these novel issues, instead adopting a “move along, nothing to see here” approach that relies on a mischaracterization of the facts and of controlling precedent, and ignores the absurd results that flow from the Court of Appeals’ erroneous construction of the annexation statute. This Court should grant certiorari to review the important issues presented.

Rather than address the important issues here, Respondent repeatedly argues that the Court of Appeals properly found that Petitioners “had no infringement of any proprietary interest” to challenge the annexation of the Nebo development tract in 2009. Return in Opp’n to Pet. for Cert. (hereinafter “Return”) at 3 (also arguing that “[t]he Court of Appeals could not find evidence of any infringement or a proprietary interest in the Petitioners because there wasn’t any.”), 6, 8, 10 (“Petitioners cannot show any infringement of any proprietary interest or harm.”). This argument merely recapitulates the Court of Appeals’ error rather than respond to the issues presented in the petition for certiorari. Petitioners seek certiorari because the Court of Appeals failed to apply this Court’s precedent allowing for public importance standing in cases such as this, and misapplied *St. Andrews* and *Town of Yemassee* to the facts here, creating absurd results not intended by the Legislature. Indeed, the argument that Petitioners could not have standing because they lack a “proprietary” interest (a term that does not appear in the annexation statute)

is tantamount to admitting that the Court of Appeals ruled out public interest standing in all annexation cases. That is a major legal holding and a serious legal error – which deserve, respectively, review and reversal.

Respondent also repeatedly raises the irrelevant argument that Petitioners did not “allege harm from the ten foot strip annexation until five years after it and the Nebo church tract were annexed.” Return at 3; 7 (arguing that Petitioners did not challenge the annexation until “five years after the fact.”). Not only is this irrelevant because there are no issues presented about the timeliness of Petitioners’ appeal by the Court of Appeals’ ruling or petition for certiorari, but Respondent has mischaracterized the facts. In fact, the Town of Awendaw failed to follow proscribed procedures and notify the public and the Charleston County Planning Department of the annexation until 2009 (although the parcels were annexed in 2004). *See* App. 189, September 2009 Letter from Town of Awendaw to Charleston County Planning Department (noting that “[a]lthough this parcel was annexed in 2004, we have found that this information may not have been sent to your department”). In sum, the Town failed to follow proper procedures – including obtaining a proper petition for annexation as required by S.C. Code Ann. § 5-3-150(3) and notifying the Charleston County Planning Department – which hampered the public’s notice of this fraudulent annexation.

After these irrelevant arguments, Respondent repeats the same incorrect refrains throughout its brief – that there was no deceitful or nefarious conduct by the Town in conducting this annexation and thus there is no public importance standing, *see* Return at 4, 5, 6, 7, and that “[w]ithout an exception to the requirements of standing, including constitutional, statutory, and public importance exceptions, the Court of Appeals correctly applied this Court’s precepts in *St. Andrews* and [*Town of*] *Yemassee*.” Return at 7. Respondent fails to respond to Petitioners’

demonstration that this case presents novel issues regarding public importance standing; that *St. Andrews* and *Town of Yemassee* do not apply; and that the Court of Appeals' opinion creates absurd results that the Legislature could not have intended in enacting the subject statute. Instead, Respondent asks this Court to simply accept the cursory and flawed analysis of the Court of Appeals without considering the impact of this case on important questions of South Carolina law.

**I. The Court of Appeals' Opinion is Inconsistent with Supreme Court Precedent Allowing Public Importance and Taxpayer Standing to Challenge Fraudulent Government Conduct.**

In arguing against public importance standing, Respondent claims that “[t]he Court of Appeals correctly determined that there was no deception on the part of Respondent,” and this negates the applicability of public importance standing. *See* Return at 5, 7. Respondent goes so far as to claim that “no evidence of deception exists in the Record.” *Id.* at 4. These claims are patently false. Indeed, so much evidence of deception exists in the Record that the trial court made the following extensive factual findings – findings which support the applicability of the public importance exception here:

- “*After it was unable to secure a petition for annexation for the Ten-Foot-Strip from the U.S. Forest Service, the Town decided to make use of a decade-old letter from a U.S. Forest Service representative in South Carolina stating that the agency had “no objection” to the annexation of ambiguously-described property referenced as Forest Strips.*” *See* App. 19.
- “According to the U.S. Forest Service, the agency did not intend for its letter of May 3, 1994 to constitute a petition of the federal government to annex National Forest lands . . . *Id.*; see also App. at 240 (February 16, 2011 Letter from Paul Bradley (Forest Service) to Samuel Robinson (Town) (“[T]he Forest Service did not intend for the letter of May 3, 1994 to constitute ‘a petition of the federal government’ to annex National Forest lands . . . .”))
- “Further, the Town failed to establish that the strips of National Forest land described in [the 1994 letter] include the Ten-Foot-Strip at issue in this case.” *See* App. 20.

- “Even though the *Forest Service* never submitted a petition for annexation relating to the Ten-Foot-Strip, the Town passed an annexation ordinance anyway stating that ‘a proper petition has been filed’ for annexation of the Ten-Foot Strip of the Francis Marion and purporting to accept an annexation petition.” *Id.*
- “Although the Town represented to the public that it received a 100% petition from the Forest Service, it never did.” *Id.*

The Court of Appeals did not overrule these findings or conclude that there was no deception by the Town. Instead, it also acknowledged that the Town had never received a valid petition for annexation, noting that “*the Forest Service did not provide [the Town] with anything in writing expressing their desire that the Ten Foot Strip be annexed.*” *See Vicary v. Town of Awendaw*, No. 2014-002118, 2016 WL 4123978 at \*1 (emphasis added) (S.C. Ct. App. Aug. 3, 2016), *reh’g denied* (Sept. 23, 2016). The Court of Appeals also noted that, while the Town relied on the 1994 Letter as a petition for annexation, “none of the strips described in the 1994 letter were the Ten-Foot strip at issue in this case.” *Id.*<sup>1</sup> Respondent’s suggestion that the Court of Appeals found no deception or “disagreed that the acceptance of the Forest Service letter as a petition was deceitful” is wrong. *See Return* at 6.<sup>2</sup>

Respondent argues that Petitioners are “overreaching” in their characterization of this Court’s public importance standing precedent. *Return* at 4. According to Respondent, there is no public importance standing here because this case “does not involve public health or welfare

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<sup>1</sup> Respondent’s strange suggestion that these “were not factual conclusions made by the Court but merely a recitation of the facts/procedural background presented to the Court of Appeals,” *Return* at 8, n.4, is a distinction without a difference – the Court of Appeals recognized that there was no valid annexation petition.

<sup>2</sup> Rather than making a factual conclusion that there was no deceit, the Court of Appeals simply (and erroneously) held that *Town of Yemassee* and *St. Andrews* controlled and that, in the Court of Appeal’s view, no case law supports the argument that these cases are distinguishable because they involve annexations carried out in good faith not through deception. In other words, rather than making a *factual* conclusion that there was no deception, the Court of Appeals made a *legal* conclusion that *St. Andrews* and *Town of Yemassee* might apply regardless of fraudulent conduct. We discuss the errors in this holding in part II.

or public finance.” *Id.*<sup>3</sup> This, too, is patently incorrect. This Court has repeatedly stated that public importance standing is “not inflexible,” *see Sloan v. Dep’t of Transportation*, 365 S.C. 299, 618 S.E. 2d 876 (2005), and is designed to afford citizens “access to the judicial process to address alleged injustices.” *ATC South, Inc. v. Charleston Co.*, 380 S.C. 191, 199, 669 S.E. 2d 337, 341 (2008) (*quoting Sloan*, 357 S.C. at 434, 593 S.E. 2d at 472); *see also Thompson v. South Carolina Comm’n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976) (“the rule [of standing] is not an inflexible one.”).

Nothing in this Court’s precedent limits public importance standing to grievances related to public health, welfare, or finance. Instead, the Court has afforded citizens public importance standing to challenge government misconduct more broadly when there is a need for redress for future guidance. *Sloan v. Dep’t of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (finding citizen had standing to bring actions for alleged violation of statutory bidding violations by the Department of Transportation); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (holding citizen had standing to challenge legislative enactment); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999); *Thompson v. South Carolina Comm’n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (holding that the plaintiffs had standing because the questions involved were of such

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<sup>3</sup> Respondent concedes that public importance standing could be available in the annexation context – *i.e.*, Respondent does not appear to argue, as the Court of Appeals held, that *St. Andrews* and *Town of Yemassee* render the doctrines of public importance or taxpayer standing inapplicable in the annexation context. Rather, Respondent makes only a factual argument against public importance standing – that there was no deception to serve as the basis for public importance standing here.

wide concern, both to law enforcement personnel and to the public); *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951).<sup>4</sup>

This case presents just the sort of injustice – a fraudulent government act affecting protected natural resources that the public uses and enjoys – that the exception is designed to address.<sup>5</sup> This case also involves a government that openly states its intent to conduct nefarious annexations in the future unless a court rules this practice illegal. *See* App. at 211; Wallace Dep. 73:23-74:7. The Court should grant certiorari to consider the important questions of law surrounding the applicability of public importance and/or taxpayer standing here.

## **II. This Case Presents Novel Questions of Law Regarding the Applicability of *St. Andrews* and *Town of Yemassee* to Nefarious Annexations.**

Finally, Respondent contends that this case is governed by *St. Andrews* and *Town of Yemassee* despite the unique circumstances presented and the absurd results created by applying these cases here. Respondent essentially rehashes its argument against public importance standing – that there was no deception, thus “standard” annexation standing law applies. *See*

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<sup>4</sup> This Court has also repeatedly recognized that citizens may have standing based on their status as taxpayers. *See, e.g., Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E. 2d 338 (Ct. App. 2003) (holding that taxpayer had direct interest in the County abiding by procurement procedures set out in County code); *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) (holding that taxpayer had standing to bring declaratory judgment action challenging whether Department of Transportation properly authorized emergency procurement for road construction project since issue was of great public importance and taxpayer alleged misuse of government authority).

<sup>5</sup> Even if Respondents were correct that the public importance exception was limited to cases involving public health, welfare, or finance, the conduct at issue in this case unquestionably impacts public welfare because it involves the annexation of nationally-protected resources in the Francis Marion National Forest when no annexation petition was ever received, and the Town’s plan to continue its pattern of nefarious annexations. As explained by one of Petitioners’ standing witnesses, “the actions taken by the Town directly threaten the long term viability of the southern portion of the Francis Marion . . . .” *See* App. 296 (Everett Affidavit at ¶ 10). This is clearly a public welfare issue.

Return at 7. For the reasons explained above, this is factually inaccurate. On the facts presented here, *St. Andrews* and *Town of Yemassee* do not apply to preclude standing to Petitioners.

Contrary to Respondent's claim, Petitioners do not ask the Court to ignore *St. Andrews* and *Town of Yemassee* "whenever an allegation of deceitful conduct" is made. Return at 6. Rather, Petitioners ask this Court to consider the applicability of these cases when both the trial court and Court of Appeals noted that no valid petition for annexation was ever received by the Town – and *St. Andrews* and *Town of Yemassee* involve disputes about properly invoked annexation procedures. *See, e.g., Town of Yemassee*, 391 S.C. at 404, 707 S.E. 2d at 569 (challenging lack of State signature on annexation petition signed by other owners). As the trial court noted here, "[i]nstead of a 100% petition method, there was in effect a 0% petition method" here. App. at 5 (citing Forest Service letter explaining that "the Forest Service did not intend for the letter of May 3, 1994 to constitute a petition of the federal government to annex National Forest lands..."). In *Town of Yemassee*, the Court specifically noted the absence of a "nefarious motive" on the part of the Town conducting the annexation, implicitly recognizing that a situation involving fraudulent conduct may be different. *See* 391 S.C. at 578, n.7; 707 S.E. 2d at 409. Yet the Court of Appeals blindly ignored such conduct here.

Rather than seeking an exception that will swallow the rule as Respondent alleges, *see* Return at 6, Petitioners ask this Court to consider a limited exception for annexations such as this involving municipal deception. It is the Court of Appeals, not Petitioners, that has set forth a sweeping new rule – so long as a municipality merely claims to have conducted a 100% method annexation (whether true or false), only the State or those with undefined "proprietary interests or statutory rights" can challenge such conduct, no matter how arbitrary, unlawful, or deceptive

it might be. The Court should grant certiorari to consider whether *St. Andrews* and *Town of Yemassee* apply to preclude standing on these facts.

**III. This Case Presents Novel Questions of Law Regarding Statutory Standing, and the Court of Appeals' Ruling Creates Absurd Results that Contravene Clear Legislative Intent.**

As explained in the petition for certiorari, this case involves novel questions of law concerning “statutory standing” to challenge 100% method annexations. As discussed above, *St. Andrews* and *Town of Yemassee* do not apply to this case. But even if they are construed to prohibit Petitioners’ standing here, these cases are wrong in their conclusion that there is an exclusive “statutory standing test for challenges to 100% annexations.” *St. Andrews*, 349 S.C. at 605, 564 S.E. 2d at 648. For the reasons explained in the petition for certiorari, there is no such “statutory standing” to challenge 100% method annexations contained in the relevant statute. *See* Petition at 11-12, citing S.C. Code Ann. § 5-3-150(3).

Respondent offers an incoherent response to this argument not grounded in the plain statutory text. *See* Return at 10. Rather than explaining how the statute creates statutory standing for 100% annexations, Respondent cites back to conclusory and unsupported language of *Town of Yemassee* that never references any statutory language. *Id.* Contrary to the holdings of *St. Andrews* and *Town of Yemassee*, there is no “statutory standing” for 100% method annexations that eliminates other methods of establishing standing as the Court of Appeals concluded here. The Court should grant certiorari to clarify this point of law.

As also explained in the petition, the Court of Appeals’ ruling creates absurd results whereby unlawful government conduct of sufficient public importance, such as the conduct here, could be challenged in any context other than the annexation context. *See* Petition at 12-13. Under the Court of Appeals’ ruling, such conduct cannot be challenged by anyone but the State

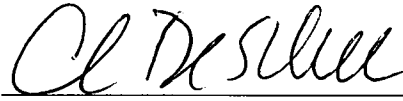
or those with undefined “proprietary interests” because the unlawfulness is related to a “purported” annexation. Respondent does not address this argument, instead reverting to its refrain that there is no problem because “Petitioners cannot show any infringement of any proprietary interest or harm.” Return at 10. This argument misses the entire point of the absurdity of such a situation when the government has engaged in intentional misconduct that could be otherwise challenged under the public importance exception.

Finally, the Court of Appeals’ conception of *St. Andrews* and *Town of Yemassee* creates absurd and obviously unintended results within the annexation statute itself. See Petition at 13-14. Namely, the Court of Appeals reads *St. Andrews* and *Town of Yemassee* to create restrictive statutory standing for only those with “proprietary interests or statutory rights” in the face of statutory silence on who may challenge 100% method annexations. This would create ridiculous results where multiple forms of annexation would be unreviewable by harmed citizens because the annexation statute is silent on who may file a challenge (as to all but 75% annexations). See *id.* Not only is this result absurd, but it conflicts with other provisions of the annexation statute suggesting broader rights for interested persons to challenge annexations. See, e.g., S.C. Code Ann. § 5-3-270 (setting time frame in which “person interested therein” may challenge any type of annexation). Again, Respondent does not address this argument with any reference to the statutory text or explanation of how the statute can be read coherently in light of the Court of Appeals’ ruling. This Court should grant certiorari to consider these important issues.

### **CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that this Court grant the Petition for Certiorari.

Respectfully submitted this 5<sup>th</sup> day of December, 2016.



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**PROOF OF SERVICE**

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I certify that I have served Petitioners Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League's Amended Reply to Return in Opposition to Petition for Writ of Certiorari on all parties by depositing a copy in the United States Mail, postage prepaid, on December 1, 2016, addressed to their attorneys of record, as indicated below:

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This 5<sup>th</sup> day of December 2016.



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