

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-001412

**RECEIVED**

**JUL 19 2017**

**S.C. SUPREME COURT**

South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, .....

**PETITIONERS**

v.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr., and The State of South Carolina, ..... Respondents.

**APPENDIX**

July 13, 2017

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Case No. 2014-001412

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South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ..... Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr., and The State of South Carolina, ..... Respondents.

---

**RECORD ON APPEAL**

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October 6, 2014

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-07790

South Carolina Public Interest Foundation, et. al

John E. Courson, et. al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Non-suited); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Dismissed without prejudice
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Proposed order<sup>S</sup> due within ten (10) days.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

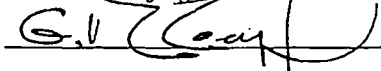
## INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge



Judge Code 2126

Date 8-9-13

## For Clerk of Court Office Use Only

This judgment was entered on the 12 day of Aug, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 12 day of Aug, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

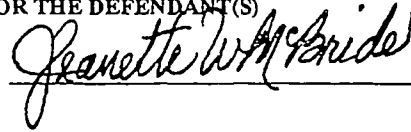
ATTORNEY(S) FOR THE PLAINTIFF(S)

Michael Robert Hitchcock

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,

Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

**Order Granting  
Summary Judgment  
to Plaintiffs**

2013 AUG 26 AM 9:35  
CLERK OF COURT  
RICHLAND COUNTY

Act 17 of 2011 ("Act 17" or "the Act") merged the Richland County Election Commission and the Richland County Board of Registration into one body known as the Board of Elections and Voter Registration for Richland County. Plaintiffs contend that the Act violates South Carolina Constitution Article III, § 34 (prohibiting special acts), and Article VIII, § 7 (prohibiting single county acts).

This action came before the Court on August 9, 2013, on Cross-Motions for Summary Judgment. James G. Carpenter represented the Plaintiffs. Michael Hitchcock represented the Defendant Senators. Emery Smith of the Attorney General's Office represented the State of South Carolina.

On July 31, 2013, Mr. Smith notified the Richland County Attorney's office and the Executive Director of the Board of Elections and Voter Registration for Richland County of this action both by telephone and in writing, and he provided them with copies of the pleadings. Neither the Richland County Attorney's office nor the Board of Elections and Voter Registration for Richland County has made an appearance or contacted the Court to seek to participate in this action.

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**SCANNED**

The Attorney General admitted in his Answer that Act 17 of 2011 may violate both Article III, § 34 and Article VIII, § 7. The State filed no memorandum in opposition to the Plaintiffs' Motion for Summary Judgment, and took no position on the Plaintiffs' standing. However, the Attorney General has issued three a written opinion on this issue.

In 2007, the Attorney General issued an opinion to Senator Glenn McConnell that the General Assembly's very similar action with regard to Charleston County in 2003 was unconstitutional (2007 WL 3244888, attached) ("McConnell Letter").

Second, in his McConnell Letter, the Attorney General referenced an earlier opinion from 1977 arriving at the same conclusion:

In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of voter registration and county election commissions on a county-by-county basis. Op. S.C. Atty. Gen., January 5, 1977. We concluded "such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county." Id.

Id. at \*4.

Third, in an opinion issued to Senator Tim Scott in 2012 concerning Act 17 of 2011, the very act at issue in this case, the Attorney General reiterated his opinion regarding the Charleston act, and opined that he would reach the same conclusion regarding relating to Richland County (2012 WL 6061812, attached) ("Scott Letter").

We do not address herein the constitutionality of Act 17 of 2011 under Art. VIII, § 7 of the South Carolina Constitution, which prohibits "laws for a specific county ...." However, we note that in an Opinion, dated August 14, 2007, we concluded that *a similar local law*, Act 127 of 2003, a statute which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and created instead the Board of Elections and Voter Registration for Charleston County *was likely unconstitutional* as being in violation of Art. VIII, § 7. See Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888).

CSL-2

(2012 WL 6061812, n. 2) (emphasis added). Thus, the Attorney General has issued three opinions dated from 1977 to 2012 that the General Assembly's action is unconstitutional.

The Defendant Senators contend that the Plaintiffs lack standing to raise these issues, and that the Act is Constitutional.

### FINDINGS OF FACT

Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution. Plaintiff William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. He served as a member of the State Election Commission during the years 1988 through 1997, and he served as its Chairman during the years 1990 through 1997. He regularly serves as a volunteer poll worker on election days. Plaintiffs bring this action individually and on behalf of all others similarly situated.

Defendants John E. Courson, Darrell Jackson, Joel Lourie, and John Scott, Jr. are South Carolina Senators from Richland County; and they are named in their official capacities. These Senators informed the Court that prior to the enactment of Act 312 of 2008, the General Assembly had enacted many local acts combining the boards of registration and election in individual counties.

Similarly, in his Scott Letter, the Attorney General referenced the history of a series of special and single county acts related to these boards.

In 2008, pursuant to Act No. 312, the General Assembly *enacted legislation codifying the various local laws which had combined county election commissions and board of voter registration*. Such provisions are found at § 7-27-10 *et seq.* Section 7-27-120 states that the purpose of Act No. 312 is that "[b]y codifying the provisions for county boards of registration and election commissions, the General Assembly intends to pro-

GD 3

vide greater public access to the statutory provisions for registering voters and coordinating elections in this State.” Section 7-27-110 provides that “[t]hose counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70.”

*Richland County was, as of 2008, one of those counties.* The Board of Voter Registration and the Election Commission remained separate entities. Thus, § 7-25-405 provided in 2008 that “the Richland County Election Commission and the Richland Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70.” See also, *Op. S.C. Atty. Gen.*, July 1, 2010 (2010 WL 3048334). . . .

However, in 2011, by Act No. 17, *the General Assembly rewrote § 7-27-405 completely*, altering Richland County’s election oversight structure. The purpose of Act No. 17 of 2011, as stated in the Act’s Title, was “to combine the Richland County Election Commission and the Richland County Board of Registration into a single entity.” *Such legislation required one combined election body, a consolidation similar to that legislated by local law in many other counties.*

(2012 WL 6061812, \*2-3) (emphasis added).

Prior to enacting Act 312 of 2008, the General Assembly was aware of its history of enacting a series of special, single-county acts relating to county election commissions and county boards of registration. The General Assembly was also aware of the Attorney General’s opinion in the McConnell Letter issued August 14, 2007. Accordingly, early in the next term of the General Assembly, on February 14, 2008, Senators McConnell and Campsen introduced the bill that became Act 312 of 2008. Act 312 addressed all forty-six counties in the state. Act 312 did not change the substance of the previous local and special acts for individual counties, but rather seems to have been the General Assembly’s attempt to use one state-wide act to correct the Constitutional defects in all the special and single county acts related to county election commissions and county boards of registration election commissions.

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By Act 312, the General Assembly enacted general legislation governing county boards of voter registration and county election commissions. Section 7-27-110 states: "Those counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70." Likewise, as initially enacted, Section 7-27-405 stated: "The Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70." South Carolina Code Annotated § 7-5-10 authorizes the Governor to appoint members of county boards of registration, with the advice and consent of the Senate. South Carolina Code Annotated § 7-13-70 authorizes the Governor to appoint county commissioners of election, "upon the recommendation of the senatorial delegation and at least half of the members of the House of Representatives from the respective counties." *Id.* Act 312 of 2008 constituted the general law of the State of South Carolina governing these appointments.

Three years later, the General Assembly enacted Act 17 of 2011, which merged the Richland County Election Commission and the Richland County Board of Registration into one body known as the Board of Elections and Voter Registration for Richland County. Act 17 also changed the way the Chairman of the Board is appointed and reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons are appointed to this body, and established other criteria for the subsequent appointments and retention of the members of this Board. Finally, Act 17 of 2011 abolished the Richland County Board of Voter Registration and the Richland County Election Commission.

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## CONCLUSIONS OF LAW

### I. Plaintiffs Have Satisfied the Standard for Public Importance Standing.

On many occasions, South Carolina courts have granted public importance standing to the South Carolina Public Interest Foundation or its founder Mr. Sloan to bring declaratory judgment actions, and to contest illegal or unconstitutional actions of the General Assembly or State officers. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), (General Assembly's unconstitutional bobtailing); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), (General Assembly's unconstitutional bobtailing); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), (Governor held a commission from the Reserve of the United States Air Force); *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895 (2011) (Freedom of Information Act violation by Defendants who were affiliated with the General Assembly). In *Sloan v. Department of Transportation (Ladson Road)*, the Supreme Court reversed the Circuit Court, and ruled, "Sloan has standing because he has alleged a misuse of the statutory emergency procurement provision and therefore an unlawful expenditure by public officials." *Id.* 379 S.C. 160, 170-71, 666 S.E.2d 236, 241 (2008).

On several occasions, the South Carolina Supreme Court has extended public importance standing to the South Carolina Public Interest Foundation in cases when SCPIF was a co-plaintiff with a citizen, resident, taxpayer, and registered elector from the county where the claim arose. *McSherry v. Spartanburg County*, 371 S.C. 586, 641 S.E.2d 431 (2007) (Spartanburg County); *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n.*, 369 S.C. 139, 632 S.E.2d 277 (2006) (Beaufort County); *Colle-*

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*ton County Taxpayers Ass'n. v. School Dist. of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006) (Colleton County).

The Supreme Court's most recent statement of the standard for public importance standing is slightly differently from the previous statements of the rule.

Sloan presents a *colorable claim that the Board is unconstitutionally comprised*, casting a cloud of illegitimacy which could marginalize the important decisions of the Board. We find resolution of this question is certainly of importance and concern to the public and therefore hold *Sloan has standing to bring this challenge*.

*South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 2013 WL 2631079 (S.C. 2013) (emphasis added). Plaintiffs satisfy the Supreme Court's standard. Plaintiffs have "present[ed] a colorable claim that the Board is unconstitutionally comprised," because the Act establishing the Board is unconstitutional.

The Plaintiffs are not the only ones who hold this opinion. As noted above, three opinion letters from the Attorney General support Plaintiffs' contentions. Plaintiffs have "present[ed] a colorable claim that the Board is unconstitutionally comprised," and have met the standard for public importance standing. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 2013 WL 2631079 (S.C. 2013). Accordingly, this Court grants public importance standing to the Plaintiffs to address the issues of great public importance that they raise.

This Court also possesses jurisdiction under South Carolina Constitution Article III, § 34 and Article VIII, § 7, and S.C. Code Ann. §15-53-10 *et seq.*, the Uniform Declaratory Judgment Act.

*Courts of record within their respective jurisdictions shall have power to declare rights*, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The

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declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20 (emphasis added).

## II. Act 17 of 2011 Violates Article VIII, § 7.

The General Assembly has returned to its unconstitutional practice of enacting special and single county legislation. Act 17 of 2011 violates Article VII, § 7 of the Constitution: "No laws for a specific county shall be enacted." The Supreme Court has repeatedly found such actions of the General Assembly unconstitutional. *See, Knight v. Salisbury*, 262 S.C. 565, 206 S.E.2d 875 (1974); *Pickens County v. Pickens County Water and Sewer Authority*, 312 S.C. 218, 439 S.E.2d 840, 842 (1994); *Torgerson v. Craver*, 267 S.C. 558, 562-63, 230 S.E.2d 228, 229-30 (1976) (Charleston County Airport District); *Cooper River Park and Playground Commission v. City of North Charleston*, 273 S.C. 639, 259 S.E.2d 107 (1979) (statute purporting to diminish commission's territorial jurisdiction and transfer assets to city was unconstitutional single county legislation); *Richardson v. McCutchen*, 278 S.C. 117, 292 S.E.2d 787 (1982) (two acts of the General Assembly changing the membership of the Williamsburg County Recreation Commission were unconstitutional single county legislation); *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991) (act that changed method of appointment for members of governing body of Newberry County Water and Sewer Authority was unconstitutional special legislation and single county legislation); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007) (an act that devolved the authority to appoint members of the Richland County Recreation Commission from county's legislative delegation to the county council was unconstitutional special legislation and single county legislation). Accordingly, this Court finds Act 17 of 2011 is unconstitutional single county legislation.

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III. Act 17 of 2011 Violates S.C. Constitution Article III, § 34.

Act 17 violates Article III, § 34's restriction on special legislation: "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ." S.C. Constitution, Article III, § 34. Act 17 fails to state any reason why a general law could not address those matters.

The Supreme Court explained the effect of Article III, § 34.

Article III, § 34(IX) prohibits the enactment of a special law "where a general law can be made applicable." This provision *not only* limits special legislation where existing general law is *already applicable*, but also *where it is possible* to create general law which would be applicable. *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Seaborne v. Hartsville Rescue Squad*, 269 S.C. 386, 237 S.E.2d 496 (1977).

Article III, § 34 (IX), however, does not prohibit all special legislation.

. . . There must, however, be a *substantial distinction* having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The *marks of distinction* upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, *account for or justify the restriction* of the legislation.

*Duke Power Co.*, 284 S.C. at 90, 326 S.E.2d at 400-401 (1985) [quoting *Shillito v. City of Spartanburg*, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948)]. In other words, the General Assembly must have a "logical basis and sound reason" for resorting to special legislation. *Gillespie v. Pickens County*, 197 S.C. 217, 14 S.E.2d 900 (1941).

*Horry County v. Horry County Higher Educ. Com 'n*, 306 S.C. 416, 418-19, 412 S.E.2d 421, 423 (1991) (emphasis added). The Act suggests no "marks of distinction upon which the classification is founded . . . as will . . . account for or justify . . . the legislation" related to Richland County *Id.* Act 17 contains no indication of anything unique related to Richland County justifying this special and single county legislation. In Act 17, the General Assembly offered no "logical basis and sound reason" its creation and enactment. Act 17 constitutes an unconstitutional local or special law, where a general

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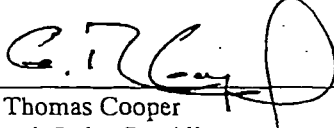
law was *already* applicable. It creates a special exception for Richland County, and it thereby violates S.C. Constitution Article III, § 34.

South Carolina recognizes a limited exception to Article III, § 34 when the legislation furthers the purposes of Home Rule by devolving the power away from the legislature to a county. However, Act 17 of 2011 does not qualify for this exception. It imposes the General Assembly and its members into the governance of the County elections, contrary to the letter and spirit of Home Rule. Furthermore, when the power is to be devolved from the legislature to the county, it should be devolved statewide and not on a county-by-county, piecemeal basis. *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). Act 17 of 2011 contravenes Home Rule and is unconstitutional.

**WHEREFORE**, the Court:

1. Declares that Act 17 of 2011 violates S.C. Constitution Article VIII, § 7 and Article III, § 34, and is therefore invalid;
2. Withholds ruling on Plaintiffs' requests for costs and attorneys' fees under S.C. Code Ann. § 15-77-300 ff., until after Plaintiffs file an appropriate motion, supported by affidavit of counsel.

**SO ORDERED**, this 26 day of August, 2013.

  
G. Thomas Cooper  
Circuit Judge Presiding

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly  
situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and the State of South  
Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2012-CP-40-7790

ORDER DENYING DEFENDANTS'  
MOTION FOR RECONSIDERATION

FILED  
2013 DEC 30 AM 9:38  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

This matter comes before the Court by way of Defendants' Motion to Reconsider pursuant to Rule 59(e), SCRCF. Specifically, Defendants ask this Court to reconsider its Order filed August 26, 2013 granting Plaintiffs' Motion for Summary Judgment.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Defendants' Motion under to Rule 59(e), SCRCF to Reconsider this Court's Order filed August 26, 2013. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

**IT IS SO ORDERED.**

Columbia, South Carolina  
December 27, 2013

  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit

**SCANNED**

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012-CP-40-07790

South Carolina Public Interest Foundation

John E. Courson, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other Dismissed without prejudice
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion for Attorney's Fees is Under Advisement. Proposed Orders due within Ten (10) Days.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

*G. R. [Signature]*

Judge Code 2126

Date 2-21-14

For Clerk of Court Office Use Only

This judgment was entered on the 25 day of Feb, 20 14 and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of Feb, 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

ATTORNEY(S) FOR THE PLAINTIFF(S)

Michael Robert Hitchcock, J. Emory Smith Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

*Janet W. [Signature]*

## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4007790

South Carolina Public Interest Foundation

John E Courson

William B DePass Jr

Darrell Jackson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 19 March 2014 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Michael Robert Hitchcock

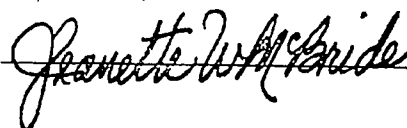
J. Emory Smith Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
South Carolina Public Interest )  
Foundation, and William B. DePass, )  
Jr., Individually, and on behalf of all )  
similarly situated, )  
Plaintiffs, )  
 )  
v. )  
 )  
Senator John E. Courson, Senator )  
Darrell Jackson, Senator Joel Lourie, )  
Senator John L. Scott, Jr., and The )  
State of South Carolina, )  
Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-40-7790

ORDER DENYING PLAINTIFFS'  
MOTION FOR FEES AND COSTS

RICHLAND COUNTY  
FILED  
2014 MAR 19 AM 9:45  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

Plaintiffs who were successful in the underlying action, move the Court pursuant to SCRCP 54, S.C. Code Ann. § 15-77-300 and § 15-37-10 for costs and attorneys' fees from the Defendant Senators. The Court finds Plaintiffs' Motion for Attorney's Fees and Costs is denied for the following reasons:

**I**

**Individual members of the General Assembly are immune from a recovery for attorney's fees and costs under Sections 15-77-300 and 15-37-10 of the South Carolina Code.**

The doctrine of legislative immunity provides federal, state, and local officials with immunity for any action taken in the sphere of legitimate legislative activity. *See Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). As Justice Frankfurter stated in *Tenney*, "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." 341 U.S. at 377.

The South Carolina Supreme Court is in accord with the United States Supreme Court and has recognized that legislators enjoy immunity for their actions taken within the scope of their legislative duties. *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). In *Richardson*, a local official sued a state legislator for defamatory remarks. The court held that the state legislator was protected by legislative immunity because he made the statement during the conduct of legislative activities. In so holding, the Court stated that "[a] sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Id.*

South Carolina Federal Courts have noted that there have been few, if any, cases before the South Carolina Supreme Court that "consider[] legislative immunity in a suit against legislators for actions taken in the performance of their legislative duties." *Bruce v. Riddle*, 464 F. Supp. 745, 748 (1979). Speaking for the court in *Riddle*, District Judge Hemphill opined that the "probable explanation for this lack of precedent is the virtually universal acceptance of the doctrine of legislative immunity which has prevented the consideration of this question at the appellate level in South Carolina." *Id.* See also 81A C.J.S. § 96 ("Legislators have an absolute common law immunity against civil suit for their legislative acts.") (citation omitted).

In the present case, the actions taken by the Defendant Senators were within the sphere of their legislative duties. The present action simply challenges the constitutionality of Act 17 of 2011 and does not allege that Defendant Senators took any action other than their involvement in the legislative process. Their actions were limited to the introduction of the bill that ultimately became Act 17 of 2011 and voting for the bill on the floor of the Senate, which squarely falls within the scope of their legislative responsibilities.

GR #2

Thus, legislative immunity applies and thus prevents the recovery of attorney's fees and costs against the individual Senator Defendants.

## II

**Section 15-77-300 applies to state agencies and does not apply to members of the General Assembly.**

Section 15-77-300 provides in relevant part:

(A) In any civil action brought by the State, any political subdivision of the State or **any party who is contesting state action**, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against **the appropriate agency** if:

- (1) the court finds that **the agency** acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

S.C. Code Ann. § 15-77-300 (Supp. 2013) (emphasis added).

The cardinal rule of statutory construction is to ascertain the intent of the General Assembly. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), citing *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993). When interpreting a statute the Court must give words their plain and ordinary meaning. *Id.* The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 343, 412 S.E.2d 377, 379 (1991). Courts should consider not merely the language of the particular clause

602-3

being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 789 (1997). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 448-49, 415 S.E.2d 799, 801 (1992).

Section 15-77-300 allows a prevailing party who is contesting "state action" to recover reasonable costs and fees. However, the statute allows fees and costs to be recovered against "the appropriate agency" and only if "the agency" acted without substantial justification. The plain and ordinary meaning of "agency" is a "state agency" operating within the executive branch of government.<sup>1</sup> The statute is intended to allow a prevailing party to recover costs and fees from a state agency or department, not individual members of the General Assembly.

The contention that "agency" means "state agency" is also supported by the Court's analysis of substantial justification in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). In that case, the Court reasoned: "in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and fact." *Id.* at 445, 658 S.E.2d at 326 (emphasis added).

Further, fee-shifting statutes are an exception to the American Rule that provides that litigants are responsible for their own fees. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997) ("Attorney's fees are not recoverable unless authorized by contract or statute.") Further, government fee-shifting statutes also constitute a waiver of sovereign immunity. *M.A.*

<sup>1</sup> See, Section 1-23-10(1): "Agency" or "State Agency" means each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases. S.C. Code Ann. § 1-23-10 (Supp. 2013).

*Mortenson Co. v. U.S.*, 996 F.2d 1177, 1180 (D.C. Cir 1993). As a result, government fee-shifting statutes should be strictly construed to only provide the relief necessary to serve the purpose of providing litigants access to the courts to challenge governmental action. See *U.S. v. Horn*, 29 F.3d 754, 762 (1st Cir. 1994) (analyzing claim for fees against federal government requires application of rule that “a waiver of sovereign immunity always is to be construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires.”)

There is no indication from the plain language of this statute that the General Assembly ever intended to waive legislative immunity and subject individual members of the General Assembly to a recovery of fees and costs for actions taken solely within the sphere of their legislative duties. There is no reasonable construction of the terms “appropriate agency” or “agency” that would support any contention that this section applies to an individual or a group of members of the General Assembly.

Thus, the Plaintiffs’ Motion for Attorneys Fees and Costs is denied because, by its plain terms, Section 15-77-300 does not apply to individual members of the General Assembly.

Plaintiffs apparently are not seeking attorneys’ fees and costs directly from the State, and therefore, this Order Denying Plaintiffs Motion for Attorneys Fees and Costs from Defendant Senators includes the State because it is a named party.

#### CONCLUSION

For the reasons stated above herein, Plaintiffs’ Motion for Fees and Costs is **DENIED**.

**IT IS SO ORDERED.**

Columbia, South Carolina  
March 14, 2014

  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit

## FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGM IN A CIVIL CASE

CASE NUMBER: 2012CP4007790

South Carolina Public Interest Foundation

John E Courson

William B DePass Jr

Darrell Jackson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

## DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);  
☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration awards; Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

## INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below)                                                                 | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-----------------------------------------------------------------------------------------------------------|---------------------------------------|--------------------------------|
|                                                                                                           |                                       | \$                             |
|                                                                                                           |                                       | \$                             |
|                                                                                                           |                                       | \$                             |
| If applicable, describe the property, including tax map information and address, referenced in the order: |                                       |                                |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

## For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 3 June 2014 to attorneys of record or to parties (when appearing pro se) as follows:

James G. Carpenter

Michael Robert Hitchcock

J. Emory Smith Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court



STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

South Carolina Public Interest Foundation, )  
and William B. DePass, Jr., individually, )  
and on behalf of all others similarly )  
situated, )

Plaintiffs, )

v. )

Senator John E. Courson, Senator Darrell )  
Jackson, Senator Joel Lourie, Senator )  
John L. Scott, Jr., and the State of South )  
Carolina, )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2012-CP-40-7790

**ORDER DENYING DEFENDANTS'  
MOTION TO ALTER OR AMEND**

RICHLAND COUNTY  
FILED  
2014 JUN 13 AM 10:24  
JEANE B. LEWIS  
CLERK OF COURT  
S.C.

This matter comes before the Court by way of Plaintiffs' Motion to Alter or Amend pursuant to Rule 59(e), SCRCF. Specifically, Plaintiffs ask this Court to reconsider its Order Denying Plaintiffs' Motion for Attorneys' Fees filed March 19, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiffs' Motion under to Rule 59(e), SCRCF to Reconsider this Court's Order filed March 19, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

**IT IS SO ORDERED.**

Columbia, South Carolina  
May 29, 2014

  
G. Thomas Cooper, Jr., Judge  
Fifth Judicial Circuit

**SCANNED**

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,  
Defendants.

IN THE CIRCUIT COURT  
CASE NO: 2012-CP-40-\_\_\_\_\_

COMPLAINT

JEANETTE W. MCGRIDE  
C.C.P. & G.S.

2012 NOV 26 PM 12:17

RICHLAND COUNTY  
FILED

NOW COME the Plaintiffs, by their undersigned attorney, and as a Complaint  
against the Defendants, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution.
2. Plaintiff William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. He served as a member of the State Election Commission 1988-1997, and he served its Chairman 1990-1997. He regularly serves a volunteer poll worker on election days. Mr. DePass possesses standing on all the foregoing bases. He brings this action individually on his behalf and on behalf of all others similarly situated.
3. Defendants John E. Courson, Darrell Jackson, Joel Lourie, and John Scott, Jr. are South Carolina Senators elected by Richland County voters; and they are named in their official capacities.

4. This Court possesses jurisdiction under the South Carolina Constitution: Art. III § 34 and Art. VIII § 7; under the following decisions: *American Petroleum Institute v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. §15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.
5. This action raises Constitutional issues of great public importance, and Plaintiffs request that the Court grant them standing based upon the great public importance of the Constitutional issues this action raises.
6. By Act 312 of 2008, codified at Title VII, Chapter 27 of the South Carolina Code, the General Assembly enacted general legislation governing county boards of voter registration and county election commissions.
  - a) Section 7-27-110 states: "Those counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70."

b) As initially enacted, Section 7-27-405 stated: "The Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70."

7. South Carolina Code Annotated § 7-5-10 authorizes the Governor to appoint members of county boards of registration, with the advice and consent of the Senate.
8. South Carolina Code Annotated § 7-13-70 authorizes the Governor to appoint county commissioners of election, "upon the recommendation of the senatorial delegation and at least half of the members of the House of Representatives from the respective counties." *Id.*
9. Act 312 of 2008, codified at Title VII, Chapter 27 of the South Carolina Code constituted the general law of the State of South Carolina governing these appointments.
10. Upon the urging of the Richland County legislative delegation, the General Assembly enacted and the Governor signed Act 17 of 2011 (**Exhibit A**), which, *inter alia*, merges the Richland County Election Commission and the Richland County Board of Registration into one body known as the Board of Elections and Voter Registration for Richland County.
11. Act 17 changes the way the Chairman of the Board is appointed and reappointed, provides for minimum budget for the newly formed Board, changes the way that persons are appointed to this body, and establishes various other criteria for the subsequent appointments and retention of the members of this Board.
12. Act 17 of 2011 also abolishes the Richland County Board of Voter Registration and the Richland County Election Commission.

---

### FIRST CAUSE OF ACTION

13. Plaintiffs incorporate by reference all the foregoing paragraphs.
14. South Carolina Constitution, Article III, § 34 states, "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ."
15. Act 17 of 2011 constitutes a local or special law, where a general law can be made applicable, and thereby violates S.C. Constitution Article III, § 34.

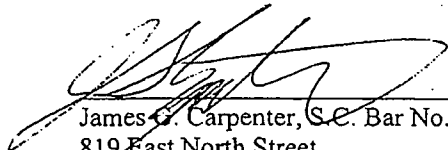
### SECOND CAUSE OF ACTION

16. Plaintiffs incorporate by reference all the foregoing paragraphs.
17. South Carolina Constitution Article VIII, § 7 states in part, "No laws for a specific county shall be enacted, and no county shall be exempted from the general laws."
18. Act 17 applies only to Richland County, and exempts Richland County from the general laws, and thereby violates S.C. Constitution Article VIII, § 7.

**WHEREFORE**, Plaintiffs pray the Court:

1. To declare that Act 17, violates S.C. Constitution Article III, § 34 and is therefore invalid;
2. To declare that Act 17, violates S.C. Constitution Article VIII, § 7 and is therefore invalid;
3. To grant Plaintiffs their costs and attorneys fees under S.C. Code Ann. § 15-77-300 ff.; and
4. To grant such other and further relief as the Court deems just and proper.

Respectfully submitted,  
**THE CARPENTER LAW FIRM, P.C.**

A handwritten signature in black ink, appearing to read 'James G. Carpenter', is written over a horizontal line.

James G. Carpenter, S.C. Bar No. 1136  
819 East North Street  
Greenville, SC 29601  
Tel. (864) 235-1269  
Fax (864) 331-3083  
Attorney for the Plaintiffs

**South Carolina General Assembly**  
119th Session, 2011-2012

Download [This Bill](#) in Microsoft Word format

**A17, R37, S692**

**STATUS INFORMATION**

General Bill

Sponsors: Senators Jackson, Courson, Scott and Lourie

Document Path: I:\council\bill\sggs\22052zw11.docx

Introduced in the Senate on March 15, 2011

Introduced in the House on April 6, 2011

Last Amended on April 5, 2011

Passed by the General Assembly on April 14, 2011

Governor's Action: May 9, 2011, Signed

Summary: Richland County Election Commission and Board of Registration to merge

**HISTORY OF LEGISLATIVE ACTIONS**

| Date      | Body   | Action Description with journal page number                                                                    |
|-----------|--------|----------------------------------------------------------------------------------------------------------------|
| 3/15/2011 | Senate | Introduced and read first time ( <a href="#">Senate Journal-page 3</a> )                                       |
| 3/15/2011 | Senate | Referred to Committee on Judiciary<br>( <a href="#">Senate Journal-page 3</a> )                                |
| 3/30/2011 | Senate | Recalled from Committee on Judiciary<br>( <a href="#">Senate Journal-page 16</a> )                             |
| 3/31/2011 | Senate | Read second time ( <a href="#">Senate Journal-page 17</a> )                                                    |
| 3/31/2011 | Senate | Roll call Ayes-6 Nays-0 ( <a href="#">Senate Journal-page 17</a> )                                             |
| 4/5/2011  | Senate | Amended ( <a href="#">Senate Journal-page 26</a> )                                                             |
| 4/5/2011  | Senate | Read third time and sent to House<br>( <a href="#">Senate Journal-page 26</a> )                                |
| 4/6/2011  | House  | Introduced, read first time, placed on calendar without<br>reference ( <a href="#">House Journal-page 11</a> ) |
| 4/13/2011 | House  | Read second time ( <a href="#">House Journal-page 38</a> )                                                     |
| 4/13/2011 | House  | Roll call Yeas-59 Nays-0 ( <a href="#">House Journal-page 38</a> )                                             |
| 4/14/2011 | House  | Read third time and enrolled ( <a href="#">House Journal-page 13</a> )                                         |
| 5/5/2011  |        | Ratified R 37                                                                                                  |
| 5/9/2011  |        | Signed By Governor                                                                                             |
| 5/13/2011 |        | Effective date 05/09/11                                                                                        |
| 5/17/2011 |        | Act No. 17                                                                                                     |

View the latest [legislative information](#) at the LPITS web site

**VERSIONS OF THIS BILL**

[3/15/2011](#)

[3/30/2011](#)

[4/5/2011](#)

[4/6/2011](#)



[http://www.scstatehouse.gov/sess119\\_2011-2012/bills/692.htm](http://www.scstatehouse.gov/sess119_2011-2012/bills/692.htm)

11/15/2012

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A17, R37, S692)

**AN ACT TO AMEND SECTION 7-27-405, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE RICHLAND COUNTY ELECTION COMMISSION AND THE RICHLAND COUNTY BOARD OF REGISTRATION, SO AS TO COMBINE THE RICHLAND COUNTY ELECTION COMMISSION AND THE RICHLAND COUNTY BOARD OF REGISTRATION INTO A SINGLE ENTITY.**

Be it enacted by the General Assembly of the State of South Carolina:

**Board of Elections and Voter Registration established**

SECTION 1. Section 7-27-405 of the 1976 Code, as added by Act 312 of 2008, is amended to read:

"Section 7-27-405. Notwithstanding another provision of law:

(A)(1) There is established the Board of Elections and Voter Registration of Richland County, to be composed of five members appointed by a majority of the Richland County Legislative Delegation.

(2) Two of the initial appointees shall serve two-year terms, and three of the initial appointees shall serve four-year terms. Upon expiration of the terms of those members initially appointed, the term of office for the members of the board is four years, and until their successors are appointed and qualify. Members may succeed themselves.

(3) In case of a vacancy on the board, the vacancy must be filled in the same manner as an original appointment, as provided in this section, for the unexpired term.

(4) A majority of senators representing the county and a majority of members of the House of Representatives representing the county shall appoint the board's chairman. The chairman shall serve a term of four years and may be reappointed to that office for any number of successive terms without limitation.

(5) The board may choose to elect a vice chair, a secretary, and other officers the board considers appropriate. The initial director must be employed by a majority of the Richland County Legislative Delegation. Subsequently, the board shall employ the director, determine the compensation, and determine the number and compensation of other staff positions. Salaries must be consistent with the compensation schedules established by the county for similar positions.

(6) The director is responsible for hiring and management of the staff positions established by the board that report to the director. Staff positions are subject to the personnel system policies and procedures by which all county employees are regulated, except that the director serves at the pleasure of the board.

(B) The Richland County Legislative Delegation shall notify the State Election Commission in writing of the appointments made pursuant to subsection (A).

(C) The Board of Elections and Voter Registration of Richland County shall notify the State Election

Commission in writing of the name of the person elected as chairman of the board pursuant to subsection (A).

(D) A member who misses three consecutive meetings of the board is considered to have resigned his office, and a vacancy on the board exists, which must be filled in the manner provided in subsection (A). This section does not apply to a member who presents a verifiable doctor's certificate that illness prevented his attendance at a meeting.

(E) Except as otherwise specifically provided in subsections (A), (B), (C), and (D), the provisions of law contained in Title 7, relating to county boards of voter registration and county election commissions, apply to the Board of Elections and Voter Registration of Richland County, mutatis mutandis.

(F)(1) The Richland County Board of Voter Registration is abolished effective within sixty days after this section is approved by the Governor, and its functions, duties, and powers are devolved upon the Board of Elections and Voter Registration of Richland County, as established pursuant to subsection (A).

(2) The Richland County Election Commission is abolished effective within sixty days after this section is approved by the Governor, and its functions, duties, and powers are devolved upon the Board of Elections and Voter Registration of Richland County, as established pursuant to subsection (A).

(G)(1) The terms of the members of the Richland County Board of Voter Registration, regardless of when these members were appointed to office, or when their current terms would otherwise have expired, expire for all purposes upon the abolishment of that board pursuant to subsection (F)(1).

(2) The terms of the members of the Richland County Election Commission, regardless of when these members were appointed to office, or when their current terms would otherwise have expired, expire for all purposes upon abolishment of that commission pursuant to subsection (F)(2).

(3) Notwithstanding items (1) and (2) of this subsection or another provision of law, a person serving as a member of the Richland County Board of Voter Registration or the Richland County Election Commission may not be removed from office, and neither the board nor the commission may be abolished until this section has been given final approval by the United States Department of Justice.

(H) The annual budget for the Board of Elections and Voter Registration of Richland County may not be less than the average of the two annual budgets for the Charleston County and Greenville County Boards of Election and Voter Registration for the prior fiscal year."

#### **Time effective**

SECTION 2. This act takes effect upon approval by the Governor.

Ratified the 5th day of May, 2011.

Approved the 9th day of May, 2011.

This web page was last updated on August 19, 2011 at 10:34 AM

|                                              |   |                              |
|----------------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                      | ) |                              |
|                                              | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND                           | ) |                              |
|                                              | ) |                              |
| South Carolina Public Interest Foundation,   | ) |                              |
| and William B. DePass, Jr. individually, and | ) |                              |
| on behalf of all others similarly situated,  | ) | C/A No. 2012-CP-40-7790      |
|                                              | ) |                              |
| Plaintiffs,                                  | ) |                              |
|                                              | ) |                              |
| v.                                           | ) | ANSWER                       |
|                                              | ) |                              |
| Senator John E. Courson, Senator Darrell     | ) |                              |
| Jackson, Senator Joel Lourie, Senator        | ) |                              |
| John L. Scott, Jr. and the State             | ) |                              |
| of South Carolina,                           | ) |                              |
|                                              | ) |                              |
| Defendants.                                  | ) |                              |
|                                              | ) |                              |

Defendant State of South Carolina, answering the Complaint herein, alleges the following:

**FOR A FIRST DEFENSE**

1. The State denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. The State is without knowledge or information sufficient to form a belief as to Paragraph 1 of the Complaint and therefore denies that paragraph except that the State admits, on information and belief, only that the Foundation is a not for profit organized and existing under State law.
3. The State admits the first three sentences of Paragraph 2 and admits that Plaintiff brings this action individually. Whether Plaintiff has standing is a question of law which the State is not required to admit or deny, and the State does not now take a position regarding that

question. The State admits only that Plaintiff alleges that he brings this action in his representative capacity, but denies that he has brought this action as a class action.

4. The State admits Paragraph 3.

5. As to Paragraph 4, the State admits only that this Court has jurisdiction to consider this matter. The citations included in this paragraph address questions of law, and the State is not required to admit or deny their applicability to this case.

6. As to Paragraph 5, the State admits only that it does not object to the Court's hearing this case, but the State does not admit that special legislation and Home Rule issues are always of great public importance regardless of the nature of the statutes at issue.

7. The State admits Paragraph 6 but notes that the cited sections are parts of section 1 of the referenced Act which also includes other provisions.

8. The State admits Paragraph 7 but craves reference to the cited statute for a complete statement of its provisions.

9. The State admits Paragraph 8 but craves reference to the cited statute for a complete statement of its provisions.

10. As to Paragraph 9, the State admits only that the cited Act provides for county boards of registration and election commissions, and the State craves reference to that statute for a complete statement of its provisions.

11. As to paragraph 10, the State admits only that Act 17 of 2011 was enacted, but the State is without information to admit or deny at whose urging the legislation was passed. The State craves reference to the statute for a complete statement of its provisions.

12. As to Paragraphs 11 and 12, the State craves reference to Act 17 for a complete statement of its provisions and denies any allegations that are inconsistent with the Act.

13. Paragraph 13 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them.

14. As to Paragraph 14, the State craves reference to the cited constitutional provision for a complete statement of its provisions.

15. Paragraph 15 sets forth a conclusions of law to which the State is not required to respond in an answer, and only a Court can determine the constitutionality of a statute with finality, but the State admits on information and belief that Act 17 may be unconstitutional under the cited provision.

16. Paragraph 16 is a cumulative paragraph to which no response is necessary. To the extent that, *arguendo*, a response is necessary, the State incorporates by reference its answers to the previous allegations and paragraphs of the Complaint and reasserts them for a complete statement of its provisions.

17. As to Paragraph 17, the State craves reference to the cited constitutional provision for a complete statement of its provisions.

18. Paragraph 18 sets forth a conclusion of law to which the State is not required to respond in an answer, and only a Court can determine the constitutionality of a statute with finality, but the State admits on information and belief that Act 17 may be unconstitutional under the cited provision.

19. Items 1 and 2 of the Prayer for Relief set forth conclusions of law to which the State is not required to respond in an answer, and only a Court can determine the constitutionality of a statute with finality, but the State admits on information and belief that Act 17 may be unconstitutional under the cited provisions. As to Item 3, the State denies that

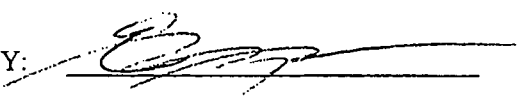
Plaintiffs are entitled to costs and attorneys fees and, as to Item 4, denies that Plaintiffs are entitled to other relief.

WHEREFORE, having fully answered the Complaint herein, the State prays that this Court take such action as it deems appropriate and grant judgment to the State in accordance with its position in this Answer and any motions, memoranda or other documents that the State files.

ALAN WILSON  
Attorney General

ROBERT D. COOK  
Deputy Attorney General

J. EMORY SMITH, JR.  
Assistant Deputy Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3680  
S.C. Bar No. 5262

BY: 

ATTORNEYS FOR THE DEFENDANT STATE OF  
SOUTH CAROLINA

December 19, 2012

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND )

FIFTH JUDICIAL CIRCUIT

South Carolina Public Interest  
Foundation, and William B. DePass, )  
Jr., Individually, and on behalf of all )  
similarly situated, )  
Plaintiffs, )

CASE NO.: 2012-CP-40-7790

v. )

DEFENDANTS' ANSWER

Senator John E. Courson, Senator )  
Darrell Jackson, Senator Joel Lourie, )  
Senator John L. Scott, Jr., and The )  
State of South Carolina, )  
Defendants. )

2012 DEC 20 PM 2:23

Defendant Senators Courson, Jackson, Lourie, and Scott, answer the Complaint as follows:

**FOR A FIRST DEFENSE**

1. The Defendants deny each and every allegation of the Complaint not specifically admitted herein.
2. As to Paragraph 1, the Defendants admit, upon information and belief, the allegation of the paragraph that the Plaintiff South Carolina Public Interest Foundation is a not for profit corporation, but deny the remaining allegations of the paragraph.
3. As to Paragraph 2, the Defendants lack sufficient information to respond to the allegations contained in the first three sentences and the last sentence of the paragraph, but deny the remaining allegations of the paragraph.
4. As to Paragraph 3, the allegations are admitted.

- 
5. As to Paragraph 4, the Defendants admit that this Court possesses jurisdiction over the subject matter of this action.
  6. As to Paragraph 5, the allegations are denied.
  7. As to Paragraph 6, the Defendants admit the allegations of the paragraph but crave reference to the Act and statutes cited in the paragraph.
  8. As to Paragraph 7, the Defendants crave reference to the provision cited in the paragraph.
  9. As to Paragraph 8, the Defendants crave reference to the provision cited in the paragraph.
  10. As to Paragraph 9, the Defendants crave reference to the Act cited in the paragraph.
  11. As to Paragraph 10, the Defendants crave reference to the Act cited in the paragraph and deny the remaining allegations in the paragraph.
  12. As to Paragraph 11, the Defendants crave reference to the Act cited in the paragraph and deny the remaining allegations in the paragraph.
  13. As to Paragraph 12, the Defendants crave reference to the Act cited in the paragraph and deny the remaining allegations in the paragraph.
  14. As to Paragraph 13, the Defendants incorporate by reference all of their previous responses.
  15. As to Paragraph 14, the Defendants crave reference to the cited constitutional provision for a complete statement of its contents.

16. As to Paragraph 15, the allegations set forth a conclusion of law that may only be decided by the Court, but to the extent that a response is required, the Defendants deny the allegations contained in the paragraph.

17. As to Paragraph 16, the Defendants incorporate by reference all of their previous responses.

15. As to Paragraph 17, the Defendants crave reference to the cited constitutional provision for a complete statement of its contents.

16. As to Paragraph 18, the allegations set forth a conclusion of law that may only be decided by the Court, but to the extent that a response is required, the Defendants deny the allegations contained in the paragraph.

WHEREFORE, having fully answered the Complaint, the Defendants pray that this Court render a judgment in favor Defendants in accordance with their position in this Answer and any subsequent filings or arguments made by the Defendants.

December 20th, 2012



Michael R. Hitchcock  
Kenneth M. Moffitt  
South Carolina Senate  
Post Office Box 142  
Columbia, South Carolina 29202  
(803) 212-6300

ATTORNEYS FOR DEFENDANT  
SENATORS COURSON, JACKSON,  
LOURIE, AND SCOTT, IN THEIR  
OFFICIAL CAPACITIES AS MEMBERS  
OF THE SOUTH CAROLINA SENATE

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,  
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

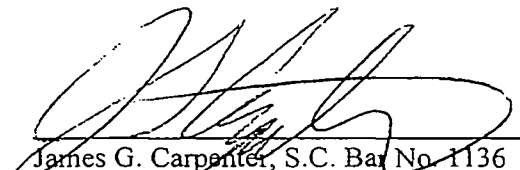
**Plaintiffs' Motion for  
Summary Judgment**

**SCRCP 56**

RICHLAND COUNTY  
FILED  
2013 APR 29 AM 11:19  
JEANETTE W. MCGRIDE  
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and move this Court for Summary Judgment, pursuant to SCRCP 56. In support of this Motion, Plaintiffs submit the accompanying Memorandum of Law in Support of Motion for Summary Judgment, to demonstrate that there is no genuine issue of material fact, and Plaintiffs are entitled to Summary Judgment as a matter of law.

Respectfully submitted,  
**THE CARPENTER LAW FIRM, P.C.**

  
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819 East North Street  
Greenville, SC 29601  
Tel. (864) 235-1269  
Fax (864) 331-3083  
Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,

Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

**Plaintiffs' Memorandum of Law  
in Support of  
Motion for Summary Judgment**

RICHLAND COUNTY  
FILED  
2013 APR 29 AM 11:19  
JANETTE W. MCBRIDE  
C.C.P. & G.S.

NOW COME the Plaintiffs, by their undersigned attorney, and submit this  
Memorandum of Law in Support of their Motion for Summary Judgment.

### STATEMENT OF FACTS

Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution. Plaintiff William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. He served as a member of the State Election Commission during the years 1988 through 1997, and he served as its Chairman during the years 1990 through 1997. He regularly serves as a volunteer poll worker on election days. Mr. DePass possesses standing on all the foregoing bases. He brings this action individually on his behalf and on behalf of all others similarly situated.

Defendants John E. Courson, Darrell Jackson, Joel Lourie, and John Scott, Jr. are South Carolina Senators elected by Richland County voters; and they are named in their

official capacities. These senators, from Richland County were instrumental in the passage of the Act at issue.

By Act 312 of 2008, codified at Title VII, Chapter 27 of the South Carolina Code, the General Assembly enacted general legislation governing county boards of voter registration and county election commissions. Section 7-27-110 states: "Those counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70." Likewise, as initially enacted, Section 7-27-405 stated: "The Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70." South Carolina Code Annotated § 7-5-10 authorizes the Governor to appoint members of county boards of registration, with the advice and consent of the Senate. South Carolina Code Annotated § 7-13-70 authorizes the Governor to appoint county commissioners of election, "upon the recommendation of the senatorial delegation and at least half of the members of the House of Representatives from the respective counties." *Id.* Act 312 of 2008, codified at Title VII, Chapter 27 of the South Carolina Code constituted the general law of the State of South Carolina governing these appointments.

Upon the urging of the Richland County legislative delegation, the General Assembly enacted and the Governor signed Act 17 of 2011 (**Exhibit A**), which, *inter alia*, merged the Richland County Election Commission and the Richland County Board of Registration into one body known as the Board of Elections and Voter Registration for Richland County. Act 17 changed the way the Chairman of the Board is appointed and

reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons are appointed to this body, and established various other criteria for the subsequent appointments and retention of the members of this Board. Act 17 of 2011 also abolished the Richland County Board of Voter Registration and the Richland County Election Commission. Plaintiffs contend that Act 17 of 2011 violated the Constitutional provisions that prohibit single county legislation and special legislation. Defendants contend that plaintiffs lack standing to raise these claims.

## ARGUMENT

### I. The Supreme Court Has Granted Public Importance Standing to SCPIF for Cases Alleging Constitutional or Statutory Violations.

This Court possesses jurisdiction under Art. III, § 34, and Art. VIII, § 7 of the South Carolina Constitution, many South Carolina decisions, and S.C. Code Ann. §15-53-10 *et seq.*, the Uniform Declaratory Judgment Act.

*Courts of record within their respective jurisdictions shall have power to declare rights*, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20 (emphasis added).

On many occasions, South Carolina courts have granted public importance standing to the South Carolina Public Interest Foundation or its founder, Mr. Sloan, to bring declaratory judgment actions, contest illegal or unconstitutional actions of the General Assembly or State officers. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), (General Assembly's unconstitutional bobtailing); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), (General Assembly's unconstitutional

bobtailing); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), (Governor held a commission from the Reserve of the United States Air Force); *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895 (2011) (Freedom of Information Act violation by Defendants who were affiliated with the General Assembly).

Chief Justice Toal, in her dissent in *Newman v. Richland County Historic Preservation Commission*, warned against closing the courthouse doors to citizens.

If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse. . . . A moderate balance is achieved by *granting citizens standing when they bring actions alleging ultra vires acts by a governmental agency*, while denying citizens standing to challenge discretionary actions.

\* \* \*

If this were not the rule . . . , then governmental abuse by the executive and legislative branches of government would be nearly completely *immune from review*.

\* \* \*

In determining when it is permissible to conduct such review, it is important to distinguish between matters of policy and matters of law. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, *our role is confined to determining whether a particular action is legal*.

*Id.* at 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, J., dissenting) (emphasis added).

Appellants respectfully suggest that the Supreme Court has since adopted the rule set out in Justice Toal's dissent in *Newman v. Richland County Historic Preservation Commission*. In *Baird v. Charleston County*, the Supreme Court reasoned, "In this case, Doctors have specifically alleged that County committed an *ultra vires* act by exceeding its statutory authority to issue the hospital bonds." *Id.* at 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Similarly in *Sloan v. Sanford*, the Court ruled,

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. *Citizens must be afforded access to the judicial process to address alleged injustices*. On the other hand,

4

Plaintiffs' Memorandum of  
Law in Support of Motion  
for Summary Judgment

standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

*Id.*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (emphasis added).

In *Sloan v. Department of Transportation (Ladson Road)*, the Supreme Court reversed the Circuit Court, and ruled that Mr. Sloan possessed standing. "Sloan has standing because he has alleged a misuse of the statutory emergency procurement provision and therefore an unlawful expenditure by public officials." *Id.* 379 S.C. 160, 170-71, 666 S.E.2d 236, 241 (2008).

The Constitutional violations alleged in this action meet the standard set out in Justice Toal's dissent and the other cases; being Constitutional violations, they are "matters of law;" they are clearly "*ultra vires*;" and they should not be "immune from review." *Id.* 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, J., dissenting). Based on these authorities, this Court should grant the South Carolina Public Interest Foundation public importance standing to address illegal and unconstitutional acts.

This action raises Constitutional issues of great public importance, and Plaintiffs request that the Court grant them standing based upon the great public importance of the Constitutional issues this action raises.

## **II. The Supreme Court Has Granted Public Importance Standing to SCPIF for Cases When Joined with a Local Co-Plaintiff.**

On several occasions, the South Carolina Supreme Court has extended public importance standing to the South Carolina Public Interest Foundation in cases from across the State when SCPIF was a co-plaintiff with a citizen, resident, taxpayer, and registered elector from the County where the claim arose. *McSherry v. Spartanburg County*, 371

S.C. 586, 641 S.E.2d 431 (2007) (Spartanburg County); *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n.*, 369 S.C. 139, 632 S.E.2d 277 (2006) (Hilton Head Island); *Colleton County Taxpayers Ass'n. v. School Dist. of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006) (Colleton County). Mr. DePass is a citizen, resident, taxpayer and registered elector of Richland County. Accordingly, this Court should grant public importance standing in this case to the South Carolina Public Interest Foundation and to Mr. DePass, in order to address the issues of great public importance that this case raises, just as the Supreme Court has on many occasions.

South Carolina courts have long recognized the right of a taxpayer to bring an action to contest allegedly illegal government activities. In *McSherry v. Spartanburg County*, the County required three readings to enact an ordinance. The issue was whether the County Council could have a “reading” of a proposed ordinance, when the “ordinance” was not yet written. *Id.*, 371 S.C. 586, 641 S.E.2d 431 (2007). In *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n.*, the issue was whether the Court would review of finding of the Judicial Merit Selection Commission, related to whether a candidate was “from” Hilton Head Island. *Id.*, 369 S.C. 139, 632 S.E.2d 277 (2006). In *Colleton County Taxpayers Ass'n. v. School Dist. of Colleton County*, the issue was whether the financing scheme of the School District complied with State law. *Id.*, 371 S.C. 224, 638 S.E.2d 685 (2006). In *Sloan v. Dept. of Transportation (Ravenel Bridge)*, the Court held that the manner of selection of source of procurement of the Arthur Ravenel Bridge violated a state statute, being by Requests for Proposals instead of by competitive sealed bids. *Id.*, 365 S.C. 299, 618 S.E.2d 876 (2005). In *Sloan v. Dept. of Transportation (Ladson Road)*, the issue was unlawful use of the statutory emergency

exception for procurement of construction services. *Id.*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008). In *Sloan v. Hardee*, the Court granted public importance standing and rule that Department of Transportation Commissioners were serving consecutive terms on the Commission, in violation of the state statute. *Id.*, 357 S.C. 495, 640 S.E.2d 457 (2007).

South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (S.C. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993). In South Carolina, taxpayers particularly possess standing to bring such actions and request such judicial relief.

### III. This Court Has a Duty to Interpret and Apply the Constitution.

This Court has the authority and responsibility to interpret the South Carolina Constitution. *Anderson v. South Carolina Election Commission*, 397 S.C. 551, 725 S.E.2d 704 (2012). In *Anderson*, the Republican Party argued that the Supreme Court lacked jurisdiction to address the legal requirement that a candidate for the General Assembly file a Statement of Economic Interest. The Supreme Court disagreed.

Here we are not asked to judge a disputed legislative election but rather to interpret a statute. ***The construction of a statute is a judicial function and responsibility.*** *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 614 S.E.2d 629 (2005). Accordingly, we reject the argument that this Court lacks subject matter jurisdiction in this case.

*Id.*, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (emphasis added). If “the construction of a statute is a judicial function and responsibility,” *Anderson v. S.C. Election Commission*,

even more so is the construction of the South Carolina Constitution. *Id.* 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012). This Court has a duty to interpret the Constitution that the Defendants violated and to apply it to the Defendants' actions

On July 25, 2011, the Supreme Court issued its opinion in *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). The General Assembly had enacted a law that applied only to the Charleston County School District. Before this decision, the Supreme Court had repeatedly ruled that the General Assembly could pass such acts. The Plaintiffs in *Charleston County School District* alleged that an act that dealt only with Charleston County School District was unconstitutional special legislation, in violation of the South Carolina Constitution Article III, § 34, and because it applied only to schools in Charleston County, it was also a single county act, another Constitutional violation. *Id.* 393 S.C. 552, 556, 713 S.E.2d 604, 606-607 (2011).

Confining our analysis to the allegations contained in the complaint, and taking them to be true, as we must, we believe School District has stated a sufficient cause of action challenging the constitutionality of Act 189 to withstand a Rule 12(b)(6) motion to dismiss. School District alleges the Charter Schools Act is a general law that applies uniformly to every county in South Carolina. Furthermore, it alleges *Act 189 improperly singles out only Charleston County as the recipient of special rules* for areas covered by the Charter Schools Act without a rational basis for doing so.

*Id.* at 393 S.C. 552, 559-60, 713 S.E.2d 604, 608 (2011) (emphasis added). The Circuit Court had dismissed the claim, but the Supreme Court reversed and ruled that the Plaintiffs had stated a valid claim. *Id.* at 393 S.C. 552, 561, 713 S.E.2d 604, 609 (2011).

This action seeks declaratory judgment that Act 17 of 2011 is unconstitutional. "A suit for declaratory judgment is neither legal nor equitable; rather, it is determined by the nature of the underlying issue. *Sloan v. Greenville County*, 380 S.C. 528, 534, 670 S.E.2d 663, 666 (Ct.App.2009). 'The issue of statutory interpretation is a question of law

for the court.” *Sloan v. Greenville Hospital System*, 388 S.C. 152, 157, 694 S.E.2d 532, 534 (2010). In this case, the claims call for the interpretation and application of two provisions of the South Carolina Constitution related to special legislation and single county legislation, both of which are prohibited.

IV. Act 17 of 2011 Violates S.C. Constitution Article III, § 34 Because It Is a Special Law.

“The General Assembly . . . shall not enact local or special laws. . . . IX. . . .

Where a general law can be made applicable, no special law shall be enacted . . . .”

S.C. Constitution, Article III, § 34. Act 17 violates Article III, § 34’s restriction on special legislation. Act 17 fails to state any reason why a general law could not address those matters. The Supreme Court explained the effect of Article III, § 34.

Article III, § 34(IX) prohibits the enactment of a special law “where a general law can be made applicable.” This provision *not only* limits special legislation where existing general law is *already applicable*, but also *where it is possible* to create general law which would be applicable. *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Seaborne v. Hartsville Rescue Squad*, 269 S.C. 386, 237 S.E.2d 496 (1977).

Article III, § 34 (IX), however, does not prohibit all special legislation.

The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation. There must, however, be a *substantial distinction* having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The *marks of distinction* upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, *account for or justify the restriction* of the legislation.

*Duke Power Co.*, 284 S.C. at 90, 326 S.E.2d at 400-401 (1985) [quoting *Shillito v. City of Spartanburg*, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948)]. In other words, the General Assembly must have a “logical basis and sound

reason” for resorting to special legislation. *Gillespie v. Pickens County*, 197 S.C. 217, 14 S.E.2d 900 (1941).

*Horry County v. Horry County Higher Educ. Com* ‘n, 306 S.C. 416, 418-19, 412 S.E.2d 421, 423 (1991) (emphasis added). Richland County is a normal urban county. It offers no “marks of distinction upon which the classification is founded . . . as will . . . account for or justify . . . the legislation.” *Id.* Act 17 contains no indication of anything unique related to Richland County justifying this special and single county legislation. In Act 17, the General Assembly offered no “logical basis and sound reason” its creation and enactment. Act 17 of 2011 constitutes an unconstitutional local or special law, where a general law was **already** applicable. It creates a special exception for Richland County, and it thereby violates S.C. Constitution Article III, § 34.

South Carolina recognizes a limited exception to Article III, § 34 when the legislation furthers the purposes of Home Rule by devolving the power away from the legislature to a county. However, if the power is to be devolved from the legislature to the county, it should be devolved statewide and not on a county-by-county, piecemeal basis. *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007).

Act 17 of 2011 does not qualify for this exception. It imposes the General Assembly and its members into the governance of the County elections, contrary to the letter and spirit of Home Rule. Act 17 of 2011 contravenes Home Rule and this Court should declare it unconstitutional.

V. **Act 17 of 2011 Violates S.C. Constitution Article VIII, § 7 Because It Applies Only to Richland County.**

*"No laws for a specific county shall be enacted,"* S.C. Constitution, Article VIII, §

7.

"Article VIII, §7, of the South Carolina Constitution prohibits the enactment of legislation after March 7, 1973 that affects a specific county. *Knight v. Salisbury*, 262 S.C. 565, 206 S.E.2d 875 (1974)" [note omitted]; *Pickens County v. Pickens County Water and Sewer Authority*, 312 S.C. 218, 439 S.E.2d 840, 842 (1994). Act 17 applies only to Richland County, and it thereby violates S.C. Constitution Article VIII, § 7.

The Supreme Court ruled in *Torgerson v. Craver* that an act related to a Charleston County Airport District was single county legislation, in violation of the Constitution. The Supreme Court quoted Art. VIII, § 7 and reasoned:

In our opinion, *the act violates both the letter and the spirit of the constitutional directive quoted above.* One of the purposes of Article VIII and of Home Rule is to relieve the General Assembly of the burdens of local governments. The Charleston County Airport District is a Charleston County political subdivision. . . .

Article VIII, § 7, prohibits legislation by the General Assembly for a specific county. Involved here is a matter which the county governing authority can and should deal with instead of the General Assembly.

267 S.C. 558, 562-63, 230 S.E.2d 228, 229-30 (1976). *Torgerson* distinguished that District from those encompassing more than one county such as the district encompassing both Richland and Lexington Counties and the district encompassing Greenville and Spartanburg Counties.

In several subsequent decisions, the Supreme Court has ruled in accord with *Torgerson*. Several times, the General Assembly sought to meddle in the affairs of a commission, authority, or entity contained wholly within the boundaries of one county,

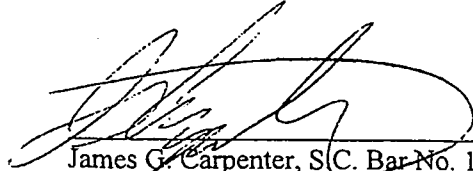
and the Court found it unconstitutional. *Cooper River Park and Playground Commission v. City of North Charleston*, 273 S.C. 639, 259 S.E.2d 107 (1979) (statute purporting to diminish commission's territorial jurisdiction and transfer assets to city was unconstitutional single county legislation); *Richardson v. McCutchen*, 278 S.C. 117, 292 S.E.2d 787 (1982) (two acts of the General Assembly changing the membership of the Williamsburg County Recreation Commission were unconstitutional single county legislation); *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991) (act that changed method of appointment for members of governing body of Newberry County Water and Sewer Authority was unconstitutional special legislation and single county legislation); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007) (an act that devolved the authority to appoint members of the Richland County Recreation Commission from county's legislative delegation to the county council was unconstitutional special legislation and single county legislation). Each time, the Court found the actions of the General Assembly unconstitutional. Accordingly, this Court should find Act 17 of 2011 unconstitutional single county and special legislation.

## CONCLUSION

WHEREFORE, Plaintiffs pray the Court:

1. To declare that Act 17 of 2011 violates S.C. Constitution Article III, § 34 and is therefore invalid;
2. To declare that Act 17 of 2011 violates S.C. Constitution Article VIII, § 7 and is therefore invalid;
3. To grant Plaintiffs their costs and attorneys' fees under S.C. Code Ann. § 15-77-300 ff.; and
4. To grant such other and further relief as the Court deems just and proper.

Respectfully submitted,  
**THE CARPENTER LAW FIRM, P.C.**



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**South Carolina General Assembly**  
119th Session, 2011-2012

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A17, R37, S692

**STATUS INFORMATION**

**General Bill**

Sponsors: Senators Jackson, Courson, Scott and Lourie

Document Path: I:\council\ills\ggs\22052zw11.docx

Introduced in the Senate on March 15, 2011

Introduced in the House on April 6, 2011

Last Amended on April 5, 2011

Passed by the General Assembly on April 14, 2011

Governor's Action: May 9, 2011, Signed

Summary: Richland County Election Commission and Board of Registration to merge

**HISTORY OF LEGISLATIVE ACTIONS**

| Date      | Body   | Action Description with journal page number                                                                    |
|-----------|--------|----------------------------------------------------------------------------------------------------------------|
| 3/15/2011 | Senate | Introduced and read first time ( <a href="#">Senate Journal-page 3</a> )                                       |
| 3/15/2011 | Senate | Referred to Committee on Judiciary<br>( <a href="#">Senate Journal-page 3</a> )                                |
| 3/30/2011 | Senate | Recalled from Committee on Judiciary<br>( <a href="#">Senate Journal-page 16</a> )                             |
| 3/31/2011 | Senate | Read second time ( <a href="#">Senate Journal-page 17</a> )                                                    |
| 3/31/2011 | Senate | Roll call Ayes-6 Nays-0 ( <a href="#">Senate Journal-page 17</a> )                                             |
| 4/5/2011  | Senate | Amended ( <a href="#">Senate Journal-page 26</a> )                                                             |
| 4/5/2011  | Senate | Read third time and sent to House<br>( <a href="#">Senate Journal-page 26</a> )                                |
| 4/6/2011  | House  | Introduced, read first time, placed on calendar without<br>reference ( <a href="#">House Journal-page 11</a> ) |
| 4/13/2011 | House  | Read second time ( <a href="#">House Journal-page 38</a> )                                                     |
| 4/13/2011 | House  | Roll call Yeas-59 Nays-0 ( <a href="#">House Journal-page 38</a> )                                             |
| 4/14/2011 | House  | Read third time and enrolled ( <a href="#">House Journal-page 13</a> )                                         |
| 5/5/2011  |        | Ratified R 37                                                                                                  |
| 5/9/2011  |        | Signed By Governor                                                                                             |
| 5/13/2011 |        | Effective date 05/09/11                                                                                        |
| 5/17/2011 |        | Act No. 17                                                                                                     |

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**VERSIONS OF THIS BILL**

[3/15/2011](#)  
[3/30/2011](#)  
[4/5/2011](#)  
[4/6/2011](#)



[http://www.scstatehouse.gov/sess119\\_2011-2012/bills/692.htm](http://www.scstatehouse.gov/sess119_2011-2012/bills/692.htm)

11/15/2012

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A17, R37, S692)

**AN ACT TO AMEND SECTION 7-27-405, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE RICHLAND COUNTY ELECTION COMMISSION AND THE RICHLAND COUNTY BOARD OF REGISTRATION, SO AS TO COMBINE THE RICHLAND COUNTY ELECTION COMMISSION AND THE RICHLAND COUNTY BOARD OF REGISTRATION INTO A SINGLE ENTITY.**

Be it enacted by the General Assembly of the State of South Carolina:

**Board of Elections and Voter Registration established**

SECTION 1. Section 7-27-405 of the 1976 Code, as added by Act 312 of 2008, is amended to read:

"Section 7-27-405. Notwithstanding another provision of law:

(A)(1) There is established the Board of Elections and Voter Registration of Richland County, to be composed of five members appointed by a majority of the Richland County Legislative Delegation.

(2) Two of the initial appointees shall serve two-year terms, and three of the initial appointees shall serve four-year terms. Upon expiration of the terms of those members initially appointed, the term of office for the members of the board is four years, and until their successors are appointed and qualify. Members may succeed themselves.

(3) In case of a vacancy on the board, the vacancy must be filled in the same manner as an original appointment, as provided in this section, for the unexpired term.

(4) A majority of senators representing the county and a majority of members of the House of Representatives representing the county shall appoint the board's chairman. The chairman shall serve a term of four years and may be reappointed to that office for any number of successive terms without limitation.

(5) The board may choose to elect a vice chair, a secretary, and other officers the board considers appropriate. The initial director must be employed by a majority of the Richland County Legislative Delegation. Subsequently, the board shall employ the director, determine the compensation, and determine the number and compensation of other staff positions. Salaries must be consistent with the compensation schedules established by the county for similar positions.

(6) The director is responsible for hiring and management of the staff positions established by the board that report to the director. Staff positions are subject to the personnel system policies and procedures by which all county employees are regulated, except that the director serves at the pleasure of the board.

(B) The Richland County Legislative Delegation shall notify the State Election Commission in writing of the appointments made pursuant to subsection (A).

(C) The Board of Elections and Voter Registration of Richland County shall notify the State Election

Commission in writing of the name of the person elected as chairman of the board pursuant to subsection (A).

(D) A member who misses three consecutive meetings of the board is considered to have resigned his office; and a vacancy on the board exists, which must be filled in the manner provided in subsection (A). This section does not apply to a member who presents a verifiable doctor's certificate that illness prevented his attendance at a meeting.

(E) Except as otherwise specifically provided in subsections (A), (B), (C), and (D), the provisions of law contained in Title 7, relating to county boards of voter registration and county election commissions, apply to the Board of Elections and Voter Registration of Richland County, mutatis mutandis.

(F)(1) The Richland County Board of Voter Registration is abolished effective within sixty days after this section is approved by the Governor, and its functions, duties, and powers are devolved upon the Board of Elections and Voter Registration of Richland County, as established pursuant to subsection (A).

(2) The Richland County Election Commission is abolished effective within sixty days after this section is approved by the Governor, and its functions, duties, and powers are devolved upon the Board of Elections and Voter Registration of Richland County, as established pursuant to subsection (A).

(G)(1) The terms of the members of the Richland County Board of Voter Registration, regardless of when these members were appointed to office, or when their current terms would otherwise have expired, expire for all purposes upon the abolishment of that board pursuant to subsection (F)(1).

(2) The terms of the members of the Richland County Election Commission, regardless of when these members were appointed to office, or when their current terms would otherwise have expired, expire for all purposes upon abolishment of that commission pursuant to subsection (F)(2).

(3) Notwithstanding items (1) and (2) of this subsection or another provision of law, a person serving as a member of the Richland County Board of Voter Registration or the Richland County Election Commission may not be removed from office, and neither the board nor the commission may be abolished until this section has been given final approval by the United States Department of Justice.

(H) The annual budget for the Board of Elections and Voter Registration of Richland County may not be less than the average of the two annual budgets for the Charleston County and Greenville County Boards of Election and Voter Registration for the prior fiscal year."

#### Time effective

SECTION 2. This act takes effect upon approval by the Governor.

Ratified the 5th day of May, 2011.

Approved the 9th day of May, 2011.

This web page was last updated on August 19, 2011 at 10:34 AM

[http://www.scstatehouse.gov/sess119\\_2011-2012/bills/692.htm](http://www.scstatehouse.gov/sess119_2011-2012/bills/692.htm)

11/15/2012

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,  
Defendants.

IN THE CIRCUIT COURT  
CASE NO: 2012-CP-40-7790

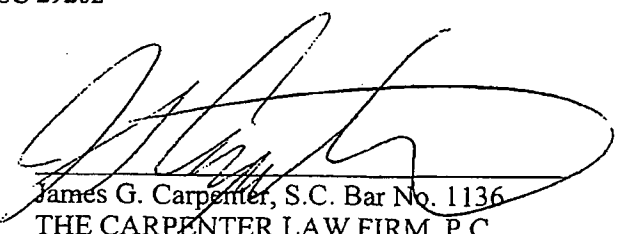
**CERTIFICATE  
OF SERVICE**

RICHLAND COUNTY  
FILED  
2013 APR 29 AM 11:19  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

The undersigned attorney hereby certifies that he has served a copy of the foregoing Motion for Summary Judgment and Memorandum on Law in Support of Motion for Summary Judgment, by first class mail, postage prepaid, on April 25, 2013, to the following persons:

J. Emery Smith, Jr.  
PO Box 11549  
Columbia, SC 29211

Michael R. Hitchcock  
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Attorneys for Plaintiffs

|                                         |   |                              |
|-----------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS |
|                                         | ) |                              |
| COUNTY OF RICHLAND                      | ) | FIFTH JUDICIAL CIRCUIT       |
|                                         | ) |                              |
| South Carolina Public Interest          | ) | CASE NO.: 2012-CP-40-7790    |
| Foundation, and William B. DePass,      | ) |                              |
| Jr., Individually, and on behalf of all | ) |                              |
| similarly situated,                     | ) |                              |
| Plaintiffs,                             | ) |                              |
|                                         | ) | DEFENDANTS' MEMORANDUM       |
| v.                                      | ) | OF LAW IN SUPPORT OF MOTION  |
|                                         | ) | FOR SUMMARY JUDGMENT         |
| Senator John E. Courson, Senator        | ) |                              |
| Darrell Jackson, Senator Joel Lourie,   | ) |                              |
| Senator John L. Scott, Jr., and The     | ) |                              |
| State of South Carolina,                | ) |                              |
| Defendants.                             | ) |                              |

NOW COME Defendant Senators Courson, Jackson, Lourie, and Scott, by their undersigned attorney, submit this Memorandum of Law in Support of their Motion for Summary Judgment.

### STATEMENT OF FACTS

The Plaintiffs have initiated this action to challenge the constitutionality of Act 17 of 2011 as a local or special law in violation of Article III, § 34(IX) and Article VIII, § 7 of the South Carolina Constitution. Act 17 of 2011 amended Section 7-27-405 of the South Carolina Code to provide for a combined Board of Registration and Election in Richland County. The facts of the case are not in dispute and this action only presents questions of law that may be appropriately addressed at Summary Judgment.

Section 7-5-10 of the South Carolina Code governs the appointment of members of county boards of registration and Section 7-13-70 provides for the appointment of members of county commissioners of election. Prior to the enactment of Act 312 of 2008, the General Assembly passed numerous local acts combining the boards of registration and election in individual counties. In 2008, the General Assembly passed Act 312 which codified these various local acts in Chapter 27 of Title 7.

In regards to Richland County, Act 312 of 2008 provided in Section 7-27-405 that Richland would not have a combined board, but rather would continue to have separate boards of registration and election appointed pursuant to Section 7-5-10 and Section 7-13-70 respectively. Act 17 of 2011 amended Section 7-27-405 to provide for the current combined board in Richland County. The Plaintiffs assert that by amending Section 7-27-405 to combine the boards of registration and election the General Assembly enacted a special law when a general law was already applicable.

## ARGUMENT

### I.

The Plaintiffs lack standing to pursue and maintain the present action. A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. *Florence Morning News, Inc. v. Bldg Comm'n of the City and Cnty. of Florence*, 265 S.C. 389, 398, 218 S.E.2d 881, 884-885 (1975). To entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is

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immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1 (1937).

The Plaintiffs have not only failed to show an individual or particularized injury, they have not even attempted to do so in this case. In order to assert standing, Plaintiffs simply allege:

Plaintiff South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution. Plaintiff William DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County. He served as a member of the State Election Commission during the years 1988 through 1997, and he served as its Chairman during the years 1990 through 1997. He regularly serves as a volunteer poll worker on election days. Mr. DePass possesses standing on the foregoing bases.

[Plaintiff's Memorandum p. 1]

The mere fact that the South Carolina Public Interest Foundation (SCPIF) has organized itself as a self-appointed "watchdog" to challenge the validity of legislative action does not in any way demonstrate that the SCPIF has suffered any particular injury as a result of Act 17 of 2011.

Further, the mere fact that Plaintiff DePass has previously been involved in varying capacities in previous elections does not demonstrate how he has been personally prejudiced by Act 17 of 2011. The difficulties experienced by voters in Richland County at the last general election were well publicized.<sup>1</sup> However, DePass does not allege that these difficulties were the result of any Board action or inaction. Further, although DePass asserts standing based upon his

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<sup>1</sup> Stephen Largen, *Study: S.C. Had Among Longest Average Wait Times to Vote in November*, April 15, 2013, available at <http://www.postandcourier.com/article/20130415/PC16/130419538/1165/study-sc-had-among-longest-average-wait-times-to-vote-in-november>; and John Monk, *Next time, Voting in About an Hour in Richland County?*, June 27, 2013, available at <http://www.thestate.com/2013/06/27/2838088/attorney-hired-by-richland-county.html#storylink=cpy>.

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involvement in previous elections, he does not even allege that he participated or even voted in the 2012 general election, which is the only election that has been conducted by the board. In fact, DePass does not allege that he has been injured in any way by any Board action.

Instead, the Plaintiffs allege that they should be granted standing based upon the public importance exception to the standing requirement. However, the Plaintiffs fail to provide sufficient justification as to why this is a matter of great urgency that must be decided immediately without the need of any person demonstrating a particularized injury. The Plaintiffs simply allege that Act 17 of 2011 violates the state constitution and that the purpose of SCPIF is to ensure the proper application of the state constitution and that DePass is a resident and taxpayer of Richland County who has previously been involved in elections.

"The general rule is that a taxpayer may not maintain a suit based on the action of state officers when he has no special interest, and his only standing is the exceedingly small interest of a general taxpayer." *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. *Id.* Rather, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). The public importance exception should only apply when there is an immediate need for a resolution in order to provide future guidance. *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012).

In the present case, the Plaintiffs fail to explain why, if this is a matter of such great public importance, that they failed to bring this action in the year ensuing between the passage of Act 17 of 2011 and the 2012 general election. It would seem that if Act 17 of 2011 constituted such a significant constitutional violation that presented such an overriding concern that the

Plaintiffs would have pursued this action prior to the combined board conducting a general election in Richland County.

Further, the Plaintiffs fail to explain why combining the Richland County Board of Registration and Board of Elections is a matter of great public importance when thirty-eight other counties operate combined boards of registration and election. As with the Richland County board, these combined boards are codified in Chapter 27, Title 7 of the South Carolina Code. Each of the other combined boards is governed by its own statutory section of Chapter 27 that only applies to that particular board for the relevant county. Each board varies in the manner by which its members are appointed, the length of the members terms, and the powers and duties of the board in regards to hiring a director, establishing a budget, and performing other administrative functions.

Prior to being codified in Chapter 27 of Title 7 by Act 312 of 2008, these boards were created by various local acts which only affected the relevant county. However, for reasons that are not explained by the Plaintiff, only the act creating the combined Richland County board is constitutionally offensive enough to constitute a matter of great public importance.

The Plaintiffs further assert that they should be granted standing because SCPIF has been granted public importance standing in similar cases when it has challenged the validity of executive and legislative action. In support of this contention the Plaintiffs cite *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008). In this case, SCPIF and its alter ego Edward D. Sloan, Jr. challenged the constitutionality of several statewide acts on the grounds that the acts violated the one-subject requirement of the South Carolina Constitution and also that several other acts each affecting only one county, violated the constitutional

prohibitions against local laws. However, the Plaintiffs decline to mention that in this case the Supreme Court found that SCPIF lacked standing to challenge these local acts.

Furthermore, the Supreme Court has certainly recognized that there are limits to the public importance exception. Though the Court granted Petitioner Sloan standing in the case of *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), the Court also stated:

An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

This case is not a one that strikes an appropriate balance to justify standing under the public importance exception standard. Other than the mere assertion that Act 17 of 2011 violates the state constitution, the Plaintiffs have not provided any justification as to how this case presents an overriding matter of public importance that requires an immediate need for future guidance. Instead, the Plaintiffs ask the court to engage in a purely intellectual legal exercise that the particularized injury element of the standing requirement was intended to avoid and the public importance standing exception does not evade. Therefore, the Court should find that the Plaintiffs lack standing to pursue this action.

## II.

Act 17 of 2011 does not constitute a violation of Article III, § 34(IX) of the South Carolina Constitution. This section provides that: "In all other cases, where a general law can be made applicable, no special law shall be enacted." However, the General Assembly may pass a special law or include special provisions in a general law if there is a "logical basis and sound reason" for doing so. *Gillespie v. Pickens County*, 197 S.C. 217, 14 S.E. 2d 900 (1941).

Our Supreme Court has long held that questions regarding the constitutionality of an act of the General Assembly "are to be resolved in light of the familiar and well-settled general rule that every presumption must be indulged in favor of the constitutionality of an act of the Legislature, and that courts should not declare a statute unconstitutional unless the invalidity is manifest beyond a reasonable doubt." *Poulnot v. Cantwell*, 129 S.C. 171, 176, 123 S.E. 651, 654 (1924); *see also*, *State v. Charron*, 351 S.C. 319, 323, 569 S.E.2d 388, 390 (2002)[*"A legislative enactment will be declared unconstitutional only when its validity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution."* *quoting*, *Westvaco Corp. v. S.C. Dept. of Revenue*, 321 S.C. 59, 63, 467 S.E.2d 739, 741 (1995)].

In the present case, Chapter 27 of Title 7 provides the generally applicable law regarding combined boards of registration and election and the slight variations in the membership, terms, powers and duties of the combined county boards of registration and election are simply permissible special laws or special provisions in the general law contemplated by Article III, Section 34(X) of the South Carolina Constitution.

Section 7-5-10 of the South Carolina governs the appointment of members of county boards of registration and Section 7-13-70 provides for the appointment of members of county commissioners of election. Prior to the enactment of Act 312 of 2008, the General Assembly passed numerous local acts combining the boards of registration and election in individual counties. In 2008, the General Assembly passed Act 312 which codified these various local acts in Chapter 27 of Title 7. The stated purpose for codifying these local acts was "to provide greater public access to the statutory provisions for registering voters and coordinating elections in this State." S.C. Code Ann. § 7-27-120 (Supp. 2012). The stated effect of the codification was not to create new law but to continue "acts passed by the General Assembly to combine the

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election and registration functions in order to provide a unified commission for the traditional state functions of conducting election and registering electors by county." S.C. Code Ann. § 7-27-130 (Supp. 2012).

In regards to Richland County, Act 312 of 2008 provided in Section 7-27-405 that Richland would not have a combined board, but rather would continue to have separate boards of registration and election appointed pursuant to Section 7-5-10 and Section 7-13-70 respectively. Act 17 of 2011 amended Section 7-27-405 to provide for the current combined board in Richland County. The Plaintiffs assert that by amending Section 7-27-405 to combine the boards of registration and election the General Assembly enacted a special law when a general law was already applicable. However, by enacting Act 17 of 2011 the General Assembly simply amended Chapter 27 of Title 7, the law generally applicable to combined boards of registration by adding Richland County to the "unified commission for the traditional state functions of conducting election and registering electors by county." S.C. Code Ann. § 7-27-130 (Supp. 2012).

As is evident from reading Chapter 27 of Title 7, the similarities of the various statutory sections governing each combined board of registration and election outweigh the differences. Each board has its members either appointed by the Governor or by a majority of the county legislative delegation, the number of members on each board range from five to ten, and the terms of the members of each board are for either two or four years. Like Richland County, twelve other combined boards have their members appointed by a majority of the county legislative delegation and twenty other combined boards members' terms are for four years.

Further, there is a "logical basis and sound reason" for the slight variations in the manner in which combined boards of registration and election are governed which reflect the practical

and political intricacies of combining county boards of registration and election. This necessity arises from the fact that the sections providing for separate boards of registration and election do not require uniformity in each county. For example, both Sections 7-5-10 and 7-13-70 provide that a county board of registration and a county board of election, respectively, may be comprised of three to five members. Also, these sections do not address the specific administrative functions performed by each board that likely differed by local practice. Thus, each county, including Richland, presented its own unique set of circumstances and considerations that had to be addressed when combining the boards of registration and election.

It is clear from a review of the sections contained in Chapter 27 of Title 7 and other provisions of Title 7 that the General Assembly has determined that there is a logical basis and sound reason for the generally applicable law to contain special provisions governing the appointment, membership, terms, and powers and duties of combined boards of registration and election. In passing Act 312 of 2008, the General Assembly certainly recognized that by codifying the various local acts providing for combined boards of registration and election that it was reaffirming a process that while similar, contained special provisions resulting in a law that is not completely uniform in all respects. This is evident from the findings and effects of the codification expressed in Section 7-27-120 and 7-27-130 respectively. Also, the General Assembly recognizes the disparate nature of the various combined boards in Section 7-5-35 when it specifically provided that the law governing the appointment of county boards of registration did not supersede any other provision of law providing for combined boards of registration and election. S.C. Code Ann. § 7-5-35 (Supp. 2012).

Also, it is clear that the General Assembly understood the necessity of the special provisions governing the combined board of registration and election for Richland County when

it passed Act 17 of 2011. Although each house has Rules providing for the treatment of bills affecting only one county on the respective house's local calendar, each house treated Act 17 of 2011 as statewide legislation.<sup>2</sup> As a result, the entire membership of each house understood that this act amended the generally applicable law governing combined boards of registration and election. Act 17 of 2011 contains special provisions that are no more dissimilar than the other counties' combined boards found in Chapter 27 of Title 7, the generally applicable law.

Therefore, the Court should find that the Plaintiffs cannot meet their burden of proving beyond a reasonable doubt that Act 17 of 2011 violates Article III, Section 34 of the South Carolina Constitution because it is either a permissible special law or a constitutional special provision in a general law.

### III.

The Plaintiffs also argue that Act 17 of 2011 violates Article VIII, Section 7 of the South Carolina Constitution because it only applies to a specific county. However, this provision of the constitution is intended to prohibit laws that only apply to a specific county which "relate to those powers and duties, functions and responsibilities, which under the mandated systems of government, are set aside for counties." *Kleckey v. Pulliam*, 265 S.C. 177, 217 S.E.2d 217 (1977). The registration of electors and conducting of elections by county is a "traditional state function" and is not one that is set aside for counties to be conducted by the county governing body. S.C. Code Ann. §§ 7-27-130, 7-5-10, 7-13-70 (Supp. 2012). Thus, an analysis of Act 17 of 2011 pursuant to Article VIII, § 7 is not relevant.

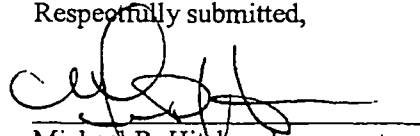
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<sup>2</sup> Rule 5, *Rules of the S.C. House of Representatives* and Rules 32 and 51, *Rules of the S.C. Senate*. 2011 *Journal of the S.C. House*, dates considered: 4/6/11, 4/13/11, 4/14/11 and 2011 *Journal of the S.C. Senate*, dates considered: 3/15/11, 3/30/11, 3/31/11, and 4/5/11.

## CONCLUSION

For the reasons stated above, this matter should be dismissed because the Plaintiffs lack standing to pursue and maintain this action. However, should the court consider the substantive issues raised by the Plaintiffs, the Court should enter a judgment for the Defendants based upon the above analysis and argument.

Respectfully submitted,



Michael R. Hitchcock

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Columbia, South Carolina 29202

(803) 212-6300

Attorney for Defendants Courson, Jackson,  
Lourie, and Scott

July 31, 2013

STATE OF SOUTH CAROLINA )  
)  
)  
COUNTY OF RICHLAND )  
)  
South Carolina Public Interest )  
Foundation, and William B. DePass, )  
Jr., Individually, and on behalf of all )  
similarly situated, )  
Plaintiffs, )  
v. )  
Senator John E. Courson, Senator )  
Darrell Jackson, Senator Joel Lourie, )  
Senator John L. Scott, Jr., and The )  
State of South Carolina, )  
Defendants. )

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

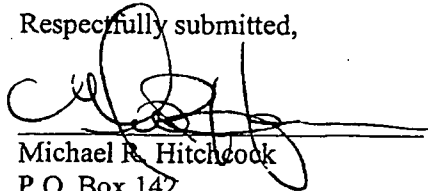
CASE NO.: 2012-CP-40-7790

DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

SCRCP 56

NOW COME the Defendants, by their undersigned counsel, and move this Court for Summary Judgment, pursuant to SCRCP 56. In support of this Motion, Defendants submit the accompanying Memorandum of Law in Support of Motion for Summary Judgment, to demonstrate that there is no genuine issue of material fact, and the Defendants are entitled to Summary Judgment as a matter of law.

Respectfully submitted,



Michael R. Hitchcock

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(803) 212-6300

Attorney for Defendants Courson, Jackson,  
Lourie, and Scott

July 31, 2012

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

South Carolina Public Interest Foundation, )  
and William B. DePass, Jr., individually, )  
and on behalf of all others similarly situated, )

Plaintiffs, )

v. )

Senator John E. Courson, Senator Darrell )  
Jackson, Senator Joel Lourie, Senator )  
John L. Scott, Jr., and The State of South )  
Carolina, )

Defendants. )

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

**Plaintiffs' Reply Memorandum  
of Law in Support of  
Motion for Summary Judgment**

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Reply  
Memorandum of Law in Support of their Motion for Summary Judgment.

### ARGUMENT

#### **I. Plaintiffs Have Satisfied the Supreme Court's Most Recent Statement of the Standard for Public Importance Standing.**

On many occasions, South Carolina courts have granted public importance standing to the South Carolina Public Interest Foundation or its founder, Mr. Sloan, to bring declaratory judgment actions, contest illegal or unconstitutional actions of the General Assembly or State officers. The Supreme Court's most recent statement of the standard for public importance standing is slightly differently from the previous statements of the rule.

Sloan presents a *colorable claim that the Board is unconstitutionally comprised*, casting a cloud of illegitimacy which could marginalize the important decisions of the Board. We find resolution of this question is certainly of importance and concern to the public and therefore hold *Sloan has standing to bring this challenge*.

*South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 2013 WL 2631079 (S.C. 2013) (emphasis added).

Plaintiffs satisfy this latest statement of the standard from the Supreme Court. Plaintiffs have “present[ed] a colorable claim that the Board is unconstitutionally comprised,” because the Act establishing the Board is unconstitutional. The Plaintiffs are not the only ones who hold this opinion.<sup>1</sup> The Attorney General agrees with Plaintiffs.

The Attorney General, representing the Defendant the State of South Carolina, admitted in his answer that Act 17 of 2011 may be unconstitutional. Furthermore, the Attorney General declined to file a legal memorandum in opposition to the Plaintiffs’ Motion for Summary Judgment and Memorandum. However, three times the Attorney General has issued a written opinion on this issue. In 2007, the Attorney General issued an opinion to Senator Glenn McConnell in relation to the General Assembly’s very similar action with regard to Charleston County in 2003. The Attorney General opined that that Act was unconstitutional (2007 WL 3244888, attached) (“McConnell Letter”).

Second, in his McConnell Letter, the Attorney General referenced an earlier opinion from 1977 arriving at the same conclusion:

In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of voter registration and county election commissions on a county-by-county basis. Op. S.C. Atty. Gen., January 5, 1977. We concluded “such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county.” *Id.*

*Id.* at \*4.

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<sup>1</sup> Plaintiffs attach, for the use of the Court, a note from the South Carolina Law Review, “A Long Way from Home: Slow Progress Toward ‘Home Rule’ in South Carolina and a Path to Full Implementation,” 64 S.C.L.Rev. 781 (Summer, 2013). This note provides a helpful summary of the history of the development of Home Rule, including the Constitutional provision at issue in this matter, and a critique of the Act at issue.

Third, in an opinion issued to Senator Tim Scott in 2012 concerning Act 17 of 2011, the very act at issue in this case, the Attorney General reiterated his opinion regarding the act related to Charleston, and opined that he would reach the same conclusion regarding relating to Richland County (2012 WL 6061812, attached) (“Scott Letter”).

We do not address herein the constitutionality of Act 17 of 2011 under Art. VIII, § 7 of the South Carolina Constitution, which prohibits ““laws for a specific county ....” However, we note that in an Opinion, dated August 14, 2007, we concluded that *a similar local law*, Act 127 of 2003, a statute which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and created instead the Board of Elections and Voter Registration for Charleston County *was likely unconstitutional* as being in violation of Art. VIII, § 7. See *Op. S.C. Atty. Gen.*, August 14, 2007 (2007 WL 3244888).

(2012 WL 6061812, n. 2) (emphasis added).

Thus, the Attorney General has issued three opinions dated from 1977 to 2012 that the General Assembly’s action is unconstitutional. Plaintiffs respectfully suggest first, that the Attorney General is correct in his Constitutional analysis, and second, that these three opinion letters from the Attorney General, supporting the Plaintiffs’ position, are sufficient to warrant the Court’s finding that the Plaintiffs have “present[ed] a colorable claim that the Board is unconstitutionally comprised.” *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 2013 WL 2631079 (S.C. 2013). Therefore, Plaintiffs should be granted public importance standing to raise this issue.

## II. The Senators have Reverted to their Unconstitutional Practice.

The Defendants’ Memorandum of Law in Support of Motion for Summary Judgment, filed on or about July 31, 2013, (“Defendant’s Memo”) references the General Assembly’s history of enacting such local and special laws. “Prior to the enactment of Act

312 2008, the General Assembly passed numerous local acts combining the boards of registration and election in individual counties.” Defendants’ Memo, p. 2. *See also*, Defendants’ Memo, p. 7.

Similarly, in his Scott Letter, the Attorney General also referenced the history of a series of special and single county acts.

In 2008, pursuant to Act No. 312, the General Assembly *enacted legislation codifying the various local laws which had combined county election commissions and board of voter registration*. Such provisions are found at § 7-27-10 *et seq.* Section 7-27-120 states that the purpose of Act No. 312 is that “[b]y codifying the provisions for county boards of registration and election commissions, the General Assembly intends to provide greater public access to the statutory provisions for registering voters and coordinating elections in this State.” Section 7-27-110 provides that “[t]hose counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70.”

*Richland County was, as of 2008, one of those counties.* The Board of Voter Registration and the Election Commission remained separate entities. Thus, § 7-25-405 provided in 2008 that “the Richland County Election Commission and the Richland Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70.” *See also*, *Op. S.C. Atty. Gen.*, July 1, 2010 (2010 WL 3048334). . . .

However, in 2011, by Act No. 17, the General Assembly rewrote § 7-27-405 completely, altering Richland County’s election oversight structure. The purpose of Act No. 17 of 2011, as stated in the Act’s Title, was “to combine the Richland County Election Commission and the Richland County Board of Registration into a single entity.” *Such legislation required one combined election body, a consolidation similar to that legislated by local law in many other counties.*

(2012 WL 6061812, \*2-3) (emphasis added).

Plaintiffs respectfully suggest that the General Assembly was aware of its history of enacting a series of special, single county acts relating to county election commissions and county boards of registration. The General Assembly was also well aware of the At-

torney General's opinion in the McConnell Letter issued August 7, 2007. Accordingly, early in the next term of the General Assembly, on February 14, 2008, Senators McConnell and Campsen introduced the bill that became Act 312 of 2008, enacted that year. Act 312 addressed all the counties in the entire state. Act 312 did not change the substance of the previous local and special acts for individual counties, but rather, seems to have been an attempt by the General Assembly to repair a Constitutional defect in all the special and single county acts related to county election commissions and county boards of registration election commissions.

In his Scott Letter, the Attorney General raises the question whether the combination of all the single county, special acts makes any constitutional difference:

*Whether the codification of all local laws relating to the structure and authority of the Boards of Election and Voter Registration would make any constitutional difference under Art. VIII is beyond the scope of this opinion and is for the courts to decide.*

(2012 WL 6061812, n. 2) (emphasis added). Plaintiffs do not challenge Act 312 of 2008; Plaintiffs challenge a special, single county act that suffers from the same constitutional deficiencies that the General Assembly attempted to correct with Act 312 of 2008.

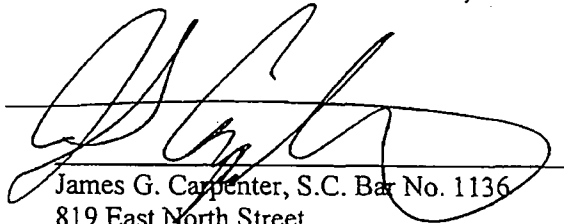
Now the General Assembly, led by the Defendant Senators, has returned to its former unconstitutional practice of enacting special legislation on a single county basis, and Plaintiffs pray the Court for Declaratory Judgment that Act 17 of 2011 is unconstitutional.

## CONCLUSION

WHEREFORE, Plaintiffs pray the Court:

1. To declare that Act 17 of 2011 violates S.C. Constitution Article III, § 34 and is therefore invalid;
2. To declare that Act 17 of 2011 violates S.C. Constitution Article VIII, § 7 and is therefore invalid;
3. To grant Plaintiffs their costs and attorneys' fees under S.C. Code Ann. § 15-77-300 ff.; and
4. To grant such other and further relief as the Court deems just and proper.

Respectfully submitted,  
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Fax (864) 331-3083  
Attorney for the Plaintiffs

|                                         |   |                                |
|-----------------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS   |
|                                         | ) |                                |
| COUNTY OF RICHLAND                      | ) | FIFTH JUDICIAL CIRCUIT         |
|                                         | ) |                                |
| South Carolina Public Interest          | ) | CASE NO.: 2012-CP-40-7790      |
| Foundation, and William B. DePass,      | ) |                                |
| Jr., Individually, and on behalf of all | ) |                                |
| similarly situated,                     | ) |                                |
| Plaintiffs,                             | ) |                                |
|                                         | ) | DEFENDANTS' MOTION TO ALTER OR |
| v.                                      | ) | AMEND A JUDGMENT               |
|                                         | ) |                                |
| Senator John E. Courson, Senator        | ) | SCRCP 59                       |
| Darrell Jackson, Senator Joel Lourie,   | ) |                                |
| Senator John L. Scott, Jr., and The     | ) |                                |
| State of South Carolina,                | ) |                                |
| Defendants.                             | ) |                                |

NOW COME Defendants Senators Courson, Jackson, and Lourie with a Motion to Alter or Amend a Judgment on the Motion for Summary Judgment filed by this Court on August 26, 2013 of which written notice of the entry of the judgment was received by the Defendants on August 30, 2013. Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, the Defendants respectfully move the Court to alter or amend the judgment by delaying the effect of the declaration that Act 17 of 2011 violates Article VIII, § 7 and Article III, § 34 of the South Carolina Constitution until January 1, 2014. This motion is made in lieu of the filing of a Notice of Intent to Appeal.

The basis for this motion is that the effect of the declaration on the ability and authority of the Richland County Board of Registration and Election to conduct the City of Columbia municipal election and Richland County bond referendum in the fall is certainly in doubt. Furthermore, even if the Court's order declaring Act 17 unconstitutional, which dissolved the separate Richland County Boards of Registration and Election, has the effect of reviving those boards, it is unclear whether those boards would be comprised of the members who previously served or if new members need to be appointed. *see*

*Pickens County v. Pickens County Water and Sewer Authority*, 312 S.C. 218, 439 S.E.2d 840 (1994); S.C. AG Op. 2007 WL 3244888 (S.C.A.G).

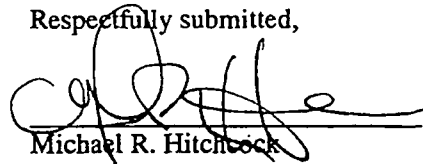
Additionally, if new members need to be appointed or if vacancies need to be filled on the county boards of registration, Section 7-5-10 of the South Carolina Code limits the appointment of members of a county board of registration to between January 1st and March 15th of even numbered years. Further, Section 7-5-30 of the South Carolina Code provides that vacancies must be filled in the manner of original appointment in Section 7-5-10, seemingly also limiting this authority to the time period provided in Section 7-5-10.

Also, if new members need to be appointed or if vacancies need to be filled on the county board of election, then Section 7-13-70 of the South Carolina Code provides that at least ninety days prior to an election that the Governor must appoint these members upon recommendation of the county legislative delegation. At this point, less than ninety days remain prior to the elections in November, thus calling into question whether these appointment can be made.

As a result, delaying the effect of the declaration until January 1, 2014, will alleviate any confusion over which entity or entities have the authority to conduct these elections and any potential special election that may be necessary. In January, the Governor can make the necessary appointments to the separate boards in compliance with the time periods provided by the controlling statutes, alleviating the constitutional difficulties associated with Act 17, while not causing unnecessary confusion during the ensuing elections. Further, this delay will not prejudice the plaintiffs in this matter who sought relief based upon the public importance exception to the standing requirement and who never alleged that Act 17 caused them a particularized injury. Thus, delaying the effect of the Court's order until January 1, 2014, strikes the most equitable balance of providing the plaintiffs the relief they seek while also preserving the ability of Richland County voters to participate in the electoral process in a manner that is free from confusion.

THEREFORE, the Defendants respectfully move the Court to alter or amend its judgment to delay the effect of the declaration that Act 17 of 2011 violates Article VIII, § 7 and Article III, § 34 of the South Carolina Constitution until January 1, 2014.

Respectfully submitted,



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Columbia, South Carolina 29202  
(803) 212-6300  
Attorney for Defendants Courson, Jackson,  
and Lourie

September 9, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,  
Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,  
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

**Plaintiffs' Memorandum of Law  
in Opposition to the Motion to  
Alter or Amend**

2013 SEP 13 AM 10:51  
CLERK OF COURT  
JAMES H. HARRIS

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in Opposition to the Defendant Senators' Motion to Alter or Amend the Judgment, filed September 9, 2013.

This Court ruled that Act 17 of 2011 is unconstitutional. The purpose of Act No. 17 of 2011, as stated in the Act's title, was "to combine the Richland County Election Commission and the Richland County Board of Registration into a single entity." Act 17 also abolished the two prior bodies, the Richland County Election Commission and the Richland County Board of Registration. When Act 17 of 2011 was ruled unconstitutional, the prior bodies, abolished by Act 17, were revived by operation of law. The Supreme Court has made this clear.

When an act repealing a prior act is held unconstitutional, the repealer is also invalidated absent specific legislative intent to the contrary. *The prior act is revived by invalidation of the repealer. Wingfield v. S.C. Tax Comm'n*, 147 S.C. 116, 144 S.E. 846 (1928); *Barringer v. City Council*, 41 S.C. 501, 19 S.E. 745 (1894).

*Pickens County v. Pickens County Water and Sewer Authority*, 312 S.C. 218, 220, 439 S.E.2d 840, 842 (1994) (emphasis added). Accordingly, there is no need for the Court to

alter, amend or stay its order. The Richland County Election Commission and the Richland County Board of Registration, with their memberships, are revived, and they are charged with conducting the election, just as they were for many years before Act 17 of 2011. Plaintiffs are informed and believe that many of the members of the joint board, which was unconstitutionally formed, were members of the newly revived separate boards. Plaintiffs are not aware of any new appointments that need to be made. However, if any appointment must be made, the Governor has been given the power of appointment when the Senate is not in session.

The Supreme Court ruled on a similar situation in *Mitchell v. Jones*, 94 S.C. 487, 78 S.E. 528 (1913). Members of a Board of Registration were duly appointed for a two-year term. At the end of the term, the Senate recommended reappointment of the members. The Governor failed to reappoint the members, and after the Senate adjourned, he appointed other persons to the Board of Registration. The Clerk of Court, however, delivered the Board's books and records to the members recommended by the Senate, and they served in the capacity as the Board. They were not paid for their service.

The Board members recommended by the Senate sued, naming as defendants (among others) the persons appointed by the Governor after adjournment. The Supreme Court took the case in its original jurisdiction. The Court quoted the statute granting the Governor the power of appointment and ruled:

This section manifestly gave the Governor the right to appoint when the Senate was not in session, and his appointees could hold under that appointment until it was confirmed by the Senate for two years from the date of the appointment, on the holding terminated by the Senate's failure to approve. . . . *The respondents had title to the office from the day of their appointment until the Senate refused to approve their appointment.*

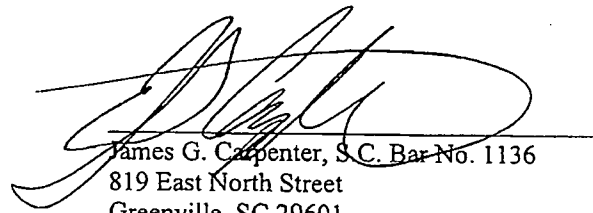
*Id.*, 94 S.C. 487, 78 S.E. 528, 530 (emphasis added). The Court ruled that the members appointed by the Governor were entitled to the pay for the office.

As to the Richland County boards, if the Governor needs to appoint any new members, the Governor's appointees can hold office under that appointment for up to two years provided the Senate confirms their appointment, or until their membership is terminated by the Senate's failure to approve. Accordingly, as a practical matter, the revival of the Richland County Election Commission and the Richland County Board of Registration could produce minor logistical or practical problems, but none sufficient to stay the order and judgment of this Court.

#### CONCLUSION

**WHEREFORE**, Plaintiffs pray the Court to deny the Senators' Motion to Alter or Amend, but to clarify the effect of its prior ruling: that the prior boards, abolished by an unconstitutional act, are revived with all their previous members, powers, and responsibilities; and to grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,  
**THE CARPENTER LAW FIRM, P.C.**



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Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,

Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

**Plaintiffs' Motion for  
Attorneys' Fees**

RICHLAND COUNTY  
FILED  
2014 JAN 13 PM 2:51  
JEANETTE W. MCGRIDE  
C.C.P. & G.S.

Plaintiffs, by their undersigned attorneys, move the Court pursuant to SCRCP 54, S.C. Code Ann. § 15-77-300 and § 15-37-10 for costs and attorneys' fees incurred in this case from the Defendant Senators. This motion incorporates a memorandum of law, and an affidavit of counsel supports it.

In any civil action brought by . . . any party who is contesting state action, . . . the court may allow the *prevailing party* to recover *reasonable attorney's fees to be taxed as court costs* against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust."

S.C. Code Ann. § 15-77-300. Thus, the citizen must prove three elements to claim attorney's fees: (1) the citizen must be the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney's fees unjust. *Heath v. County of Aiken*, 302 S.C. 178, 394

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S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002).

The award of attorneys' fees is discretionary with the trial court. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990). Plaintiffs meet the three elements for an award of attorney's fees under this statute.

**I. PLAINTIFFS ARE PREVAILING PARTIES.**

Prior to the enactment of Act 312 of 2008, the General Assembly had enacted various local legislation combining the boards of registration and election in individual counties. In 2007, the Attorney General issued an opinion to Senator Glenn McConnell that the General Assembly's very similar action with regard to Charleston County in 2003 was unconstitutional. Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888). Accordingly, early in the next term of the General Assembly, on February 14, 2008, Senators McConnell and Campsen introduced the bill that became Act 312 of 2008. Act 312 addressed all forty-six counties in the state. Act 312 did not change the substance of the previous local and special acts for individual counties, but amounts to the General Assembly's attempt to use one state-wide act to correct the Constitutional defects in all the special and single county acts related to county election commissions and county boards of registration election commissions.

Act 312 of 2008 constituted the general law of the State of South Carolina governing these appointments.

Three years later, the General Assembly enacted Act 17 of 2011, which merged the Richland County Election Commission and the Richland County Board of Registration into one body known as the Board of Elections and Voter Registration for Richland

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County. Act 17 also changed the way the Chairman of the Board is appointed and reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons are appointed to this body, and established other criteria for the subsequent appointments and retention of the members of this Board. Finally, Act 17 of 2011 abolished the Richland County Board of Voter Registration and the Richland County Election Commission. The General Assembly had returned to its unconstitutional practice of enacting special and single county legislation.

This Court found that Act 17 of 2011 violates Article VII, § 7 of the Constitution: “No laws for a specific county shall be enacted.” The Supreme Court has repeatedly found such actions of the General Assembly unconstitutional.

This Court also found that Act 17 violates Article III, § 34’s restriction on special legislation: “The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . .” S.C. Constitution, Article III, § 34. Act 17 fails to state or relate to any reason why a general law could not address those matters. Under these circumstances, the Plaintiffs have prevailed.

## **II. DEFENDANTS ACTED WITHOUT SUBSTANTIAL JUSTIFICATION.**

Defendant Senators acted without substantial justification in pressing their claims in this lawsuit with the knowledge of three opinions of the Attorney General that Act 17 was unconstitutional. In analyzing this element, courts look to whether the governmental defendant had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). De-

defendants did not have a reasonable basis in law and fact. Defendants were not "substantially justified" in pressing their claims in this lawsuit.

### III. NO SPECIAL CIRCUMSTANCES MAKE AN AWARD OF FEES UNJUST.

No special circumstances make an award of fees unjust. Plaintiffs funded this effort to enforce the Constitution. The State benefits when civic-minded citizens bring such actions. "It is very commendable that public-spirited citizens should endeavor to protect the taxpayers of a county from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of public funds." *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948), *quoting Fox v. Lantrip*, 169 Ky. 759, 185 S.W. 136, 139. The Court continued, "Citizens should be encouraged to bring suits like these." Plaintiffs' action benefitted the citizens of South Carolina by upholding the Constitution.

Accordingly, Plaintiffs meet the qualifications for an award of attorneys' fees under S.C. Code Ann. § 15-77-300.

### IV. PLAINTIFFS ARE ENTITLED TO RECOVER COSTS.

Attorneys for Plaintiffs are entitled to recover costs in this matter.

In every civil action commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party as prescribed in §§ 15-37-20, 15-37-60, 15-37-70, and 15-37-120 to 15-37-160, and Chapter 21 of Title 8, Article 3 of Chapter 11 of Title 14, Chapter 19 of Title 14, Article 7 of Chapter 23 of Title 14, Chapter 19 of Title 19, Chapter 7 of Title 22, Article 3 of Chapter 9 of Title 22, and Article 1 of Chapter 19 of Title 23, *such costs to be allowed as of course* to the attorneys for the plaintiff or defendant and all officers of the court thereto entitled accordingly as the action may terminate and to be inserted in the judgment against the losing party. *In cases in chancery the same rule as to costs shall prevail* unless otherwise ordered by the court.

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S.C. Code Ann. § 15-37-10 (emphasis added). Accordingly, Plaintiffs should be awarded costs.

**V. PLAINTIFFS' ACTUAL ATTORNEYS FEES AND COSTS ARE REASONABLE.**

As to the amount, this case presented a financial risk for Plaintiffs. The public benefited from this litigation. Plaintiffs' counsel attaches an affidavit and statements documenting attorneys' fees and costs (Affidavit and Exhibits to Affidavit). Through December 31, 2013, Plaintiffs incurred \$24,525 in attorneys' fees and \$388.22 in costs pursuing this matter. Accordingly, Plaintiffs' actual attorneys' fees and costs were reasonable, and Plaintiffs are entitled to an award of attorneys' fees and costs.

"There are six factors for the trial court to consider when determining an award of attorneys fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) *citing Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). "Upon request for attorneys fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors." *Id. citing Jackson*, 326 S.C. at 308, 486 S.E.2d at 760 and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427.

First, as to the nature, extent and difficulty of the case, Plaintiffs brought this action and spent significant time, effort and money challenging these Senators to uphold the Constitution.

Second, as to the time necessarily devoted to the case, as shown by the affidavit of Plaintiffs' counsel, Plaintiffs spent significant time in proving the unconstitutional nature of the Act.

Third, Plaintiffs' counsel are experienced attorneys of high professional standing and well known to the courts of this State. *See, inter alia, South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Fourth, counsel did not work on a contingency fee, but rather Plaintiffs paid these fees as they accrued. They should be reimbursed for their fees and expenses.

Fifth, Plaintiffs obtained beneficial results. Upholding the Constitution was the Plaintiffs' objective. Furthermore, Plaintiffs' litigation benefits every citizen by requiring the General Assembly to follow the Constitution.

Sixth, as to the customary legal fees for similar services, Plaintiffs have presented Counsel's affidavit supported by detailed time records showing that Plaintiff incurred attorneys' fees and costs. Plaintiffs respectfully suggest that based upon counsel's affidavit and the Court's familiarity with attorney fees customarily charged in this legal community, the time spent and the hourly rates requested by Counsel are reasonable. In fact, Plaintiff's Counsel have discounted their normal rates due to the public interest nature of

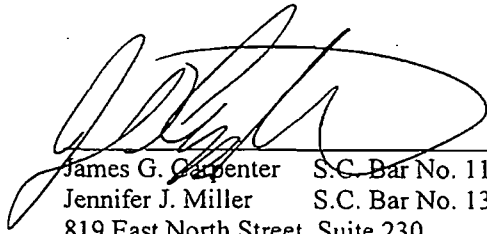
this litigation. The Court should find that Plaintiffs' actual attorneys' fees and costs were reasonable, and that Plaintiffs are entitled to a full award of attorney's fees and costs.

### CONCLUSION

In the case at bar, Plaintiffs prevailed. The Defendants were not substantially justified in pressing their claims. No other factors make an award of attorneys' fees unjust. Wherefore, Plaintiffs pray the Court for an award of actual attorneys' fees and costs from the Defendants.

January 10, 2014

Respectfully submitted,  
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter S.C. Bar No. 1136  
Jennifer J. Miller S.C. Bar No. 13611  
819 East North Street, Suite 230  
Greenville, SC 29601  
Telephone: (864) 235-1269  
Facsimile: (864) 331-3083  
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,  
Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,  
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

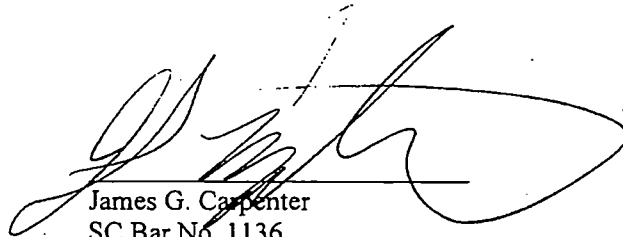
**Plaintiffs' Affidavit in Support of  
Motion for Attorneys Fees**

I, James G. Carpenter, being first duly sworn, state as follows:

1. I am lead counsel for the Plaintiffs. I graduated from the University of South Carolina School of Law in 1984. I was admitted to the Bar in South Carolina in 1985 and in North Carolina in 1986. I am also admitted to practice before the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit.
2. Since 1994, I have been practicing civil litigation in my own firm. My normal billing rate is \$300 per hour, but because of the public interest nature of this litigation, I agreed with Plaintiffs for rates \$275 per hour. My associate Jennifer Miller also billed her time at a reduced rate: \$150.00 per hour.
3. As far as I know, our firm is the only one in this State with an established taxpayer and public interest litigation. For more than fifteen years, this firm has represented Mr. Edward D. Sloan, Jr., the South Carolina Public Interest Foundation, and numerous other taxpayers.
4. We maintain daily detailed time records of our professional services. I attach to this Affidavit monthly invoices with daily work records detailing the hours I expended litigating this case.
5. Our records show attorneys' fees for time spent totaled \$24,525.00 through December 31, 2013, plus \$388.22 in costs, as shown by the attached invoices, for a total fees and costs through December 31, 2013, of \$24,913.22.
6. In the hearing in this case, the State *admitted* that the Act violated the South Carolina Constitution.

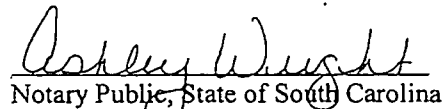
7. The record and time descriptions in this case demonstrate that Defendants vigorously contested this action, yet Plaintiffs prevailed. Plaintiffs should be granted an award of attorneys' fees under S.C. Code Ann. § 30-4-100(b).
8. The State as a whole and its citizens benefited as a result of this litigation.
9. I believe that our actual requested attorneys' fees and costs were reasonable and that Plaintiffs are entitled to a full award of attorney's fees.

Further the affiant saith naught.



James G. Carpenter  
SC Bar No. 1136  
819 East North Street  
Greenville, SC 29601  
Tel. (864) 235-1269  
Fax (864) 331-3083

Subscribed and sworn to before me  
this 10<sup>th</sup> day of January, 2014



Notary Public, State of South Carolina  
My commission expires: January 25, 2023

**819 East North Street  
Greenville, SC 29601**

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| Date       | Invoice # |
| 12/31/2013 | 5507      |

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| JG Carpenter-C...                          | Emails from and to client; | 12/12/2013                           | 0.25  | 275.00 | 68.75           |  |
| Thank You for using The Carpenter Law Firm |                            |                                      | Total |        | \$68.75         |  |
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| (864) 235-1269                             | (864) 331- 3083            | james.carpenter@carpenterlawfirm.net |       |        |                 |  |

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| JG Carpenter-C...                          | Emails from and to Rusty DePass; | 10/15/2013                           | 0.25 | 275.00 | 68.75           |         |
| Thank You for using The Carpenter Law Firm |                                  |                                      |      |        | <b>Total</b>    | \$68.75 |
| Phone #                                    | Fax #                            | E-mail                               |      |        |                 |         |
| (864) 235-1269                             | (864) 331- 3083                  | james.carpenter@carpenterlawfirm.net |      |        |                 |         |

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| Name                                       | Description                                                                                                                                                                                                                                                       | Service Date                         | QTY   | Rate            | Amount   |
| JG Carpenter-C...                          | Preparation of attorneys fees Motion and affidavit; fax to Mr. Sloan;                                                                                                                                                                                             | 9/3/2013                             | 1.25  | 275.00          | 343.75   |
| Jennifer Miller                            | conf. w/JGC re. attorneys fees motion                                                                                                                                                                                                                             | 9/4/2013                             | 0.25  | 150.00          | 37.50    |
| JG Carpenter-C...                          | Conf. with JJ Miller, review of invoices; Conf. with Mr. Sloan, re: Motion and affidavit for Attorneys fees;                                                                                                                                                      | 9/4/2013                             | 0.75  | 275.00          | 206.25   |
| JG Carpenter-C...                          | Call from Richland County Clerk's office, re: Monday's non-jury docket; revising motion/memo for fees                                                                                                                                                             | 9/5/2013                             | 0.25  | 275.00          | 68.75    |
| Jennifer Miller                            | revising motion/memo for fees                                                                                                                                                                                                                                     | 9/5/2013                             | 1.75  | 150.00          | 262.50   |
| Jennifer Miller                            | revising motion/memo for fees                                                                                                                                                                                                                                     | 9/6/2013                             | 1.5   | 150.00          | 225.00   |
| JG Carpenter-C...                          | Emails from and to Rusty DePass; Emory Smith                                                                                                                                                                                                                      | 9/6/2013                             | 0.5   | 275.00          | 137.50   |
| JG Carpenter-C...                          | Fax and emails from client; tel. confs. with Mr. Sloan; Revisions to Motion for Attorneys fees and affidavit;                                                                                                                                                     | 9/8/2013                             | 1     | 275.00          | 275.00   |
| JG Carpenter-C...                          | Calls and faxes from and to Mr. Sloan; Calls from and to Mike Hitchcock; tel. confs. with Client; Revisions to Motion and affidavit for fees; Receipt & review of Motion to Alter or Amend the Judgment; Drafting Memo in Opposition to Motion to Alter or Amend; | 9/9/2013                             | 4     | 275.00          | 1,100.00 |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                                                                                                                                   |                                      | Total |                 |          |
| Phone #                                    | Fax #                                                                                                                                                                                                                                                             | E-mail                               |       |                 |          |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                                                                                                                                                   | james.carpenter@carpenterlawfirm.net |       |                 |          |

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| JG Carpenter-C...                          | Revisions to Memo in Opposition to Motion to Alter or Amend; fax from Mr. Sloan; Tel. conf. with News media, re: Motion to Alter or Amend; call and email from Rusty DePass; Conf. with JJ Miller; Faxes to Mr. Sloan; | 9/10/2013                            | 2.25 | 275.00          | 618.75     |
| Jennifer Miller                            | revising memorandum of law                                                                                                                                                                                             | 9/10/2013                            | 1    | 150.00          | 150.00     |
| JG Carpenter-C...                          | Emails from and to Court; emails to opposing counsel and clients; filing and service of Memo in opposition; Faxes from Mr. Sloan;                                                                                      | 9/11/2013                            | 0.75 | 275.00          | 206.25     |
| JG Carpenter-C...                          | Emails from opposing counsel, Judge Cooper; faxes and emails to client; Tel. conf. with Mr. Sloan; Tel. conf. with Mike Hitchcock; Email to Judge Cooper, opposing counsel;                                            | 9/12/2013                            | 1.5  | 275.00          | 412.50     |
| JG Carpenter-C...                          | Emails from and to Rusty DePass;                                                                                                                                                                                       | 9/18/2013                            | 0.25 | 275.00          | 68.75      |
| JG Carpenter-C...                          | Call to Mike Hitchcock;                                                                                                                                                                                                | 9/26/2013                            | 0.25 | 275.00          | 68.75      |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                                                                                        |                                      |      | <b>Total</b>    | \$4,181.25 |
| Phone #                                    | Fax #                                                                                                                                                                                                                  | E-mail                               |      |                 |            |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                                                                                                        | james.carpenter@carpenterlawfirm.net |      |                 |            |

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| Name                                       | Description                                                                                                            | Service Date                         | QTY   | Rate            | Amount   |
| JG Carpenter-C...                          | Work on Reply Memorandum on Standing and Constitutional violations;                                                    | 8/2/2013                             | 1.75  | 275.00          | 481.25   |
| JG Carpenter-C...                          | Call and fax from Mr. Sloan; research on standing and single county cases;                                             | 8/2/2013                             | 2.5   | 275.00          | 687.50   |
| JG Carpenter-C...                          | Research on Single County cases; Drafting Reply Memo; faxes to Mr. Sloan; emails to client; Tel. conf. with Mr. Sloan; | 8/3/2013                             | 5.5   | 275.00          | 1,512.50 |
| JG Carpenter-C...                          | Call and fax from Mr. Sloan, re: Reply Memo; Research and revisions to Reply Memo; fax to Mr. Sloan;                   | 8/4/2013                             | 2     | 275.00          | 550.00   |
| JG Carpenter-C...                          | Tel. conf. with Mr. Sloan; email to Court, opposing counsel, client; filing and service of Reply Memo;                 | 8/5/2013                             | 1.5   | 275.00          | 412.50   |
| JG Carpenter-C...                          | Preparation for hearings on Motion for Summary Judgment;                                                               | 8/8/2013                             | 1     | 275.00          | 275.00   |
| JG Carpenter-C...                          | Trip to Columbia to argue cross motions for Summary Judgment;                                                          | 8/9/2013                             | 5.75  | 275.00          | 1,581.25 |
| JG Carpenter-C...                          | Drafting proposed order; fax to Mr. Sloan;                                                                             | 8/10/2013                            | 1.5   | 275.00          | 412.50   |
| JG Carpenter-C...                          | Call from Mr. Sloan; email to Rusty DePass; Revisions to proposed order; faxes to Mr. Sloan                            | 8/12/2013                            | 1.75  | 275.00          | 481.25   |
| Thank You for using The Carpenter Law Firm |                                                                                                                        |                                      | Total |                 |          |
| Phone #                                    | Fax #                                                                                                                  | E-mail                               |       |                 |          |
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| JG Carpenter-C...                          | Tel. conf. with Mr. Sloan; email to Court and opposing counsel, with proposed order;                    | 8/13/2013                            | 0.5  | 275.00       | 137.50            |
| JG Carpenter-C...                          | Receipt & review of proposed order from Michael Hitchcock; fax to Mr. Sloan; emails to and from client; | 8/19/2013                            | 0.75 | 275.00       | 206.25            |
| Jennifer Miller                            | conf. w/JGC; revising outline of argument; reviewing changes made; revision                             | 8/20/2013                            | 1.25 | 150.00       | 187.50            |
| JG Carpenter-C...                          | Receipt & review of Order and Judgment; fax to Mr. Sloan; email to client;                              | 8/29/2013                            | 0.5  | 275.00       | 137.50            |
| Jennifer Miller                            | conf. w/JGC                                                                                             | 8/29/2013                            | 0.25 | 150.00       | 37.50             |
| JG Carpenter-C...                          | Fax from Mr. Sloan; tel. conf. with client; tel. conf. with news media;                                 | 8/30/2013                            | 0.5  | 275.00       | 137.50            |
| JG Carpenter-C...                          | Faxes and emails from and to Client; tel. conf. with Client;                                            | 9/3/2013                             | 0.5  | 275.00       | 137.50            |
|                                            | Roundtrip Gnlv to Cola for the argument on cross motions for summary                                    | 8/12/2013                            |      | 113.22       | 113.22            |
| Thank You for using The Carpenter Law Firm |                                                                                                         |                                      |      | <b>Total</b> | <b>\$7,488.22</b> |
| Phone #                                    | Fax #                                                                                                   | E-mail                               |      |              |                   |
| (864) 235-1269                             | (864) 331- 3083                                                                                         | james.carpenter@carpenterlawfirm.net |      |              |                   |

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08/08/2013

| CLIENT MATTER                              |                                                                                                                                                                                 |                                      |       | TERMS           |        |
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| Name                                       | Description                                                                                                                                                                     | Service Date                         | QTY   | Rate            | Amount |
| JG Carpenter-C...                          | Review of Richland County Rosters; emails to counsel;                                                                                                                           | 7/10/2013                            | 0.25  | 275.00          | 68.75  |
| JG Carpenter-C...                          | Receipt & review of notice of Motions Roster, and Non-Jury Trial Roster; fax to Mr. Sloan; email to opposing counsel; Tel. conf. with Mr. Sloan; email from Emery Smith;        | 7/16/2013                            | 0.5   | 275.00          | 137.50 |
| JG Carpenter-C...                          | E-mails to and from Judge Manning and opposing counsel regarding conflicting notices, and request to be excused from the roster meeting; e-mails to client; faxes to Mr. Sloan; | 7/17/2013                            | 1     | 275.00          | 275.00 |
| JG Carpenter-C...                          | Emails from and to Rusty DePass;                                                                                                                                                | 7/18/2013                            | 0.25  | 275.00          | 68.75  |
| Jennifer Miller                            | conf. w/JGC re. summary judgment hearing                                                                                                                                        | 7/18/2013                            | 0.25  | 150.00          | 37.50  |
| JG Carpenter-C...                          | Memo to JJ Miller, re: preparation of case authorities for motions hearing;                                                                                                     | 7/20/2013                            | 0.5   | 275.00          | 137.50 |
| Jennifer Miller                            | summary judgment hearing research and preparation                                                                                                                               | 7/22/2013                            | 1.5   | 150.00          | 225.00 |
| Jennifer Miller                            | summary judgment hearing research and preparation                                                                                                                               | 7/23/2013                            | 2     | 150.00          | 300.00 |
| Jennifer Miller                            | summary judgment hearing research and preparation                                                                                                                               | 7/24/2013                            | 2.25  | 150.00          | 337.50 |
| Jennifer Miller                            | summary judgment hearing research and preparation                                                                                                                               | 7/25/2013                            | 2.25  | 150.00          | 337.50 |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                                                 |                                      | Total |                 |        |
| Phone #                                    | Fax #                                                                                                                                                                           | E-mail                               |       |                 |        |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                                                                 | james.carpenter@carpenterlawfirm.net |       |                 |        |

**The Carpenter Law Firm P.C.**

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| Jennifer Miller                            | summary judgment hearing research and preparation                                                                                                                                                    | 7/26/2013    | 2.5  | 150.00       | 375.00            |
| JG Carpenter-C...                          | Email from client;                                                                                                                                                                                   | 7/29/2013    | 0.25 | 275.00       | 68.75             |
| JG Carpenter-C...                          | Receipt of Summary Judgment Motion and Memo from Hitchcock; fax to Mr. Sloan; email to Judge;                                                                                                        | 7/31/2013    | 0.25 | 275.00       | 68.75             |
| JG Carpenter-C...                          | Email from Emory Smith; faxes from and to Mr. Sloan; Tel. conf. w/ Mr. Sloan; Review of legal memos; emails to and from client; Receipt & Review of notices from Court; faxes and emails to clients; | 8/1/2013     | 2    | 275.00       | 550.00            |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                                                                      |              |      | <b>Total</b> | <b>\$2,987.50</b> |

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|----------------|----------------|--------------------------------------|
| (864) 235-1269 | (864) 331-3083 | james.carpenter@carpenterlawfirm.net |

# The Carpenter Law Firm P.C.

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Greenville, SC 29601

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| JG Carpenter-C...                          | Receipt & review of Notice of Hearing from Clerk of Court; tel. conf. with Mike Hitchcock; Emails to and from Emory Smith; faxes to Mr. Sloan; | 6/3/2013                             | 0.5  | 275.00       | 137.50          |
| JG Carpenter-C...                          | Receipt & review of request for continuance; fax to Mr. Sloan; Receipt & Review of Notice from Court;                                          | 6/6/2013                             | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Call from Clerk of Court's office, re: request for continuance;                                                                                | 6/7/2013                             | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Emails from and to Emory Smith, Mike Hitchcock; fax to Mr. Sloan;                                                                              | 6/10/2013                            | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Review of Summary Judgment Motion and Memo; email to opposing counsel;                                                                         | 6/12/2013                            | 0.5  | 275.00       | 137.50          |
| JG Carpenter-C...                          | Email from Emory Smith;                                                                                                                        | 6/17/2013                            | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Emails from and to Mike Hitchcock, Emory Smith; Tel. conf. with client;                                                                        | 6/18/2013                            | 1.25 | 275.00       | 343.75          |
| JG Carpenter-C...                          | Letter from Mike Hitchcock; fax to Mr. Sloan;                                                                                                  | 6/19/2013                            | 0.25 | 275.00       | 68.75           |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                |                                      |      | <b>Total</b> | <b>\$962.50</b> |
| Phone #                                    | Fax #                                                                                                                                          | E-mail                               |      |              |                 |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                                | james.carpenter@carpenterlawfirm.net |      |              |                 |

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06/12/2013

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| Name                                       | Description                                                                                                                 | Service Date                         | QTY  | Rate         | Amount          |
| JG Carpenter-C...                          | Emails from and to Emory Smith;                                                                                             | 5/3/2013                             | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Call to Mr. Sloan, re: Roster Meeting;                                                                                      | 5/5/2013                             | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Emails from and to Emory Smith; fax to Mr. Sloan; Receipt & review of filed copy of Motion and receipt from Clerk of Court; | 5/6/2013                             | 0.5  | 275.00       | 137.50          |
| JG Carpenter-C...                          | Receipt & review of Notice of Non-Jury Trial Roster; fax to Mr. Sloan; Tel.conf. with Mr. Sloan;                            | 5/17/2013                            | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Review of Notice of Roster Meeting; email to opposing counsel;                                                              | 5/20/2013                            | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Email from Emory Smith; fax to Mr. Sloan;                                                                                   | 5/21/2013                            | 0.25 | 275.00       | 68.75           |
| Thank You for using The Carpenter Law Firm |                                                                                                                             |                                      |      | <b>Total</b> | \$481.25        |
| Phone #                                    | Fax #                                                                                                                       | E-mail                               |      |              |                 |
| (864) 235-1269                             | (864) 331-3083                                                                                                              | james.carpenter@carpenterlawfirm.net |      |              |                 |

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819 East North Street  
Greenville, SC 29601

## INVOICE

| Date      | Invoice # |
|-----------|-----------|
| 4/30/2013 | 5326      |

Bill To  
SCPIF  
PO Box 25999  
Greenville, SC 29516-0999

**PAID**  
**05/24/2013**

| CLIENT MATTER                              |                                                                                                                                        |                                      |       | TERMS           |        |
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|                                            |                                                                                                                                        |                                      |       | Due by the 15th |        |
| Name                                       | Description                                                                                                                            | Service Date                         | QTY   | Rate            | Amount |
| JJ Miller--\$175                           | conf. w/JGC; review and revision of S.J. memo                                                                                          | 4/8/2013                             | 1.5   | 150.00          | 225.00 |
| JG Carpenter-C...                          | Drafting Memorandum of Law in Support of Motion for Summary Judgment; fax to Mr. Sloan;                                                | 4/9/2013                             | 1     | 275.00          | 275.00 |
| Jennifer Miller                            | review of JGC's global revision of summary judgment memorandum of law; proofreading and revision                                       | 4/9/2013                             | 2.5   | 150.00          | 375.00 |
| JG Carpenter-C...                          | Receipt & Review of Notice of Roster Meeting; Letter to Court and opposing counsel, re: scheduling and protection; faxes to Mr. Sloan; | 4/10/2013                            | 0.75  | 275.00          | 206.25 |
| Jennifer Miller                            | additional revision of s.j. memo                                                                                                       | 4/10/2013                            | 2.75  | 150.00          | 412.50 |
| JG Carpenter-C...                          | Revisions to memorandum of law in support of motion for summary judgment;                                                              | 4/11/2013                            | 2     | 275.00          | 550.00 |
| Jennifer Miller                            | review of JGC's further revision; proofreading and revision; conf. w/JGC                                                               | 4/11/2013                            | 2.25  | 150.00          | 337.50 |
| Jennifer Miller                            | final revision of s.j. memo                                                                                                            | 4/12/2013                            | 1     | 150.00          | 150.00 |
| JG Carpenter-C...                          | Review and revisions to Summary Judgment Memo; email to opposing counsel; fax to Mr. Sloan;                                            | 4/16/2013                            | 1     | 275.00          | 275.00 |
| JG Carpenter-C...                          | Receipt & review of emails from Emery Smith, Mike Hitchcock; fax to Mr. Sloan;                                                         | 4/17/2013                            | 0.25  | 275.00          | 68.75  |
| Thank You for using The Carpenter Law Firm |                                                                                                                                        |                                      | Total |                 |        |
| Phone #                                    | Fax #                                                                                                                                  | E-mail                               |       |                 |        |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                        | james.carpenter@carpenterlawfirm.net |       |                 |        |

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| Name                                       | Description                                                                                                                                                            | Service Date                         | QTY  | Rate   | Amount          |  |
| Jennifer Miller                            | further revision of memorandum of law in support of summary judgment;                                                                                                  | 4/23/2013                            | 1.5  | 150.00 | 225.00          |  |
| JG Carpenter-C...                          | Revisions to Memo in Support of Motion for Summary Judgment; Faxes to Mr. Sloan; Drafting Motion for Summary Judgment, Certificate of Service, and Motion Cover Sheet; | 4/24/2013                            | 1.75 | 275.00 | 481.25          |  |
| Jennifer Miller                            | final proofreading of s.j. motion;                                                                                                                                     | 4/24/2013                            | 0.75 | 150.00 | 112.50          |  |
| JG Carpenter-C...                          | Revision, filing and service of Motion for Summary Judgment; email to opposing counsel; fax and email to clients;                                                      | 4/26/2013                            | 1.5  | 275.00 | 412.50          |  |
|                                            |                                                                                                                                                                        | 4/26/2013                            |      | 25.00  | 25.00           |  |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                                        |                                      |      | Total  | \$4,131.25      |  |
| Phone #                                    | Fax #                                                                                                                                                                  | E-mail                               |      |        |                 |  |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                                                        | james.carpenter@carpenterlawfirm.net |      |        |                 |  |

**819 East North Street  
Greenville, SC 29601**

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| Date      | Invoice # |
| 2/28/2013 | 5268      |

Bill To

SCPIF  
PO Box 25999  
Greenville, SC 29516-0999

**PAID**  
03/15/2013

CLIENT MATTER

## TERMS

Due by the 15th

| Name              | Description                                                  | Service Date | QTY  | Rate   | Amount |
|-------------------|--------------------------------------------------------------|--------------|------|--------|--------|
| JG Carpenter-C... | Review of file; email to opposing counsel; fax to Mr. Sloan; | 2/27/2013    | 0.75 | 275.00 | 206.25 |

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|              |                 |
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| <b>Total</b> | <b>\$206.25</b> |
|--------------|-----------------|

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| (864) 235-1269 | (864) 331- 3083 | james.carpenter@carpenterlawfirm.net |

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**INVOICE**

| Date      | Invoice # |
|-----------|-----------|
| 1/31/2013 | 5249      |

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| Bill To                   |
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| PO Box 25999              |
| Greenville, SC 29516-0999 |

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**03/15/2013**

| CLIENT MATTER                              |                   |                                      |      | TERMS           |                      |
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|                                            |                   |                                      |      | Due by the 15th |                      |
| Name                                       | Description       | Service Date                         | QTY  | Rate            | Amount               |
| JG Carpenter-C...                          | Fax to Mr. Sloan; | 1/3/2013                             | 0.25 | 275.00          | 68.75                |
| Thank You for using The Carpenter Law Firm |                   |                                      |      |                 | <b>Total</b> \$68.75 |
| Phone #                                    | Fax #             | E-mail                               |      |                 |                      |
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**The Carpenter Law Firm P.C.**

819 East North Street  
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**INVOICE**

| Date       | Invoice # |
|------------|-----------|
| 12/31/2012 | 5229      |

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| Bill To                   |
| SCPIF                     |
| PO Box 25999              |
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**PAID**  
**01/10/2013**

| CLIENT MATTER                              |                                                                                                             |                                      |      |              | TERMS           |
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|                                            |                                                                                                             |                                      |      |              | Due by the 15th |
| Name                                       | Description                                                                                                 | Service Date                         | QTY  | Rate         | Amount          |
| JG Carpenter-C...                          | Fax from Mr. Sloan;                                                                                         | 12/5/2012                            | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Fax from Mr. Sloan, re: election commission;                                                                | 12/7/2012                            | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Receipt & Review of email from Emery Smith; fax to Mr. Sloan; Tel. conf. with Mr. Sloan; email to client;   | 12/19/2012                           | 0.5  | 275.00       | 137.50          |
| JG Carpenter-C...                          | Emails from Rusty DePass;                                                                                   | 12/19/2012                           | 0.25 | 275.00       | 68.75           |
| JG Carpenter-C...                          | Receipt & review of Answer of Senators; fax to Mr. Sloan; Tel. conf. with Mr. Sloan; email to Rusty DePass; | 12/20/2012                           | 0.75 | 275.00       | 206.25          |
| Thank You for using The Carpenter Law Firm |                                                                                                             |                                      |      | <b>Total</b> | <b>\$550.00</b> |
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| Date       | Invoice # |
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| 11/30/2012 | 5210      |

| Bill To                                                 |
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| SCPIF-STIB<br>PO Box 25999<br>Greenville, SC 29516-0999 |

| CLIENT MATTER     |                                                                                                                                                                                                                                                            |                                      |       | TERMS           |          |
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|                   |                                                                                                                                                                                                                                                            |                                      |       | Due by the 15th |          |
| Name              | Description                                                                                                                                                                                                                                                | Service Date                         | QTY   | Rate            | Amount   |
| JG Carpenter-C... | Tel. confs. with clients; Drafting complaint; fax to Mr. Sloan;                                                                                                                                                                                            | 11/15/2012                           | 3.75  | 275.00          | 1,031.25 |
| IJM-200           | revising complaint                                                                                                                                                                                                                                         | 11/15/2012                           | 1     | 200.00          | 200.00   |
| JG Carpenter-C... | Emails from and to Rusty DePass; faxes to Mr. Sloan;                                                                                                                                                                                                       | 11/16/2012                           | 0.5   | 275.00          | 137.50   |
| JG Carpenter-C... | E-mails from and to Rusty DePass; faxes from and to Mr. Sloan; research on single County cases;                                                                                                                                                            | 11/17/2012                           | 1.5   | 275.00          | 412.50   |
| JG Carpenter-C... | Faxes to and from Mr. Sloan;                                                                                                                                                                                                                               | 11/18/2012                           | 0.25  | 275.00          | 68.75    |
| JG Carpenter-C... | E-mails from and to Rusty DePass; revisions to complaint;                                                                                                                                                                                                  | 11/19/2012                           | 0.75  | 275.00          | 206.25   |
| JG Carpenter-C... | Fax from Mr. Sloan; revisions to Complaint; Drafting Summons, Civil Action Cover Sheet; Cover letter; Tel. confs. with Mr. Sloan; Email from Rusty DePass; filing and service of Pleadings; tel. calls to Emery Smith, Mike Hitchcock; Faxes to Mr. Sloan; | 11/20/2012                           | 3     | 275.00          | 825.00   |
| JG Carpenter-C... | Tel. Confs. with Mr. Sloan; Andy Shane; receipt & review of acceptance of service from Mike Hitchcock; fax to Mr. Sloan;                                                                                                                                   | 11/21/2012                           | 0.75  | 275.00          | 206.25   |
| JG Carpenter-C... | Review of article; call from Mr. Sloan;                                                                                                                                                                                                                    | 11/26/2012                           | 0.25  | 275.00          | 68.75    |
|                   |                                                                                                                                                                                                                                                            |                                      | Total |                 |          |
| Phone #           | Fax #                                                                                                                                                                                                                                                      | E-mail                               |       |                 |          |
| (864) 235-1269    | (864) 331- 3083                                                                                                                                                                                                                                            | james.carpenter@carpenterlawfirm.net |       |                 |          |

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| 11/30/2012 | 5210      |

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| CLIENT MATTER     |                                                                                                                                                                                 |                                      |      |              | TERMS             |  |
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| Name              | Description                                                                                                                                                                     | Service Date                         | QTY  | Rate         | Amount            |  |
| JG Carpenter-C... | faxes to and from Mr. Sloan; Email from Emory Smith; receipt of filed complaint from Clerk; Letter to Emory Smith; email to opposing counsel; e-mails to and from Rusty DePass; | 11/27/2012                           | 1    | 275.00       | 275.00            |  |
| JG Carpenter-C... | Tel. conf. with Mr. Sloan; fax to Mr. Sloan;                                                                                                                                    | 11/28/2012                           | 0.25 | 275.00       | 68.75             |  |
| JG Carpenter-C... | Receipt & review of letter of attorney general accepting service; fax to Mr. Sloan;                                                                                             | 11/30/2012                           | 0.25 | 275.00       | 68.75             |  |
|                   |                                                                                                                                                                                 | 11/20/2012                           |      | 150.00       | 150.00            |  |
|                   |                                                                                                                                                                                 |                                      |      | <b>Total</b> | <b>\$3,718.75</b> |  |
| Phone #           | Fax #                                                                                                                                                                           | E-mail                               |      |              |                   |  |
| (864) 235-1269    | (864) 331- 3083                                                                                                                                                                 | james.carpenter@carpenterlawfirm.net |      |              |                   |  |

STATE OF SOUTH CAROLINA )  
 )  
 )  
 COUNTY OF RICHLAND )  
 )  
 )  
 South Carolina Public Interest )  
 Foundation, and William B. DePass, )  
 Jr., Individually, and on behalf of all )  
 similarly situated, )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Senator John E. Courson, Senator )  
 Darrell Jackson, Senator Joel Lourie, )  
 Senator John L. Scott, Jr., and The )  
 State of South Carolina, )  
 Defendants. )

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-40-7790

DEFENDANT'S REPLY IN OPPOSITION TO  
 PLAINTIFFS' MOTION FOR FEES AND COSTS

RICHLAND COUNTY  
 FILED  
 2012 SEP 27 PM 2:04  
 JENNIFER L. HOSKINS  
 CLERK OF COURT

The Defendant Senators, by and through their undersigned Counsel, provide the following Reply in Opposition to Plaintiffs' Motion for Fees and Costs which incorporates a Memorandum of Law and ask the Court to deny the Plaintiffs' Motion for Fees and Costs.

#### ARGUMENT

*(1) Individual members of the General Assembly are immune from a recovery for attorney's fees and costs under Sections 15-77-300 and 15-37-10 of the South Carolina Code.*

The Doctrine of Legislative Immunity provides federal, state, and local officials with immunity for any action taken "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). As Justice Frankfurter stated in *Tenney*: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

The South Carolina Supreme Court is in accord with the United States Supreme Court and has recognized that legislators enjoy Legislative Immunity for their actions taken within the scope of their legislative duties. *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979). In *Richardson*, a local official sued a state legislator for defamatory remarks. The court held that the state legislator was protected by Legislative Immunity because he made the statement during the conduct of legislative activities. In so holding, the Court stated: "A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Id.* at 146, 255 S.E.2d at 343.

In the present case, the actions taken by the Defendants were wholly within the sphere of their legislative duties. The present action simply challenges the constitutionality of Act 17 of 2011 and does not allege that the Defendants took any action other than their involvement in the legislative process. The actions of the Defendants were limited to the introduction of the bill that ultimately became Act 17 of 2011 and voting for the bill on the floor of the Senate, which squarely falls within the scope of their legislative responsibilities.

Thus, the Doctrine of Legislative Immunity would apply and prevent the recovery of fees and costs against the individual members of the Senate.

(2) *Section 15-77-300 applies to state agencies and simply does not apply to members of the General Assembly.*

Section 15-77-300 provides in relevant part:

(A) In any civil action brought by the State, any political subdivision of the State or **any party who is contesting state action**, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against **the appropriate agency** if:

(1) the court finds that **the agency** acted without substantial justification in pressing its claim against the party; and

(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction. [emphasis added]  
S.C. Code Ann. § 15-77-300 (Supp. 2013).

As the Court is well aware, the cardinal rule of statutory construction is to ascertain the intent of the General Assembly. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), citing *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993). When interpreting a statute the Court must give words their plain and ordinary meaning. *Id.* The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 412 S.E.2d 377 (1991). Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992).

Section 15-77-300 allows a prevailing party who is contesting "state action" to recover reasonable costs and fees. However, the statute allows fees and costs to be recovered against "the appropriate agency" and only if "the agency" acted without substantial justification. Undoubtedly, the plain and ordinary meaning of "agency" is a "state agency" operating within the executive branch of government.<sup>1</sup> Clearly, when the highlighted language is construed

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<sup>1</sup> See, Section 1-23-10(1): "Agency" or "State Agency" means each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases. S.C. Code Ann. § 1-23-10 (Supp. 2013).

together. the statute is intended to allow a prevailing party to recover costs and fees from a state agency or department, not individual members of the General Assembly.

The contention that "agency" means "state agency" is also supported by the Court's analysis of substantial justification in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). In that case, the Court reasoned: "in deciding whether a **state agency** acted with substantial justification, the relevant question is whether the **agency's** position in litigating the case had a reasonable basis in law and fact." [emphasis added] *Id.* at 445, 326.

Further, fee-shifting statutes are an exception to the American Rule that provides that litigants are responsible for their own fees. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997)("Attorney's fees are not recoverable unless authorized by contract or statute.") Further, government fee-shifting statutes also constitute a waiver of sovereign immunity. *M.A. Mortenson Co. v. U.S.*, 996 F.2d 1177, 1180 (D.C. Cir 1993). As a result, government fee-shifting statutes should be strictly construed to only provide the relief necessary to serve the purpose of providing litigants access to the courts to challenge governmental action. *See U.S. v. Horn*, 29 F.3d 754, 762 (1st Cir. 1994)(analyzing claim for fees against federal government requires application of rule that "a waiver of sovereign immunity always is to be construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires.")

Obviously, the purpose of Section 15-77-300 is to ease access to the Courts for litigants who are challenging action taken by a state agency against them. This purpose supports a sound public policy of allowing litigants aggrieved by a state agency's action to seek redress in the courts when the litigant might not otherwise be able to afford to bring suit. However, there is no indication that this statute is intended to provide a cost recovery for litigants simply engaging in

an intellectual exercise by merely challenging the constitutionality of a provision of law that the litigants do not even allege aggrieves them personally.

Further, there is no indication from the plain language of this statute that the General Assembly ever intended to waive legislative immunity and subject individual members of the General Assembly to a recovery of fees and costs for actions taken solely within the sphere of their legislative duties. Section 15-77-300 does not even have to be construed in the light most favorable to the Defendants to ascertain that there is no reasonable construction of the terms "appropriate agency" or "agency" that would support any contention that this section applies to an individual or a group of members of the General Assembly. Any construction that attempts to "shoehorn" members of the General Assembly into the meaning of "agency" would simply transverse the bounds of logic and reason.

Thus, the Plaintiffs' Motion for Fees and Costs should be dismissed because Section 15-77-300 is not intended to apply to individual members of the General Assembly.

*(3) The Plaintiffs would not be entitled to costs and fees even if they had named the "appropriate agency" charged with executing Act 17 of 2011 as a party.*

In the present case, the Plaintiffs named the Defendant Senators and the State of South Carolina as parties, but for some unknown reason, declined to name the combined Richland County Board of Registration and Elections created by Act 17 of 2011. However, even if they had named the combined board, which is "the appropriate agency", as a party, they would still not be entitled to fees and costs.

The Plaintiffs fail to argue the appropriate standard for the award of fees and costs pursuant to Section 15-77-300. In order to be entitled to fees and costs, the Plaintiffs must be the

prevailing party and the agency must have been without substantial justification in pressing its claim against the Plaintiffs.

Prior to 2010, Section 15-77-300 provided no guidance to the Court to determine the existence of substantial justification. Correspondingly, the Court defined substantial justification as: "In deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and fact." *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). This is the standard the Plaintiffs argue in their motion.

However, in 2010, the General Assembly amended Section 15-77-300 to provide guidance as to what constitutes substantial justification. The General Assembly added the portion of the statute that provides: "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction." S.C. Code Ann. § 15-77-300 (Supp. 2013).

The Plaintiffs fail to address and provide no basis to overcome this new presumption. There is no doubt the General Assembly intended to change the analysis by which the Court determines the existence of substantial justification. As a result, the general rule applies which states that "when the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intends to change the existing law." *Key Corp. Capital v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007). Thus, the Plaintiffs' reliance on the previous standard is misplaced and does not support a grant of fees and costs pursuant to the current standard.

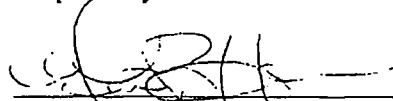
Further, under the current standard, there is no plausible argument the Plaintiffs could make to overcome the presumption. The Plaintiffs' entire case centers on whether Act 17 of 2011 which combined the Richland County Boards of Registration and Elections is constitutional. Even if the combined board were a party, it would simply be defending its authority to exist under a statute that had not been declared unconstitutional. Certainly, this action would fall squarely within the presumption provided by the 2010 amendment to Section 15-77-300.

Thus, even if the combined board, which is the appropriate agency for purposes of Section 15-77-300, had been a party to this suit and defended the constitutionality of Act 17 of 2011, the Plaintiffs would not have been able to recover costs and fees. Therefore, if the Plaintiffs would not be entitled to costs and fees from "the appropriate agency", the conclusion that they are not entitled to costs and fees from any other party is inescapable. As a result, the Court should deny the Plaintiffs' motion.

### CONCLUSION

For the reasons stated above, the Plaintiffs' Motion for Fees and Costs should be denied.

Respectfully submitted,



Michael R. Hitchcock  
P.O. Box 142  
Columbia, South Carolina 29202  
(803) 212-6300  
Attorney for Defendants Courson, Jackson,  
Lourie, and Scott

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situ-  
ated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,  
Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

**Reply in Support of  
Plaintiffs' Motion for  
Attorneys' Fees**

FILED-5-11-10-11

Plaintiffs, by their undersigned attorneys, submit this Reply in Support of their Mo-  
tion for Costs and Attorneys' Fees incurred in this case from the Defendant Senators.

#### **Statement of the Case**

Act 312 of 2008 addressed the composition and appointment of County election commissions and County boards of voter registration on a comprehensive basis for all the counties in the State of South Carolina. Three years later, the General Assembly enacted Act 17 of 2011, which merged the Richland County Election Commission and the Richland County Board of Registration into one body known as the Board of Elections and Voter Registration for Richland County. Act 17 also changed the way the Chairman of the Board is appointed and reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons are appointed to this body, and established other criteria for the subsequent appointments and retention of the members of this Board. Finally, Act 17 of 2011 abolished the Richland County Board of Voter Registration and the Richland County Election Commission. The General Assembly had returned to its unconstitutional practice of enacting special and single county legislation.

This Court found that Act 17 of 2011 violates Article VII, § 7 of the Constitution: “No laws for a specific county shall be enacted.” The Supreme Court has repeatedly found such actions of the General Assembly unconstitutional. This Court also found that Act 17 violates Article III, § 34’s restriction on special legislation: “The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . .” S.C. Constitution, Article III, § 34. Act 17 fails to state or relate to any reason why a general law could not address those matters.

Plaintiffs moved for attorneys’ fees and the Defendant Senators opposed the motion. The Senators make three arguments: first, they argue that they are immune from the payment of attorneys’ fees; second, they argued that the statute does not apply to them; and third, they argue that the Plaintiffs did not name the combined Board as a defendant, and that they could not recover from the combined Board anyway. Plaintiffs submit this Reply to the arguments of the Defendants.

**I. Defendants Are Not Immune from the Payment of Attorneys’ Fees.**

The Senators contend that they are immune from paying an award of attorneys’ fees and costs. However, Plaintiffs did not bring this case against private parties, but against members of the South Carolina General Assembly in their official capacities (Complaint, par. 3), and the Senators admitted that they were sued in their official capacities (Answer of the Senators, par. 3).

Suing a Senator in his official capacity is simply another way of naming the State of South Carolina as a Defendant. “Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.” Monell v. New York City Department of Social Services, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56

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L.Ed.2d 611 (1978). Plaintiffs alleged nothing against them for any personal misconduct.

Accordingly, the Senators were named only in their official capacities.

South Carolina Courts have awarded fees against public officials acting in their official capacities under S.C. Code Ann. § 15-77-300. Heath v. County of Aiken, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney's fees under § 15-77-300 against the County and County Council members); Eargle v. Horry County, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney's fees under § 15-77-300 against the County and County Administrator); Simpkins v. City of Gaffney, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney's fees under § 15-77-300 against the City, City Council members, and City Administrator). Thus, an award of fees against the Senators in their official capacities would not be unprecedented or even unusual.

Defendants in Layman v. State attempted to make a similar argument at the Supreme Court in opposition to an attorneys' fees claim under § 15-77-300. The Supreme Court reasoned as follows:

In our view, separating the liability of the State and the Retirement System is simply an attempt by these parties to bar any potential for a fee award, and this Court refuses to compartmentalize the actions of the State and the Retirement System in this manner. Instead, we believe the overriding principle of the state action statute is that as a state agency, the Retirement System is obligated to carry out the instructions of the State. **Furthermore, as a governing body, the State is ultimately responsible for the actions of its agencies.** That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is "contesting **state action**." S.C. Code Ann. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that either the State or the Retirement System may be liable for attorneys' fees under the statute.

Id., 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008) (emphasis added).

Legislative policy behind § 15-77-300 encourages South Carolinians to challenge unlawful governmental actions in court. Reimbursing citizens' litigation costs when they

prevail encourages the citizens to pursue legitimate public interest actions and discourages governments from defending the indefensible in court. Therefore, the provision should be interpreted broadly to effect its beneficial and remedial purposes. Plaintiffs possess a common law and constitutional right to challenge an act of the General Assembly as being unconstitutional. Accordingly, the legislative immunity defense is not applicable.

## **II. The Attorneys' Fees Statute Applies to the Senators' Litigation Conduct.**

The Senators contend that § 15-77-300 does not apply to them. This is a novel interpretation of the statute. Section 15-77-300 applies to civil actions "brought by *the State* . . . or a party who is contesting *state action*" *Id.* (emphasis added). The Senate is the State. An Act of the General Assembly is a State action. The Supreme Court has awarded attorneys' fees under S.C. Code Ann. § 15-77-300 to plaintiffs who successfully challenged an unlawful Act of the General Assembly. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

The award of attorneys' fees is not based on the conduct of the Senators acting as legislators, but rather it is based on the conduct of the Senators in defending an indefensible lawsuit. "Rather, the substantial justification inquiry in this case is based solely on the State's and the Retirement System's maintenance of litigation in which they defended a breach of their contract with the TERI participants." *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

In deciding whether a state agency acted with substantial justification, courts must only determine whether the agency's position in litigating the case has a reasonable basis in law and in fact. *Id.* at 542, 405 S.E.2d at 832. For this reason, the factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State's and the Retirement System's defense of Act 153's contractual validity in the underlying litigation. The circuit judge's finding that the State's enactment of Act 153 lacked substantial justification was not

only completely unrelated to the relevant inquiry in this case, it also unnecessarily implicated separation of powers principles which recognize that the authority to carry out the legislative process rests exclusively with the legislature. Although a court may issue the final judgment with regard to the constitutionality or enforceability of a law currently in effect, there is no similar judicial authority for reviewing the basis for the legislature's enactment of a law in the first instance. See *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly."). For these reasons, the actions of the General Assembly in passing Act 153 into law was an incorrect basis on which to find a lack of substantial justification.

*Id.* at 376 S.C. 434, 449-450, 658 S.E.2d 320, 328 (2008) (emphasis added). It is the action of the Defendant Senators in this litigation that justifies an award of attorneys' fees.

The Act at issue was unconstitutional from its inception. The Attorney General agreed with the Plaintiffs that the act in question was unconstitutional (Answer of the State, par. 15 and 17). The Attorney General has also issued three prior opinions on essentially the same question, each time concluding that the act in question was unconstitutional. The Senators had access to the Attorney General opinions, just as did the Plaintiffs. This Court found the Act to violate two separate provisions of the South Carolina Constitution (Order Granting Summary Judgment to the Plaintiffs, entered August 26, 2013). As State officers, they took a solemn oath to uphold the South Carolina Constitution, yet the Senators persisted in defending an unconstitutional Act.

The Senators contend that they were substantially justified. The Senators argue that their actions are "presumed to be substantially justified" because they were following "a statutory or constitutional mandate." In analyzing this element, courts look to whether the governmental defendant had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004). Defendants did not have a reasonable basis in law and fact. Defendants were not

“substantially justified” in pressing their claims in this lawsuit. As in Cornelius v. Oconee County, these Respondents “cited *no viable authority* supporting [their] position” that the Act was constitutional, and therefore in this litigation, they “acted *without substantial justification*.” Id., 369 S.C. 531, 633 S.E.2d 492, 497 (2006) (emphasis added). The Senators are under no constitutional or statutory mandate to defend an Act that the Attorney General found to be unconstitutional. They have no mandate to defend the indefensible, and an award of attorneys’ fees is warranted.

### **III. The Senators Were the Appropriate Defendants.**

Finally, the Senators argue that Plaintiffs should have named the combined Board as a Defendant and sought attorneys’ fees from the combined Board. This contention is unavailing. First, the Senators did not raise this issue as an affirmative defense. Now that the Court has ruled against them, it is too late to raise this as a new issue.

Second, this Court’s Order abolished the combined Board, and the combined (but abolished) Board would have had no ability to respond to a claim for attorneys’ fees or to act in any way.

Third, such a tactic would have been contrary to recent statutory and judicial authority. “The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.” S.C. Code Ann. § 15-77-300. Defendants call this sentence a “new presumption.” Plaintiffs believe that this 2010 amendment to S.C. Code Ann. § 15-77-300 is a codification of recent case law.

The Supreme Court’s reasoning in Layman v. State is in accord with this view:

The State and the Retirement System contend that their actions in *Layman* were substantially justified under *Video Gaming Consultants, Inc. v. S.C.*

*Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct.App.2004). In that case, a video gaming business sought attorneys' fees under the state action statute after this Court ruled in the underlying litigation that a state statute prohibiting the advertising of video poker machines was an unconstitutional restriction on commercial speech. *See id.* at 649, 595 S.E.2d at 891. The court of appeals found no evidence that the Department of Revenue acted without substantial justification in pressing its claim against the gaming business, reasoning that "[a]s an administrative agency, the Department 'must follow the law as written until its constitutionality is judicially determined.'" *Id.* at 652, 595 S.E.2d at 892 (quoting *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 241, 516 S.E.2d 655, 660-61 (1999)). The court of appeals determined that the Department of Revenue was substantially justified in maintaining its action against the gaming business because the Department was "merely enforcing [the statute] as it was obligated to do until a proper court determined the statute to be unconstitutional." *Id.* Therefore, the court of appeals held that the video gaming business could not recover attorneys' fees under the statute.

Layman v. State, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The

Layman Court further explained:

To the contrary, our courts have clearly established that under separation of powers principles, executive agencies are obligated to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid. *See, e.g., Video Gaming*, 358 S.C. at 652, 595 S.E.2d at 892. To imply that the Retirement System would have been substantially justified under the state action statute had it refused to enforce Act 153 infringes on the legislative authority and burdens executive agencies with the duty of making their own assessment of legislation while already harboring the responsibility of administering legislation. Under our system of government, state agencies are not saddled with such burdens, and therefore, this was an incorrect basis on which to find a lack of substantial justification.

*Id.* at 376 S.C. 434, 450, 658 S.E.2d 320, 329-330 (2008) (emphasis added)

Under that recent case law, including Layman and the statutory adoption of it in § 15-77-340, an agency cannot be forced to pay fees for simply defending its own existence, or following an Act of the General Assembly. The better Defendant in such cases is the General Assembly, who passed the unconstitutional act, or representative members of the General Assembly. If Plaintiffs had sued the combined Board to challenge its existence,

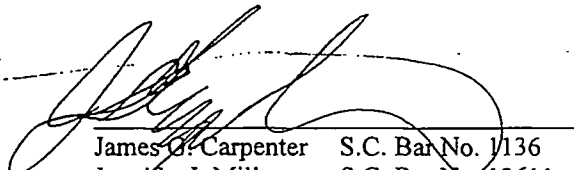
the Board may have been excused from paying Plaintiffs' attorneys' fees on the basis of the statutory exemption and the reasoning of Layman, arguing that it was simply defending its existence on the basis of an Act that had not yet been declared unconstitutional in a court of law. Accordingly, the appropriate Defendants—and the appropriate ones to pay attorneys' fees—are the ones who enacted the unconstitutional Act, these defendants.

### CONCLUSION

In the case at bar, the Senators are appropriate Defendants, the attorneys' fees statute applies to them, and they are not immune from the payment of attorneys' fees. The Senators do not contest the amount of attorneys' fees and costs claimed by the Plaintiffs.

**WHEREFORE**, Plaintiffs pray the Court for an award of actual attorneys' fees and costs from the Defendants.

Respectfully submitted,  
THE CARPENTER LAW FIRM, P.C.



James O. Carpenter S.C. Bar No. 1136  
Jennifer J. Miller S.C. Bar No. 13611  
819 East North Street, Suite 230  
Greenville, SC 29601  
Telephone: (864) 235-1269  
Facsimile: (864) 331-3083  
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,

Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

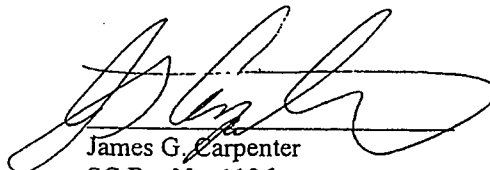
Plaintiffs' Supplemental Affidavit  
Support of Motion for Attorneys Fees

FILED  
RICHLAND COUNTY  
2014 APR 10 AM 11:49  
JAMES G. CARPENTER  
CLERK OF COURT

I, James G. Carpenter, being first duly sworn, state as follows:

1. I am lead counsel for the Plaintiffs. In January, 2014, I submitted an affidavit in support of Plaintiffs' Motion for Attorneys' Fees showing that my client in this case had incurred attorneys' fees of \$24,525.00, plus \$388.22 in costs, for a total fees and costs of \$24,913.22 through December 31, 2013, as shown by attached invoices.
2. From January 1, 2014, to the present, my client incurred additional fees and costs of \$8,498.85 on this case, as shown on the attached invoices, plus \$412.50 in unbilled attorneys' fees in March, 2014, for a total attorneys' fees and costs of \$33,824.57.
3. I believe that our actual requested attorneys' fees and costs were reasonable and that Plaintiffs are entitled to a full award of attorney's fees.

Further the affiant saith naught.



James G. Carpenter  
SC Bar No. 1136  
819 East North Street  
Greenville, SC 29601  
Tel. (864) 235-1269  
Fax (864) 331-3083

Subscribed and sworn to before me  
this 4<sup>th</sup> day of March, 2014

Sharon Daykerty  
Notary Public, State of South Carolina  
My commission expires: 8-11-2020

**The Carpenter Law Firm P.C.**

819 East North Street  
Greenville, SC 29601

**INVOICE**

| Date      | Invoice # |
|-----------|-----------|
| 2/28/2014 | 5549      |

| Bill To                                            |
|----------------------------------------------------|
| SCPIF<br>PO Box 25999<br>Greenville, SC 29516-0999 |

| CLIENT MATTER                              |                                                                                                                                                                                        |                                      |      |        | TERMS           |  |
|--------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|------|--------|-----------------|--|
|                                            |                                                                                                                                                                                        |                                      |      |        | Due by the 15th |  |
| Name                                       | Description                                                                                                                                                                            | Service Date                         | QTY  | Rate   | Amount          |  |
| JG Carpenter-C...                          | Fax from Mr. Sloan; tel. confs. with Clients; Call to Mike Hitchcock; fax and e-mail to clients;                                                                                       | 2/10/2014                            | 1.25 | 275.00 | 343.75          |  |
| JG Carpenter-C...                          | Call from Mr. Sloan; call from Judge's office; preparation of PDF of filed Motion for Attorneys Fees; e-mails to Court, opposing counsel; faxes to Mr. Sloan; Preparation for hearing; | 2/19/2014                            | 1.75 | 275.00 | 481.25          |  |
| JG Carpenter-C...                          | Preparation for argument on attorneys fees;                                                                                                                                            | 2/20/2014                            | 1.25 | 275.00 | 343.75          |  |
| JG Carpenter-C...                          | Trip to Columbia to argue Motion for Attorneys Fees;                                                                                                                                   | 2/21/2014                            | 5    | 275.00 | 1,375.00        |  |
| JG Carpenter-C...                          | Drafting Proposed Order for Attorneys Fees; faxes to Mr. Sloan;                                                                                                                        | 2/22/2014                            | 3    | 275.00 | 825.00          |  |
| JG Carpenter-C...                          | Call and faxes from and to Mr. Sloan; revisions to Proposed Order;                                                                                                                     | 2/24/2014                            | 0.5  | 275.00 | 137.50          |  |
| JJM--225                                   | revising order                                                                                                                                                                         | 2/24/2014                            | 2.25 | 150.00 | 337.50          |  |
| JG Carpenter-C...                          | E-mail of article; faxes and call to Mr. Sloan; E-mail to and call from Hinson; Call to Hitchcock; Revisions to Order granting fees; E-mail to Court and opposing counsel;             | 2/25/2014                            | 2.25 | 275.00 | 618.75          |  |
| JJM--225                                   | revising order                                                                                                                                                                         | 2/25/2014                            | 2.25 | 150.00 | 337.50          |  |
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| (864) 235-1269                             | (864) 331- 3083                                                                                                                                                                        | james.carpenter@carpenterlawfirm.net |      |        |                 |  |

**The Carpenter Law Firm P.C.**

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| Name                                       | Description                                                                                 | Service Date                         | QTY  | Rate            | Amount            |
| JG Carpenter-C...                          | Receipt & Review of Form 4 Order;<br>fax to Mr. Sloan; tel. conf. with Mr.<br>Sloan;        | 2/27/2014                            | 0.25 | 275.00          | 68.75             |
| JJM--225                                   | revising order                                                                              | 2/27/2014                            | 2.25 | 150.00          | 337.50            |
|                                            | Travel To Columbia - Argue Attorneys'<br>Fees Motion - SCPIF Richland Cnty<br>Election Comm | 2/21/2014                            |      | 117.60          | 117.60            |
| Thank You for using The Carpenter Law Firm |                                                                                             |                                      |      | <b>Total</b>    | <b>\$5,323.85</b> |
| Phone #                                    | Fax #                                                                                       | E-mail                               |      |                 |                   |
| (864) 235-1269                             | (864) 331- 3083                                                                             | james.carpenter@carpenterlawfirm.net |      |                 |                   |

# The Carpenter Law Firm P.C.

819 East North Street  
Greenville, SC 29601

## INVOICE

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| CLIENT MATTER                              |                                                                                                                                                                                  |                                      |       | TERMS           |          |
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| Name                                       | Description                                                                                                                                                                      | Service Date                         | QTY   | Rate            | Amount   |
| JG Carpenter-C....                         | Receipt & review of Order denying Motion to Reconsider; faxes and emails to client; telephone conferences with client; revising Motion and affidavit for attorneys fees;         | 1/3/2014                             | 1.25  | 275.00          | 343.75   |
| JG Carpenter-C....                         | Revisions to motion and affidavit for attorneys fees; drafting cover letter; filing and service of motion and affidavit;                                                         | 1/10/2014                            | 0.25  | 275.00          | 68.75    |
| JG Carpenter-C....                         | Call from Clerk of Court; conf. with paralegal, re: Motion Cover Sheet;                                                                                                          | 1/13/2014                            | 0.25  | 275.00          | 68.75    |
| JG Carpenter-C....                         | E-mails to and from opposing counsel; receipt and review of filed a motion for attorneys fees and costs;                                                                         | 1/16/2014                            | 0.25  | 275.00          | 68.75    |
| JG Carpenter-C....                         | Faxes from and to Mr. Sloan;                                                                                                                                                     | 1/21/2014                            | 0.25  | 275.00          | 68.75    |
| JG Carpenter-C....                         | Receipt & review of Memorandum Opposing our Motion for Attorneys Fees; Drafting and revising Reply Memo; faxes to Mr. Sloan;                                                     | 1/27/2014                            | 3.75  | 275.00          | 1,031.25 |
| JG Carpenter-C....                         | Faxes from and to Mr. Sloan; memo to Mr. Sloan, re: attorneys fees under 15-77-300. Revisions to Reply Memo in Support of Motion for Attorneys Fees; tel. confs. with Mr. Sloan; | 1/28/2014                            | 3.25  | 275.00          | 893.75   |
| Thank You for using The Carpenter Law Firm |                                                                                                                                                                                  |                                      | Total |                 |          |
| Phone #                                    | Fax #                                                                                                                                                                            | E-mail                               |       |                 |          |
| (864) 235-1269                             | (864) 331- 3083                                                                                                                                                                  | james.carpenter@carpenterlawfirm.net |       |                 |          |

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| Name                                       | Description                                                                                                                           | Service Date | QTY  | Rate            | Amount            |
| Jennifer Miller                            | revising response on attorneys fees;<br>conf. w/JGC                                                                                   | 1/30/2014    | 1.75 | 150.00          | 262.50            |
| JG Carpenter-C...                          | Revision, filing and service of Reply in<br>Support of Motion for Attorneys Fees;<br>faxes to and from Mr. Sloan; Letter to<br>Court; | 1/31/2014    | 1.25 | 275.00          | 343.75            |
|                                            |                                                                                                                                       | 1/10/2014    |      | 25.00           | 25.00             |
| Thank You for using The Carpenter Law Firm |                                                                                                                                       |              |      | <b>Total</b>    | <b>\$3,175.00</b> |

| Phone #        | Fax #          | E-mail                               |
|----------------|----------------|--------------------------------------|
| (864) 235-1269 | (864) 331-3083 | james.carpenter@carpenterlawfirm.ncf |

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,

Defendants.

IN THE CIRCUIT COURT

CIVIL ACTION NO: 2012-CP-40-7790

**Plaintiffs' Motion to  
Alter or Amend Order  
Denying Plaintiffs' Motion  
for Attorneys' Fees**

**SCRPC 59**

2014 APR 15 PM 3:17

Plaintiffs move the Court, pursuant to SCRPC 59, to alter or amend its Order denying Plaintiffs their costs and attorneys' fees under S.C. Code Ann. § 15-77-300 on the basis of sovereign immunity. The Order was entered March 19, 2014, mailed by the Clerk's office March 24, 2014, and received by the undersigned March 26, 2014.<sup>1</sup>

The Plaintiffs do not seek attorneys' fees for discretionary acts of the Defendant Senators in enacting Act 17 of 2011, but rather for blatantly unjustified litigation. In this action, the Attorney General, representing the State, did not contest the Plaintiffs' claim that the Act was unconstitutional. (Answer of the State, par. 15 and 17). The Defendant Senators could have followed suit.

Furthermore, the Attorney General had repeatedly warned the Defendant Senators that this Act and others like it were plainly unconstitutional. In 2007, the Attorney General wrote to Senator McConnell, who had requested an opinion on a similar act related to Charleston County. Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888). In that

<sup>1</sup> The Defendant Senators waived the affirmative defense of sovereign immunity by failing to plead it in their Answer. SCRPC 12(b). Nevertheless Plaintiffs will address the substance of the issue.

opinion, the Attorney General quoted an earlier opinion from 1977 arriving at the same conclusion:

In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of voter registration and county election commissions on a county-by-county basis. *Op. S.C. Atty. Gen.*, January 5, 1977. We concluded “such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county.” *Id.*

*Id.* at \*4.

Third, in 2012, the Attorney General issued a third opinion, this one to Senator Tim Scott, concerning Act 17 of 2011, the very act at issue in this case, and reiterated his opinion to Senator McConnell and opined that he would reach the same conclusion regarding Act 17 of 2011 (2012 WL 6061812).

We do not address herein the constitutionality of Act 17 of 2011 under Art. VIII, § 7 of the South Carolina Constitution, which prohibits ““laws for a specific county ....” However, we note that in an Opinion, dated August 14, 2007, we concluded that *a similar local law*, Act 127 of 2003, a statute which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and created instead the Board of Elections and Voter Registration for Charleston County *was likely unconstitutional* as being in violation of Art. VIII, § 7. See *Op. S.C. Atty. Gen.*, August 14, 2007 (2007 WL 3244888).

(2012 WL 6061812, n. 2) (emphasis added). Thus, the Attorney General has issued three opinions that the General Assembly’s action was unconstitutional.

Instead of heeding the warnings of the Attorney General, which they had requested, the Defendant Senators chose to burden the Plaintiffs with the unnecessary expense of echoing the Attorney General’s opinions as to the obvious unconstitutionality of Act 17 of 2011. It is only fair and just that § 15-77-300 require them to pay Plaintiffs’ attorneys’ fees.

Plaintiffs respectfully ask the Court to rule that not only South Carolina Supreme Court rulings, but also S.C. Code Ann. § 15-77-300, have abrogated sovereign immunity, and that sovereign immunity does not bar the Plaintiffs' claim for costs and attorneys' fees.<sup>2</sup>

**I. THE SOUTH CAROLINA SUPREME COURT ABROGATED SOVEREIGN IMMUNITY FOR THE STATE.**

In 1788, an English court ruled that the Crown possessed sovereign immunity, because "the king can do no wrong." The South Carolina Supreme Court noted, "The English law has been received here in its full extent, until it may now be considered as constituting a part of the common law of this State." *Duncan v. Course*, 1 Mill Const. 100, 8 S.C.L. 100 (1817). See S.C. Code Ann. § 14-1-50. Justice Chandler observed, "It is anomalous that [sovereign immunity] should become the law of states which only 12 years earlier had fought for liberation from wrongs of the king." *McCall by Andrews v. Batson*, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J. concurring).

Shortly thereafter, an English court abrogated the doctrine of sovereign immunity, but it remained the law of South Carolina. In 1820, the South Carolina Supreme Court ruled that the State enjoyed sovereign immunity. *Young v. Commissioners of Roads*, 2 Nott and Mc. 537, 11 S.C.L. 215 (1820), citing *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng.Rep. 359 (1788).

---

<sup>2</sup> This Court accepted the Defendant Senators' argument that they are immune from paying an award of attorneys' fees and costs. However, suing a Senator in his official capacity names the Senate or the State as a Defendant. "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Plaintiffs alleged nothing against them for any personal misconduct or injury.

In 1981, the South Carolina Supreme Court abrogated immunity for tortious conduct by a charity. *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association*, 277 S.C. 1, 282 S.E.2d 230 (1981).

The South Carolina Supreme Court abrogated sovereign immunity for contractual obligations in 1978, and for tortious liability in 1985. *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

South Carolina formerly afforded immunity to both governmental and charitable entities. We eliminated the State's immunity from suit based upon its contractual obligations in *Kinsey Construction Company Inc. v. S.C. Department of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978). Thereafter, we abolished charitable immunity in *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association*, 277 S.C. 1, 282 S.E.2d 230 (1981). This Court's view of the antiquated doctrine of sovereign immunity was foreshadowed in the dissents in *Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398 at 403, 223 S.E.2d 769 at 771 (1976) and *Belue v. The City of Spartanburg*, 276 S.C. 381 at 384, 280 S.E.2d 49 at 50 (1981).

The trend towards abolition of sovereign immunity in other jurisdictions was recognized by the South Carolina Court of Appeals in *Shea v. State Department of Mental Retardation*, 279 S.C. 604, 310 S.E.2d 819 (App. Ct. 1983). As noted in *Shea*, thirty-six other jurisdictions have abolished sovereign immunity in whole or in part—some judicially, some legislatively.

More than twenty years ago this Court noted that the doctrine had come under fire as being “archaic and outmoded.” *McKenzie v. City of Florence*, 234 S.C. 428, 435, 108 S.E.2d 825, 828 (1959). The Court suggested that any change of the doctrine should come from the legislature. *Id.* The Court has expressly urged the legislature to address the rule. *Copeland v. Housing Authority of Spartanburg*, 282 S.C. 8, 316 S.E.2d 408 (1984); *Belton v. Richland Memorial Hospital*, 263 S.C. 446, 211 S.E.2d 241 (1975). The exceptions that have been carved out by the legislature reflect a scattered patchwork of sovereign liability that lacks continuity, logic or fairness.

Even in affirming the continued validity of the rule, the Court has heretofore expressed “serious reservations about the soundness and fairness of the doctrine.” *Belton v. Richland Memorial Hospital*, 263 S.C. at 451, 211 S.E.2d 241.

It is not necessary to laboriously analyze the doctrine and its inequities. Few principles of modern law have been so uniformly criticized. See, *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (Wis.1962). **Sovereign immunity can no longer be tolerated in this State.**

*McCall by Andrews v. Batson*, 285 S.C. 243, 244-46, 329 S.E.2d 741, 742 (1985) (emphasis added, footnote omitted). In *McCall*, the Supreme Court explicitly overruled at least 122 South Carolina cases preceding it since 1820. Justice Chandler, concurring, summarized the Court's justification for exercising this authority: "The doctrine, being court-created, may be court-abrogated." *McCall by Andrews v. Batson*, 285 S.C. 243, 258, 329 S.E.2d 749, 746 (1985) (Chandler, J. concurring).

An overriding principle in our jurisprudence is that "liability follows tortious conduct." *McCall by Andrews v. Batson*, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J. concurring). If the members of the General Assembly can flagrantly violate the Constitution and defend that violation in litigation, no matter how indefensible, without consequence, then liability would **not** follow the wrongful conduct. Furthermore, such a holding would emasculate § 15-77-300, which authorizes reimbursement of costs and attorneys' fees to any South Carolinian who challenges State action and prevails when the State is acting without substantial justification.

Justice Chandler agreed with the Florida Supreme Court that sovereign immunity frustrated "our constitutional guarantee that the courts shall always be open to redress wrongs" and "there should be a remedy for every wrong committed." *McCall by Andrews v. Batson*, 285 S.C. 243, 254, 329 S.E.2d 741, 747 (1985) (Chandler, J. concurring), citing *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla.1957). Justice Chandler also agreed with the New Jersey court: "It is plainly unjust to refuse relief to persons injured by the

wrong conduct of the State.” *McCall by Andrews v. Batson*, 285 S.C. 243, 254, 329 S.E.2d 741, 747 (1985) (Chandler, J. concurring), citing *Willis v. Dept. of Conservation and Economic Development*, 55 N.J. 534, 264 A.2d 34, 36 (1970).

A significant justification for the Court’s rationale in *McCall* was the widespread availability of insurance. Plaintiffs respectfully suggest that the Defendants in the case at bar possess liability insurance coverage, and Defendants present no good reason to make them immune from the application of § 15-77-300.

The Court in *McCall* also reasoned that the General Assembly had been debating the bills that would become the South Carolina Tort Claims Act as the Court was ruling in *McCall*. In addition, Act 44 of 1985, codified as § 15-77-300, was likewise considered by the General Assembly. It had been pre-filed in December, 1984, and was signed by the Governor April 29, 1985. The Supreme Court issued the decision in *McCall* April 18, 1985. The policies of the South Carolina Tort Claims Act also support Act 44, and they support an award of attorneys’ fees in this case.

Recognizing the logistical and practical difficulties of the waiver of sovereign immunity, the Supreme Court issued its decision April 18, 1985, and ruled that sovereign immunity would not bar any case then pending or filed before July 1, 1986, provided the defendant had liability insurance coverage. Thereafter, sovereign immunity would not apply to *any* case filed after July 1, 1986, other than for official discretionary or legislative acts. *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743.

**A. The Defendant Senators Were Not Performing Discretionary or Legislative Duties.**

In *McCall*, the Court maintained some exceptions allowing the State to continue to enjoy limited sovereign immunity for official legislative and discretionary acts. *Id.* at 285

S.C. 243, 246, 329 S.E.2d 741, 743. However, the Defendant Senators' litigating an indefensible position is not a discretionary or legislative act of the General Assembly in its official capacity, because the litigation strategy was not something arising out of legislative responsibilities.

The Court ruled that the Defendant Senators were performing their "legitimate legislative activity" in enacting the unconstitutional Act (Order entered March 19, 2014, pp. 1-2) and are therefore sovereignly immune to § 15-77-300. However, § 15-77-300 and its remedy of attorneys' fees targets "acting without substantial justification in pressing [a] claim," rather than for the legislating. If the Defendant Senators had admitted that the Act was unconstitutional as it was on its face, the fees would not have been incurred. This waste and stonewalling is exactly what § 15-77-300 is designed to prevent and remedy. Accordingly, defending a patently unconstitutional Act falls outside the "discharge of their legislative duty" and "legislative acts," *McCall*, but rather constitutes "acting without substantial justification in pressing its claim." *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743; S.C. Code Ann. § 15-77-300.

**B. The Court Possesses Authority to Award Costs.**

First, this Court possesses inherent power and statutory power to award costs to a prevailing party.

Second, this Court possesses general statutory power to award court costs.

In **every civil action** commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party as prescribed in §§ 15-37-20, 15-37-60, 15-37-70, and 15-37-120 to 15-37-160, and Chapter 21 of Title 8, Article 3 of Chapter 11 of Title 14, Chapter 19 of Title 14, Article 7 of Chapter 23 of Title 14, Chapter 19 of Title 19, Chapter 7 of Title 22, Article 3 of Chapter 9 of Title 22, and Article 1 of

Chapter 19 of Title 23, such costs to be allowed as of course to the attorneys for the plaintiff or defendant and all officers of the court thereto entitled accordingly as the action may terminate and to be inserted in the judgment against the losing party. In cases in chancery the same rule as to costs shall prevail unless otherwise ordered by the court.

S.C. Code Ann. § 15-37-10 (emphasis added).

Third, this Court possesses authority from S. C. Code Ann. § 15-77-300, to award attorneys' fees as "court costs." *Id.* The award of attorneys' fees as costs arises out of the Court's inherent power and statutory power, and is explicitly authorized under S.C. Code Ann. § 15-77-300 against representatives of the State who have pursued unjustified litigation. *Id.*

**C. The South Carolina Supreme Court Has Previously Awarded Costs and Attorneys' Fees to Mr. Sloan from the House and the Senate.**

Mr. Sloan successfully challenged the constitutionality of an act of the General Assembly. In that case the Defendants were the Speaker of the House in his official capacity and the President of the Senate in his official capacity. The President Pro Tempore intervened as a Defendant. Mr. Sloan prevailed, and the Life Sciences Act was declared unconstitutional in large part. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005).

The full title of that case was:

Edward D. SLOAN, Jr., individually, and as a Citizen, Resident,  
Taxpayer and Registered Elector of South Carolina,  
and on behalf of all others similarly situated, Petitioners,

v.

David H. WILKINS, in his official capacity as Speaker of the  
S.C. House of Representatives, R. Andre Bauer in his official capacity as  
Lt. Governor and President of the S.C. Senate,  
and the State of South Carolina, Respondents.

Glenn F. McConnell, in his capacity as President Pro Tempore of the  
South Carolina Senate, Intervenor.

*Id.*

At the conclusion of the case, the Supreme Court awarded Mr. Sloan costs and attorneys' fees in that matter, thus abrogating sovereign immunity. Plaintiffs attach a copy of the Court Order dated March 3, 2005. **Exhibit A.** Plaintiffs also attach a copy of a check dated May 12, 2005, for \$1,432.01 from the House of Representatives, and a check dated May 12, 2005 for \$1,432.02 from the Senate. **Exhibit B.** A third check dated August 17, 2005, was for accumulated interest on the judgment for fees and costs. Accordingly, the Supreme Court judicially waived sovereign immunity years ago to award of costs and attorneys' fees to a plaintiff challenging an unconstitutional act, and against the House and Senate in litigation.

## **II. THE SOUTH CAROLINA GENERAL ASSEMBLY ABROGATED SOVEREIGN IMMUNITY FOR ATTORNEYS' FEES UNDER § 15-77-300.**

Plaintiffs respectfully suggest that the enactment of S.C. Code Ann. § 15-77-300 abrogated the sovereign immunity of the State of South Carolina, including the Senate, for an award of costs and attorneys' fees, as specified therein.

In any civil action brought by . . . any party who is contesting state action, . . . the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust."

*Id.*

### **A. The Supreme Court Has Already Ruled That § 15-77-300 Supports an Award of Attorneys' Fees Against the State.**

The Supreme Court upheld an award of attorneys' fees against the State under § 15-77-300, and reasoned as follows:

In our view, separating the liability of the State and the Retirement System is simply an attempt by these parties to bar any potential for a fee award, and this Court refuses to compartmentalize the actions of the State and the Retirement System in this manner. Instead, we believe the overriding principle of the state action statute is that as a state agency, the Retirement System is obligated to carry out the instructions of the State. Furthermore, as a governing body, the State is ultimately responsible for the actions of its agencies. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is “contesting state action.” S.C. Code Ann. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that either the State or the Retirement System may be liable for attorneys’ fees under the statute.

*Layman v. State*, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008) (emphasis added).

Section 15-77-300 applies to civil actions “brought by the State . . . or a party who is contesting state action,” *Id.* (emphasis added). The State includes the Senate. An Act of the General Assembly is a State action. The Supreme Court has awarded attorneys’ fees as “court costs” under S.C. Code Ann. § 15-77-300 to plaintiffs who successfully challenged an unconstitutional Act of the General Assembly. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). If the State itself can be held liable for attorneys’ fees under § 15-77-300 for its litigation conduct, then surely the Senate can be held liable.

The Court emphasized that it was the conduct of litigation that produced liability. “[T]he substantial justification inquiry in this case is based solely on the State’s and the Retirement System’s maintenance of litigation in which they defended a breach of their contract with the TERI participants.” *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

In deciding whether a state agency acted with substantial justification, courts must only determine whether the agency’s position in litigating the case has a reasonable basis in law and in fact. *Id.* at 542, 405 S.E.2d at 832. For this reason, the factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State’s and the Retirement System’s defense of Act 153’s contractual validity in the underlying litigation.

*Id.* at 376 S.C. 434, 449, 658 S.E.2d 320, 328 (2008) (emphasis added). The Defendant Senators' unjustified defense of this action allows an award of attorneys' fees.

A statute that is remedial in nature should be liberally construed in order to effectuate its remedial purposes. *Sloan Construction Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 115, 659 S.E.2d 158 (2008); *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978); *Newsom v. Manufacturing Company*, 102 S. C. 77, 86 S. E. 195 (1915); *Trammell v. Manufacturing Company*, 102 S. C. 483, 86 S. E. 1057 91915); *Law v. J. F. Prettyman & Sons*, 149 S. C. 178, 146 S. E. 815 (1929). Accordingly, § 15-77-300 applies. Therefore, § 15-77-300 should be interpreted broadly to effect its beneficial and remedial purposes.

**B. The Statutory Exception in Section 15-77-300 Does Not Apply to These Defendants.**

Section 15-77-300(A) contains a statutory exception or limitation on the eligibility for fees: "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction" S.C. Code Ann. § 15-77-300(A) (emphasis added). The Defendant Senators contend that their actions are "presumed to be substantially justified" and they are exempt from the payment of attorneys' fees because they were following a "statutory or constitutional mandate."

However, they had no "statutory or constitutional mandate" to defend a patently unconstitutional Act that the Attorney General had found to be unconstitutional on three separate occasions and in response to this particular litigation. The Defendant Senators had no mandate in any statute or constitutional provision to pursue this litigation.

The policy behind § 15-77-300 encourages South Carolinians to challenge unlawful governmental actions in court. Reimbursing citizens' litigation costs when they prevail encourages the citizens to pursue legitimate public interest actions and discourages governments from defending the indefensible in court. Plaintiffs possess a common law and constitutional right to challenge an unconstitutional act of the General Assembly. Accordingly, the policy behind § 15-77-300 demonstrates that the legislative immunity defense does not apply.

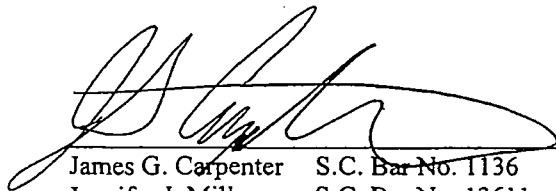
### CONCLUSION

Because the doctrine of sovereign immunity has been abrogated both by judicial decision and by legislative enactment, sovereign immunity should not bar an award of attorneys' fees to the Plaintiffs.

**WHEREFORE**, Plaintiffs pray the Court for an award of actual attorneys' fees and costs from the Defendants.

April 7, 2014

Respectfully submitted,  
THE CARPENTER LAW FIRM, P.C.



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Attorneys for Plaintiffs



2005CP4001930

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1090

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March 3, 2005

James G. Carpenter, Esquire  
Jennifer J. Miller, Esquire  
The Carpenter Law Firm, PC  
819 E. North Street  
Greenville, SC 29601

RICHLAND COUNTY  
FILED  
2005 APR 27 AM 8:55  
BARBARA A. SCOTT  
C.C.C. & G.S.

Re: Sloan, Edward D. v. Wilkins, et al.

Dear Counsel:

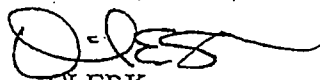
The following Order has been endorsed on your Motion for Costs in the above entitled matter:

"Plaintiff is awarded \$1,864.03 in costs and \$1,000.00 in attorney's fees.

Jean H. Toal C.J.  
For the Court

March 03, 2005."

Very truly yours,

  
CLERK

DES/bs



Sloan v. Wilkins

Page 2

March 3, 2005

cc: Charles F. Reid, Esquire  
Robert F. Smith, II, Esquire  
Benjamin P. Mustian, Esquire  
Patrick G. Dennis, Esquire  
Michael R. Hitchcock, Esquire  
S. Phillip Lenski, Esquire  
Jennifer L. Parrish, Esquire  
The Honorable Henry D. McMaster  
Assistant Deputy Attorney General Robert D. Cook  
Assistant Deputy Attorney General J. Emory Smith, Jr.  
Michael R. Hitchcock, Esquire  
S. Phillip Lenski, Esquire  
Jennifer L. Parrish, Esquire  
Dwight F. Drake, Esquire  
William C. Hubbard, Esquire  
C. Mitchell Brown, Esquire  
Keith D. Munson, Esquire  
Heather G. Ruth, Esquire

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288  
CERTIFIED TRUE COPY:

*Dianda J. Shealy*  
Chief Deputy Clerk, S. C. Supreme Court

PURSUANT TO WARRANT OF  
RICHARD ECKSTROM  
COMPTROLLER GENERAL

STATE OF SOUTH CAROLINA  
**Office Of State Treasurer**

67-22  
539

THE HOUSE OF REPRESENTATIVES

GRADY L. PATTERSON, JR.

126586621

AGENCY NBR.

WARRANT NBR.

VOUCHER NUMBER

DATE

AMOUNT

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05/12/2005

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PAY TO E D SLOAN JR

C/O THE CARPENTER LAW FIRM  
819 E NORTH ST  
GREENVILLE, SC

29601

PAY-->\$

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CONTINGENCIES ACCOUNT  
WACHOVIA BANK, GREENVILLE, SC

*Grady L. Patterson*  
GRADY L. PATTERSON, JR. STATE TREASURER

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323304378

PURSUANT TO WARRANT OF  
RICHARD ECKSTROM  
COMPTROLLER GENERAL

STATE OF SOUTH CAROLINA  
**Office Of State Treasurer**

67-22  
539

THE SENATE

GRADY L. PATTERSON, JR.

126627046

AGENCY NBR.

WARRANT NBR.

VOUCHER NUMBER

DATE

AMOUNT

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DV 505

05/26/2005

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PAY TO E D SLOAN

CARPENTER LAW FIRM  
819 E NO  
GREENVILLE, SC

29601

PAY-->\$

\*\*\*\*\*1,432.02

CONTINGENCIES ACCOUNT  
WACHOVIA BANK, GREENVILLE, SC

*Grady L. Patterson*  
GRADY L. PATTERSON, JR. STATE TREASURER

126627046 053900225

323304378

CHARLES FREID AND  
TJ B REID JTWROS  
705 HATRICK ROAD  
COLUMBIA, SC 29209-2468



Financial  
Management  
Account

1147

Date 8/17/05

55-7265/212

Pay to the  
Order of

E. D. Sloan, Jr.

\$ 30.65

Thirty dollars + 65/100

Dollars

SMITH BARNEY  
FINANCIAL MANAGEMENT ACCOUNT  
800-634-9855  
Citibank F.S.B. Englewood Cliffs, N.J.

For *Have a nice day!*

*Charles Freid*

0021272655 105990128

1147



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

South Carolina Public Interest Foundation,  
and William B. DePass, Jr., individually,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

Senator John E. Courson, Senator Darrell  
Jackson, Senator Joel Lourie, Senator  
John L. Scott, Jr., and The State of South  
Carolina,

Defendants.

IN THE CIRCUIT COURT

CASE NO: 2012-CP-40-7790

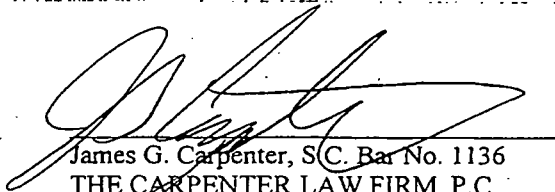
CERTIFICATE  
OF SERVICE

2014 APR 15 PM 3:17

The undersigned attorney hereby certifies that he has served a copy of the foregoing Plaintiffs' Motion to Alter or Amend Order Denying Plaintiffs' Motion for Attorneys' Fees by email and by first class mail, postage prepaid, on April 7, 2014, to the following persons:

J. Emery Smith, Jr.  
PO Box 11549  
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Michael R. Hitchcock  
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Columbia, SC 29202



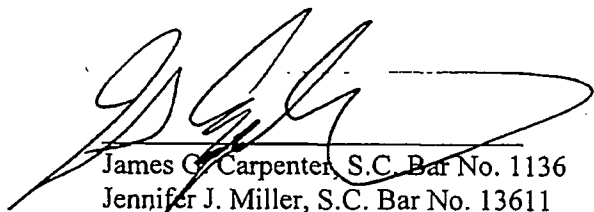
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---

**Certificate of Counsel**

---

Appellant certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Case No. 2012-CP-40-07790

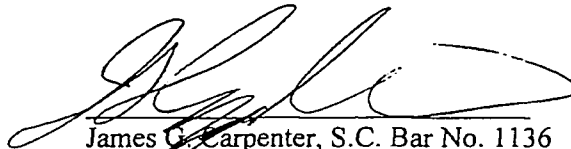
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**Certificate of Service**

The undersigned attorney hereby certifies that he has served a copy of the foregoing Record on Appeal on counsel for Defendants by US Mail, postage prepaid on Monday, October 06, 2014 to the following persons:

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Attorneys for Plaintiffs

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Appellate Case No. 2014-001412

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South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ..... Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr., and The State of South Carolina, ..... Respondents.

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**APPELLANTS' FINAL BRIEF**

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October 17, 2014

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Columbia, SC 29211  
Attorney for Defendant  
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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE CIRCUIT COURT ERR IN RULING THAT THE RESPONDENTS ARE IMMUNE FROM AN AWARD OF COSTS AND ATTORNEYS' FEES?**
- II. DID THE CIRCUIT COURT ERR IN RULING THAT S.C. CODE ANN. § 15-77-300 DID NOT APPLY TO THE RESPONDENTS?**
- III. DID APPELLANTS SATISFY THE STATUTORY CRITERIA?**
- IV. WERE APPELLANTS' ACTUAL ATTORNEYS' FEES AND COSTS REASONABLE?**

### **Statement of the Case**

Appellant South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution (R. p. 4). Appellant William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County (R. p. 4). He served as a member of the State Election Commission during the years 1988 through 1997, and he served as its Chairman during the years 1990 through 1997 (R. p. 4). He regularly serves as a volunteer poll worker on election days (R. p. 4). Mr. DePass claimed standing on all the foregoing bases (R. p. 4). He brought this action individually on his behalf and on behalf of all others similarly situated (R. p. 4).

Respondents John E. Courson, Darrell Jackson, Joel Lourie, and John Scott, Jr. are South Carolina Senators elected by Richland County voters; and they are named in their official capacities (R. p. 4). These senators, all from Richland County, were instrumental in the passage of the Act at issue (R. p. 24, par. 10).

Prior to the enactment of Act 312 of 2008, the General Assembly had enacted various local acts combining the boards of voter registration and boards of election in individual counties (R. p. 5). In 2007, the Attorney General issued an opinion to Senator Glenn McConnell that the General Assembly's very similar action with regard to Charleston County in 2003 was unconstitutional. Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888). The Attorney General quoted an earlier opinion from 1977 arriving at that conclusion:

In an opinion of this Office issued in 1977, we considered generally whether the General Assembly can introduce legislation merging county boards of

voter registration and county election commissions on a county-by-county basis. Op. S.C. Atty. Gen., January 5, 1977. We concluded “such legislation would most probably be violative of that portion of Article VIII, section 7 of the South Carolina Constitution of 1985, as amended, which proscribes laws for a specific county.” *Id.*

*Id.* at \*4.

Accordingly, early in the next term of the General Assembly, on February 14, 2008, Senators McConnell and Campsen introduced the bill that became Act 312 of 2008. Act 312 addressed all forty-six counties in the state (R. p. 5). Act 312 did not change the substance of the previous local and special acts for individual counties, but amounted to the General Assembly’s attempt to use one act to correct the Constitutional defects in all the special and single county acts related to county election commissions and county boards of voter registration (R. p. 5).

Act 312 of 2008 was codified at Title VII, Chapter 27 of the South Carolina Code. Section 7-27-110 stated: “Those counties that do not have combined boards of registration and election commissions must have their members appointed and powers of their boards and commissions as provided by Sections 7-5-10 and 7-13-70.” Likewise, as initially enacted, Section 7-27-405 stated: “The Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70.”

South Carolina Code Annotated § 7-5-10 authorized the Governor to appoint members of county boards of registration, with the advice and consent of the Senate. South Carolina Code Annotated § 7-13-70 authorized the Governor to appoint county commissioners of election, “upon the recommendation of the senatorial delegation and at

least half of the members of the House of Representatives from the respective counties.”

*Id.*

Three years later, at the urging of the Richland County legislative delegation, including the Respondents, the General Assembly enacted and the Governor signed Act 17 of 2011, which merged the Richland County Election Commission and the Richland County Board of Voter Registration into one body known as the Board of Elections and Voter Registration for Richland County (*Id.*, p. 5). Act 17 changed the way the Chairman of the Board was appointed and reappointed, provided for a minimum budget for the newly formed Board, changed the way that persons were appointed to this body, and established various other criteria for the subsequent appointments and retention of the members of this Board (*Id.*). Act 17 of 2011 also abolished the Richland County Board of Voter Registration and the Richland County Election Commission (*Id.*).

The Attorney General, representing the State in this action, did not dispute that Act 17 was unconstitutional. (R. p. 32, par. 15 and 17). Furthermore, the Attorney General had repeatedly warned the Respondent Senators that this Act and others like it were plainly unconstitutional. In addition to the letter to Senator McConnell in 2007, (Op. S.C. Atty. Gen., August 14, 2007 (2007 WL 3244888)) and the previous opinion cited therein, in 2012, the Attorney General issued a third opinion, this one to Senator Tim Scott, concerning Act 17 of 2011, the act at issue in this case, and reiterated his opinion that Act 17 of 2011 was likewise unconstitutional (2012 WL 6061812).

We do not address herein the constitutionality of Act 17 of 2011 under Art. VIII, § 7 of the South Carolina Constitution, which prohibits “laws for a specific county ....” However, we note that in an Opinion, dated August 14, 2007, we concluded that *a similar local law*, Act 127 of 2003, a statute which abolished the Charleston County Board of Voter Registration and the Charleston County Election Commission and created instead the Board of

Elections and Voter Registration for Charleston County *was likely unconstitutional* as being in violation of Art. VIII, § 7. See *Op. S.C. Atty. Gen.*, August 14, 2007 (2007 WL 3244888).

(2012 WL 6061812, n. 2) (emphasis added). Thus, three times the Attorney General has issued opinions that such legislation was unconstitutional. Instead of heeding the Attorney General's warnings, the Respondent Senators chose to burden the Appellants with the unnecessary expense of litigating the unconstitutionality of Act 17 of 2011.

The Circuit Court ruled that Act 17 of 2011 was unconstitutional, finding that Act 17 of 2011 violated Article VIII, § 7 of the Constitution: "No laws for a specific county shall be enacted" (R. p. 10). The Circuit Court also found that Act 17 violated Article III, § 34's restriction on special legislation: "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . ." S.C. Constitution, Article III, § 34" (R. p. 11).

Appellants moved the Court pursuant to SCRCP 54, S.C. CODE ANN. § 15-37-10 and § 15-77-300 for costs and attorneys' fees. (R. pp. 79-104).

In any civil action brought by . . . any party who is contesting state action, . . . the court may allow the *prevailing party* to recover *reasonable attorney's fees to be taxed as court costs* against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust."

S.C. CODE ANN. § 15-77-300.

Respondent Senators opposed the motion (R. pp. 105-111). Respondents argued that they were immune from the payment of attorneys' fees. The Respondent Senators failed to plead the affirmative defense of sovereign immunity in their Answer; nevertheless

Appellants will address the substance of the issue. Respondents also argued that § 15-77-300 does not apply to them.

Respondents did not object to the amount of the attorneys' fees claimed by the Appellants, nor did they object to any particular entry or fact in the affidavits in support of the motion for attorneys' fees (R. pp. 105-111).

The Circuit Court denied Appellants' Motion for Attorneys' Fees. The Circuit Court ruled that the members of the General Assembly were immune from a recovery for attorneys' fees and costs under sections 15-77-300 and 15-37-10. The Circuit Court also ruled that section 15-77-300 does not apply to members of the General Assembly, even in their official capacities. Appellants moved the Court, pursuant to SCRCP 59, to alter or amend its Order, and the Court denied the Motion.

Appellants respectfully ask this Court to rule that the Respondent Senators are not immune from the award of costs and attorneys' fees, that S.C. CODE ANN. § 15-77-300 applies to them, and to award Appellants their actual and reasonable attorneys' fees.

## ARGUMENT

### I. THE CIRCUIT COURT ERRED IN RULING THAT RESPONDENT SENATORS ARE IMMUNE FROM THE AWARD OF COSTS AND ATTORNEYS' FEES.

The Circuit Court ruled that individual members of the General Assembly are immune from recovery for attorneys' fees and costs (R. p. 15).

As a preliminary matter, Respondents not raise sovereign immunity as an affirmative defense, and therefore is waived (R. pp. 34-36). Nevertheless, the Circuit Court accepted the Respondent Senators' argument that they are immune from paying an award of attorneys' fees and costs.

Appellants did not bring this case against private parties, but against members of the South Carolina General Assembly in their official capacities (R. p. 22, par. 3), and the Senators admitted that they were sued in their official capacities (R. p. 34, par. 3). Suing a Senator in his official capacity is simply another way of naming the Senate or the State of South Carolina as a Defendant. "Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Department of Social Services*, 436 U.S. 658 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Appellants alleged nothing against the individual defendants for any personal misconduct. Accordingly, the Senators were named only in their official capacities. Furthermore, Appellants did not seek compensatory or punitive damages from the Respondent Senators. Appellants sought merely a declaratory judgment.

South Carolina courts have awarded fees against other public officials acting in their official capacities under S.C. CODE ANN. § 15-77-300. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney's fees under § 15-77-300 against

the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney's fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney's fees under § 15-77-300 against the City, City Council members, and City Administrator). Thus, an award of fees against the Senators in their official capacities would not be unprecedented or even unusual.

**A. By Enacting § 15-77-300, the South Carolina General Assembly Abrogated Sovereign Immunity for an Award of Attorneys' Fees.**

By enacting S.C. CODE ANN. § 15-77-300, the South Carolina General Assembly statutorily waived the sovereign immunity of the State of South Carolina, including the Senate, for an award of costs and attorneys' fees.

In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, . . . the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (3) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (4) The court finds that there are no special circumstances that would make the award of attorney's fees unjust."

*Id.* Section 15-77-300 applies to civil actions "brought by the State . . . or a party who is contesting state action" *Id.* (emphasis added). This language abrogated sovereign immunity, at least as to an award of attorneys' fees under this statute.

**1. An act of the General Assembly is a state action.**

The State includes the Senate. The South Carolina Constitution, Art. III, § 1 grants legislative power of this State to the General Assembly, consisting of the House of Representatives and the Senate. The Supreme Court explained this provision:

To the Legislature of South Carolina, consisting of the House and Senate, is granted the legislative power by the Constitution of 1895, article 3, § 1, in this broad language: 'The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'

Our courts have held that by the use of this language the people of the state vested the General Assembly with the entire legislative power of the state, subject only to such restrictions upon and regulations of such power as were contained in the Constitution itself. It is the theory and intent of the Constitution of South Carolina that the powers vested in the General Assembly include all powers not specifically reserved by the Constitution. *Massey v. Glenn*, 106 S.C. 53, 90 S.E. 321; *State v. City Council of Aiken*, 42 S.C. 222, 20 S.E. 221, 26 L.R.A. 345; *Mauldin v. City Council of Greenville*, 72 S.C. 293, 20 S.E. 842, 27 L.R.A. 284, 46 Am.St.Rep. 723; *Cathcart v. City of Columbia*, 170 S.C. 362, 170 S.E. 435.

*Byrd v. Lawrimore*, 212 S.C. 281, 288-289, 47 S.E.2d 728, 731 (1948). Thus, an Act of the General Assembly is a State action.

**2. The Supreme Court ruled that § 15-77-300 supports an award of attorneys' fees against the State.**

The Supreme Court upheld an award of attorneys' fees against the State under § 15-77-300, and reasoned as follows:

In our view, separating the liability of the State and the Retirement System is simply an attempt by these parties to bar any potential for a fee award, and this Court refuses to compartmentalize the actions of the State and the Retirement System in this manner. Instead, we believe the overriding principle of the state action statute is that as a state agency, the Retirement System is obligated to carry out the instructions of the State. Furthermore, as a governing body, the State is ultimately responsible for the actions of its agencies. That the statute plainly recognizes this principle is exhibited by the language purporting to apply to cases in which a party is "contesting

state action.” S.C. CODE ANN. § 15-77-300. For this reason, we find the attempt to parse the actions of the State and the Retirement System unpersuasive, and therefore hold that either the State or the Retirement System may be liable for attorneys’ fees under the statute.

*Layman v. State*, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008) (emphasis added). Section 15-77-300 applies to civil actions “brought by the State . . . or a party who is contesting state action,” *Id.* (emphasis added).

The Supreme Court awarded attorneys’ fees as “court costs” under S.C. CODE ANN. § 15-77-300 to Appellants who successfully challenged an unconstitutional Act of the General Assembly. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). If the State itself can be held liable for attorneys’ fees under § 15-77-300 for its litigation conduct, then surely the Senate can be held liable.

In *Layman*, plaintiffs challenged an unconstitutional act:

[P]laintiffs filed an action in the circuit court against the State of South Carolina (“State”) and the South Carolina Retirement System (“Retirement System”) in response to the enactment of the State Retirement System Preservation and Investment Reform Act (“Act 153”). Act 153 amended the Teachers and Employee Retention Incentive (TERI) program and the Working Retiree program by requiring TERI participants and Working Retirees to make pay-period contributions of their salaries into the Retirement System when the statutes codifying these programs did not previously require them to do so.

*Id.*, 376 S.C. 434, 441, 658 S.E.2d 320, 323-24 (2008) (footnotes omitted).

In *Layman*, Defendants’ liability under § 15-77-300 was not based on the General Assembly’s enacting an unconstitutional act. The Supreme Court emphasized that it was the Defendants’ conduct in the litigation that produced liability. “[T]he substantial justification inquiry in this case is based solely on the State’s and the Retirement System’s maintenance of litigation in which they defended a breach of their contract with the TERI

participants.” *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

In deciding whether a state agency acted with substantial justification, **courts must only determine whether the agency’s position in litigating the case has a reasonable basis in law and in fact.** *Id.* at 542, 405 S.E.2d at 832. For this reason, the factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State’s and the Retirement System’s **defense** of Act 153’s contractual validity **in the underlying litigation.**

*Id.* at 376 S.C. 434, 449, 658 S.E.2d 320, 328 (2008) (emphasis added). The Respondent Senators’ unjustified defense of this action justifies an award of attorneys’ fees.

S.C. CODE ANN. § 15-77-300 is remedial. A statute that is remedial in nature should be liberally construed in order to effectuate its remedial purposes. *Sloan Construction Co., Inc. v. Southco Grassing, Inc.*, 377 S.C. 108, 115, 659 S.E.2d 158 (2008); *S.C. Dept. of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978); *Newsom v. Manufacturing Company*, 102 S. C. 77, 86 S. E. 195 (1915); *Trammell v. Manufacturing Company*, 102 S. C. 483, 86 S. E. 1057 91915); *Law v. J. F. Prettyman & Sons*, 149 S. C. 178, 146 S. E. 815 (1929). Therefore, § 15-77-300 should be interpreted broadly to effect its beneficial and remedial purposes.

Appellants possess a common law and constitutional right to challenge an unconstitutional act of the General Assembly. The policy behind § 15-77-300 encourages South Carolinians to challenge unlawful governmental actions in court. Reimbursing citizens’ litigation costs when they prevail encourages the citizens to pursue legitimate public interest actions and discourages governments from defending the indefensible in court. Accordingly, the policy behind § 15-77-300 demonstrates that the legislative immunity defense does not apply.

**B. The South Carolina Supreme Court Has Previously Awarded Costs and Attorneys' Fees to Mr. Sloan from the House and the Senate.**

In 2005, Mr. Sloan successfully challenged an unconstitutional act of the General Assembly. The Defendants were the Speaker of the House in his official capacity and the President of the Senate in his official capacity. The President Pro Tempore intervened as a Defendant. Mr. Sloan prevailed, and the Court declared the Life Sciences Act unconstitutional in large part. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005).

The full title of that case was:

Edward D. SLOAN, Jr., individually, and as a Citizen, Resident,  
Taxpayer and Registered Elector of South Carolina,  
and on behalf of all others similarly situated, Petitioners,

v.

David H. WILKINS, in his official capacity as Speaker of the  
S.C. House of Representatives, R. Andre Bauer in his official capacity as  
Lt. Governor and President of the S.C. Senate,  
and the State of South Carolina, Respondents.

Glenn F. McConnell, in his capacity as President Pro Tempore of the  
South Carolina Senate, Intervenor.

*Id.*

The Supreme Court awarded Mr. Sloan costs and attorneys' fees, implicitly recognizing the abrogation of any claim of sovereign immunity, at least insofar as it addressed costs and attorneys' fees (R. pp. 138-39). Mr. Sloan received a check dated May 12, 2005, for \$1,432.01 from the House of Representatives, and a check dated May 12, 2005 for \$1,432.02 from the Senate (R. p. 140). He also received a third check dated August 17, 2005, was for accumulated interest on the judgment for fees and costs (R. p. 140). Mr. Sloan was awarded costs and fees against the House and Senate. Accordingly, when he successfully challenged an unconstitutional act, sovereign immunity did not prevent an award of costs and attorneys' fees.

**C. The South Carolina Supreme Court Abrogated Sovereign Immunity for the State.**

**1. Judicial decisions created and abrogated sovereign immunity.**

In 1788, an English court ruled that the Crown possessed sovereign immunity, because “the king can do no wrong.” The South Carolina Supreme Court noted, “The English law has been received here in its full extent, until it may now be considered as constituting a part of the common law of this State.” *Duncan v. Course*, 1 Mill Const. 100, 8 S.C.L. 100 (1817). See S.C. CODE ANN. § 14-1-50. Justice Chandler observed, “It is anomalous that [sovereign immunity] should become the law of states which only 12 years earlier had fought for liberation from wrongs of the king.” *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741, 746 (1985) (Chandler, J. concurring).

Shortly thereafter, an English court abrogated the doctrine of sovereign immunity, but it remained the law of South Carolina. In 1820, the South Carolina Supreme Court ruled that the State enjoyed sovereign immunity. *Young v. Commissioners of Roads*, 2 Nott and Mc. 537, 11 S.C.L. 215 (1820), citing *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng.Rep. 359 (1788).

In 1981, the South Carolina Supreme Court abrogated immunity for tortious conduct by a charity. *Fitzer v. Greater Greenville South Carolina Young Men’s Christian Association*, 277 S.C. 1, 282 S.E.2d 230 (1981).

The South Carolina Supreme Court abrogated sovereign immunity for contractual obligations in 1978, and for tortious liability in 1985. *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

South Carolina formerly afforded immunity to both governmental and charitable entities. **We eliminated the State’s immunity from suit based upon its contractual obligations** in *Kinsey Construction Company Inc. v.*

*S.C. Department of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978). Thereafter, we abolished charitable immunity in *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association*, 277 S.C. 1, 282 S.E.2d 230 (1981). This Court's view of **the antiquated doctrine of sovereign immunity** was foreshadowed in the dissents in *Boyce v. Lancaster County Natural Gas Authority*, 266 S.C. 398 at 403, 223 S.E.2d 769 at 771 (1976) and *Belue v. The City of Spartanburg*, 276 S.C. 381 at 384, 280 S.E.2d 49 at 50 (1981).

The trend towards abolition of sovereign immunity in other jurisdictions was recognized by the South Carolina Court of Appeals in *Shea v. State Department of Mental Retardation*, 279 S.C. 604, 310 S.E.2d 819 (App.Ct.1983). As noted in *Shea*, **thirty-six other jurisdictions have abolished sovereign immunity** in whole or in part-some judicially, some legislatively.

More than twenty years ago this Court noted that the doctrine had come under fire as being "**archaic and outmoded.**" *McKenzie v. City of Florence*, 234 S.C. 428, 435, 108 S.E.2d 825, 828 (1959). The Court suggested that any change of the doctrine should come from the legislature. *Id.* The Court has expressly urged the legislature to address the rule. *Copeland v. Housing Authority of Spartanburg*, 282 S.C. 8, 316 S.E.2d 408 (1984); *Belton v. Richland Memorial Hospital*, 263 S.C. 446, 211 S.E.2d 241 (1975). The exceptions that have been carved out by the legislature reflect a **scattered patchwork of sovereign liability that lacks continuity, logic or fairness.**

Even in affirming the continued validity of the rule, the Court has heretofore expressed "**serious reservations about the soundness and fairness of the doctrine.**" *Belton v. Richland Memorial Hospital*, 263 S.C. at 451, 211 S.E.2d 241.

It is not necessary to laboriously analyze the doctrine and its inequities. Few principles of modern law have been so uniformly criticized. See, *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (Wis.1962). **Sovereign immunity can no longer be tolerated in this State.**

*McCall by Andrews v. Batson*, 285 S.C. 243, 244-46, 329 S.E.2d 741, 742 (1985) (emphasis added, footnote omitted). In *McCall*, the Supreme Court explicitly overruled at least 122 South Carolina cases preceding it since 1820. Justice Chandler, concurring, summarized the Court's justification for exercising this authority: "The doctrine, being court-created, may be court-abrogated." *McCall by Andrews v. Batson*, 285 S.C. 243, 258, 329 S.E.2d

749, 746 (1985) (Chandler, J. concurring).

An overriding principle in our jurisprudence is that “liability follows tortious conduct.” *McCall by Andrews v. Batson*, 285 S.C. 243, 253, 329 S.E.2d 741, 746 (1985) (Chandler, J. concurring) (emphasis added). If the members of the General Assembly can flagrantly violate the Constitution and defend that violation in litigation, no matter how indefensible, without consequence, then liability would not follow the wrongful conduct. Furthermore, such a holding would emasculate § 15-77-300, which authorizes reimbursement of costs and attorneys’ fees to any South Carolinian who challenges State action and prevails when the State is acting without substantial justification.

Justice Chandler agreed with the Florida Supreme Court that sovereign immunity frustrated “our constitutional guarantee that the courts shall always be open to redress wrongs” and “there should be a remedy for every wrong committed.” *McCall by Andrews v. Batson*, 285 S.C. 243, 254, 329 S.E.2d 741, 747 (1985) (Chandler, J. concurring), *citing Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla.1957). Justice Chandler also agreed with the New Jersey court: “It is plainly unjust to refuse relief to persons injured by the wrong conduct of the State.” *McCall by Andrews v. Batson*, 285 S.C. 243, 254, 329 S.E.2d 741, 747 (1985) (Chandler, J. concurring), *citing Willis v. Dept. of Conservation and Economic Development*, 55 N.J. 534, 264 A.2d 34, 36 (1970).

A significant justification for the Court’s rationale in *McCall* was the widespread availability of insurance. Appellants respectfully suggest that the Respondents at bar possess liability insurance coverage, and Respondents present no good reason to make them immune from the application of § 15-77-300.

The Court in *McCall* also reasoned that the General Assembly had been debating the bills that would become the South Carolina Tort Claims Act as the Court was ruling in *McCall*. In addition, the General Assembly considered Act 44 of 1985, codified as § 15-77-300. It was signed by the Governor April 29, 1985. The Supreme Court issued the decision in *McCall* April 18, 1985. The policies of the South Carolina Tort Claims Act also support Act 44, and they support an award of attorneys' fees in this case.

Recognizing the logistical and practical difficulties of the waiver of sovereign immunity, the Supreme Court issued its decision April 18, 1985, and ruled that sovereign immunity would not bar any case then pending or filed before July 1, 1986, provided the defendant had liability insurance coverage. Thereafter, sovereign immunity would not apply to *any* case filed after July 1, 1986, other than for official discretionary or legislative acts. *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743.

**2. The Respondent Senators were not performing discretionary or legislative duties.**

In *McCall*, the Court continued to allow limited sovereign immunity for official legislative and discretionary acts. *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743. However, the Respondent Senators' litigating an indefensible position is not a discretionary or legislative act of the General Assembly in its official capacity, and the litigation strategy was not something arising out of legislative responsibilities.

The Circuit Court ruled that the Respondent Senators were performing their "legitimate legislative activity" in enacting the unconstitutional act (R. pp. 15-16) and are therefore sovereignly immune to § 15-77-300.

The award of attorneys' fees is not based on the conduct of the Senators acting as legislators, but rather it is based on the conduct of the Senators in defending an indefensible

lawsuit. “Rather, the substantial justification inquiry in this case is based solely on the State’s and the Retirement System’s maintenance of litigation in which they defended a breach of their contract with the TERI participants.” *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (emphasis added). The Court in *Layman* reasoned further:

[T]he factual circumstances surrounding the enactment of Act 153 are irrelevant in deciding whether substantial justification existed for the State’s and the Retirement System’s defense of Act 153’s contractual validity in the underlying litigation. The circuit judge’s finding that the State’s enactment of Act 153 lacked substantial justification was not only completely unrelated to the relevant inquiry in this case, it also unnecessarily implicated separation of powers principles which recognize that the authority to carry out the legislative process rests exclusively with the legislature. Although a court may issue the final judgment with regard to the constitutionality or enforceability of a law currently in effect, there is no similar judicial authority for reviewing the basis for the legislature’s enactment of a law in the first instance. *See Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (“We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly.”). For these reasons, the actions of the General Assembly in passing Act 153 into law was an incorrect basis on which to find a lack of substantial justification.

*Id.* at 376 S.C. 434, 449-450, 658 S.E.2d 320, 328 (2008) (emphasis added). It is the action of the Respondent Senators in this litigation that justifies an award of attorneys’ fees.

The Attorney General agreed with the Appellants that the act in question was unconstitutional (R. p. 32, par. 15 and 17). The Attorney General has also issued three prior opinions on essentially the same question, each time concluding that the act in question was unconstitutional. The Senators had access to the Attorney General opinions, just as did the Appellants. The Circuit Court found the Act to violate two separate provisions of the South Carolina Constitution (R. pp. 2-11). As State officers, they took a solemn oath to uphold the South Carolina Constitution, yet the Senators persisted in defending an unconstitutional Act.

Section § 15-77-300 and its remedy of attorneys' fees targets "acting without substantial justification in pressing [a] claim," rather than for the legislating. *Id.* (emphasis added) If the Respondent Senators had admitted that the Act was unconstitutional, the fees would not have been incurred. This waste and stonewalling is exactly what § 15-77-300 is designed to prevent and remedy. Defending a patently unconstitutional Act falls outside the "discharge of their legislative duty" and "legislative acts," *McCall*, but rather constitutes "acting without substantial justification in pressing its claim." *Id.* at 285 S.C. 243, 246, 329 S.E.2d 741, 743; S.C. CODE ANN. § 15-77-300.

**D. The Court Possesses Authority to Award Costs to or from Any Litigant under Section 15-37-10.**

A court possesses statutory power to award court costs.

In every civil action commenced or prosecuted in the courts of record in this State, except cases in chancery, the attorneys for the plaintiff or defendant shall be entitled to recover costs and disbursements of the adverse party . . . , such costs to be allowed as of course to the attorneys for the plaintiff or defendant and all officers of the court thereto entitled accordingly as the action may terminate and to be inserted in the judgment against the losing party. In cases in chancery the same rule as to costs shall prevail unless otherwise ordered by the court.

S.C. CODE ANN. § 15-37-10 (emphasis added).

S.C. CODE ANN. § 15-77-300 empowers a Court to award attorneys' fees as "court costs" against representatives of the State who have pursued unjustified litigation. *Id.* In the case at bar, the Senators are not immune from the payment of costs or attorneys' fees.

**II. SECTION 15-77-300 APPLIES TO RESPONDENTS.**

The Circuit Court ruled that § 15-77-300 did not apply to the Respondents holding that the statute applied only to a "state agency," a subdivision of the executive branch of state government. The Circuit Court relied on the statutory language allowing costs to be

taxed against “the appropriate agency” under certain circumstances. The Circuit Court also relied on the criteria that costs should be awarded if the court finds that “the agency” acted without substantial justification in defending the lawsuit. The Circuit Court ruled, “The plain and ordinary meaning of ‘agency’ is ‘state agency’ operating within the executive branch of government.” In so ruling, the Circuit Court eviscerated the strength and heart of the statute. Appellants respectfully suggest that in focusing on this term, “agency,” and not on the overall import or effect of the statute, the Circuit Court erred.

The entire purpose and effect of § 15-77-300 is to award attorneys’ fees against a state actor who unjustifiably maintains litigation against a private party. It explicitly allows attorneys’ fees to any party that is in litigation against “the State or any political subdivision of the State.” *Id.* “The State” itself is subject to the statute. *Layman v State*. However, “the State” not a person or entity “operating within the executive branch of government,” as required by the Circuit Court (R. p. 18). Furthermore, “any political subdivision of the State” is subject to the statute, but is not a person or entity “operating within the executive branch of government” (R. p. 18). Yet the statute covers a “political subdivision of the State.” *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney’s fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney’s fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney’s fees under § 15-77-300 against the City, City Council members, and City Administrator); *see also Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006); *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004).

Thus, the word “agency” in the statute cannot be limited to those divisions of the executive branch, as the Circuit Court holds. Therefore, the meaning of the term “the appropriate agency” is not limited to a subdivision of the executive branch, but rather it is used in a generic sense, meaning any representative of “the State [or] any political subdivision of the State.” § 15-77-300 (A). As such, it applies to these Respondents, and the Circuit Court erred in holding that the statute did not apply to them.

### **III. APPELLANTS SATISFY THE STATUTORY CRITERIA.**

A citizen must prove three elements to claim attorneys’ fees: (1) the citizen must be the prevailing party; (2) the government entity must have acted without substantial justification; and (3) no special circumstances would have made the award of attorney’s fees unjust. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990); *Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002). Appellants satisfied these three criteria.

**A. Appellants Are Prevailing Parties.**

The Circuit Court found that Act 17 of 2011 violates Article VIII, § 7 of the Constitution: “No laws for a specific county shall be enacted” (R. p. 9). The Supreme Court has repeatedly found such actions of the General Assembly unconstitutional.

The Circuit Court also found that Act 17 violates Article III, § 34’s restriction on special legislation: “The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted . . . .” S.C. Constitution, Article III, § 34. Act 17 fails to state or relate to any reason why a general law could not address those matters. (R. pp. 10-11). Under these circumstances, the Appellants have prevailed.

**B. Respondents Acted Without Substantial Justification.**

Respondent Senators acted without substantial justification in pressing their claims in this lawsuit, with the knowledge of three opinions of the Attorney General that Act 17 was unconstitutional. In analyzing this element, courts look to whether the governmental defendant had a reasonable basis in law and fact. *Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 358 S.C. 647, 595 S.E.2d 890 (Ct. App. 2004).

Respondents did not have a reasonable basis in law and fact. Act 17 applied only to Richland County. The Senators are under no constitutional or statutory mandate to defend an Act that is so clearly unconstitutional. Like the defendants in *Cornelius v. Oconee County*, these Respondents “cited no viable authority supporting [their] position” that the Act was constitutional, and therefore in this litigation, they “acted without substantial justification.” *Id.*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006) (emphasis added). Respondents had no mandate to defend the indefensible. Respondents were not

“substantially justified” in pressing their claims in this lawsuit, and an award of attorneys’ fees is warranted.

**C. No Special Circumstances Make An Award Of Fees Unjust.**

No special circumstances make an award of fees unjust. Appellants brought this action to uphold the Constitution. The State benefits when civic-minded citizens bring such actions. “It is very commendable that public-spirited citizens should endeavor to protect the taxpayers of a county from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of public funds.” *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948), *quoting Fox v. Lantrip*, 169 Ky. 759, 185 S.W. 136, 139. The Court continued, “Citizens should be encouraged to bring suits like these.” Appellants’ action benefitted the citizens of South Carolina by upholding the Constitution.

Accordingly, Appellants meet the qualifications for an award of attorneys’ fees under S.C. CODE ANN. § 15-77-300.

**IV. APPELLANTS’ ACTUAL ATTORNEYS’ FEES AND COSTS WERE REASONABLE.**

Appellants incurred total attorneys’ fees and costs of \$33,824.57 in pursuing this matter. Appellants’ counsel attached an affidavit, a supplemental affidavit, and statements documenting attorneys’ fees and costs (R. pp. 86-104). The Defendant Senators did not object to any specific entry claimed as Appellants’ attorneys’ fees, nor did they argue that the total fee claimed was unreasonable in any way (R. pp. 105-111). Appellants’ actual attorneys’ fees and costs were reasonable, and Appellants are entitled to an award of attorneys’ fees and costs.

“There are six factors for the trial court to consider when determining an award of attorneys fees: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.” *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004) citing *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). “Upon request for attorneys fees that are authorized by contract or statute, the trial court should make specific findings of fact on the record for each of these factors.” *Id. citing Jackson*, 326 S.C. at 308, 486 S.E.2d at 760 and *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494.

First, as to the nature, extent and difficulty of the case, Appellants brought this action and spent significant time, effort and money challenging these Senators to uphold the Constitution.

Second, as to the time necessarily devoted to the case, as shown by the affidavit of Appellants’ counsel, Appellants spent significant time in proving the unconstitutional nature of the Act.

Third, Appellants’ counsel are experienced attorneys of high professional standing and well known to the courts of this State. *See, inter alia, South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004), *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct.

App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Fourth, counsel did not work on a contingency fee, but these fees were paid as they accrued.

Fifth, Appellants obtained beneficial results. Upholding the Constitution was the Appellants' objective. Furthermore, Appellants' litigation benefits every citizen by requiring the General Assembly to comply with the Constitution.

Sixth, as to the customary legal fees for similar services, Appellants have presented Counsel's affidavit supported by detailed time records showing that Plaintiff incurred attorneys' fees and costs. Appellants respectfully suggest that based upon counsel's affidavit and the Court's familiarity with attorney fees customarily charged in this legal community, the time spent and the hourly rates requested by Counsel are reasonable. In fact, Plaintiff's Counsel have discounted their normal rates due to the public interest nature of this litigation. The Court should find that Appellants' actual attorneys' fees and costs were reasonable, and that Appellants are entitled to a full award of attorneys' fees and costs.

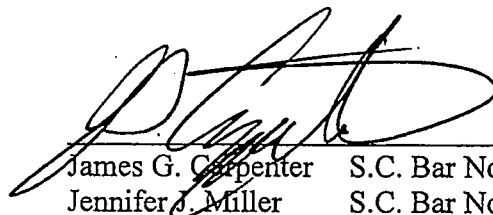
## CONCLUSION

The South Carolina General Assembly abrogated sovereign immunity for the award of attorneys' fees and costs in enacting section 15-77-300, and the South Carolina Supreme Court abrogated sovereign immunity in *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), and in *Layman v. State*, 376 S.C. 434, 446, 658 S.E.2d 320, 326 (2008), for the award of attorneys' fees and costs under § 15-77-300. The statute applies to these Respondents, as they were acting for the State.

Appellants have met the statutory criteria for an award of fees. They prevailed. The Respondents were not substantially justified in pressing their claims. No other factors make an award of attorneys' fees unjust. Respondents made no objection to any particular entry, nor to the amount of the fees claimed. Appellants' attorneys' fees are reasonable.

Wherefore, Appellants pray the Court to reverse the judgment of the Circuit Court and award Appellants their actual attorneys' fees and costs from the Respondent Senators.

Respectfully submitted,  
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October 17, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Appellate Case No. 2014-001412

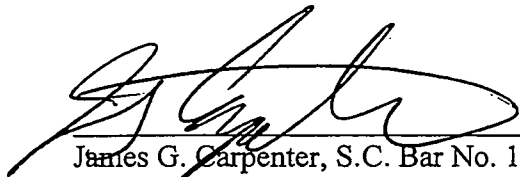
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**Certificate of Service**

The undersigned attorney hereby certifies that he has served a copy of the foregoing Appellants' Final Brief on counsel for Defendants by US Mail, postage prepaid on Friday, October 17, 2014 to the following persons:

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-07790

South Carolina Public Interest Foundation and William B. DePass, Jr., Individually, and on behalf of all others similarly situated, Appellants.

VS.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr. and The State of South Carolina, Respondents.

RESPONDENTS' FINAL REPLY BRIEF

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ATTORNEYS FOR RESPONDENT  
SENATORS COURSON, JACKSON,  
LOURIE, AND SCOTT, IN THEIR  
OFFICIAL CAPACITIES AS MEMBERS  
OF THE SOUTH CAROLINA SENATE

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## STATEMENT OF ISSUES ON APPEAL

- I. DOES THE DOCTRINE OF LEGISLATIVE IMMUNITY PROHIBIT THE RECOVERY OF COSTS AND FEES AGAINST MEMBERS OF THE SENATE?
- II. DOES THE APPLICATION OF THE WELL SETTLED RULES OF STATUTORY CONSTRUCTION CLEARLY DEMONSTRATE THAT SECTION 15-77-300 IS INTENDED TO APPLY TO STATE ACTION UNDERTAKEN BY EXECUTIVE BRANCH AGENCIES AND NOT TO APPLY TO THE EXERCISE OF LEGISLATIVE AUTHORITY BY MEMBERS OF THE SENATE?
- III. ARE THE APPELLANTS PROHIBITED FROM RECOVERING FEES AND COSTS AGAINST THE RESPONDENTS BECAUSE THE APPELLANTS WOULD NOT HAVE BEEN ENTITLED TO RECOVER FEES AND COSTS AGAINST THE APPROPRIATE AGENCY CHARGED WITH EXECUTING ACT 17 OF 2011?

## STATEMENT OF THE CASE

The Appellants originally initiated this action to challenge the constitutionality of Act 17 of 2011 as a local or special law in violation of Article III, § 34(IX) and Article VIII, § 7 of the South Carolina Constitution. Act 17 of 2011 amended Section 7-27-405 of the South Carolina Code to provide for a combined Board of Registration and Election in Richland County. The facts of the case were not in dispute and only presented questions of law that were appropriately addressed at summary judgment.

Section 7-5-10 of the South Carolina Code governs the appointment of members of county boards of registration and Section 7-13-70 provides for the appointment of members of county commissioners of election. Prior to the enactment of Act 312 of 2008, the General Assembly passed numerous local acts combining the boards of registration and election in individual counties. In 2008, the General Assembly passed Act 312 which codified these various local acts in Chapter 27 of Title 7.

In regards to Richland County, Act 312 of 2008 provided in Section 7-27-405 that Richland would not have a combined board, but rather would continue to have separate boards of registration and election appointed pursuant to Section 7-5-10 and Section 7-13-70, respectively. Act 17 of 2011 amended Section 7-27-405 to provide for the current combined board in Richland County. The Appellants asserted that by amending Section 7-27-405 to combine the boards of registration and election for Richland County, the General Assembly enacted a special law when a general law was already applicable. (R. p. 39, line 19 -p. 40, line 40)

The parties filed cross motions for Summary Judgment along with supporting memoranda of law. (R. pp. 37, 38-50, 55-65, 66) The Circuit Court granted Appellants' motion by order filed on August 26, 2013, which found Act 17 to be unconstitutional on the grounds

asserted by the Appellants. (R. pp. 2-11) The Respondents filed a Motion to Alter or Amend the Judgment on September 9, 2013, so that the Court's order would be stayed as to not interfere with conducting local city and county elections in the fall of 2013. (R. pp. 73-75) Subsequent to the elections, the Court denied the motion to reconsider by order filed December 30, 2013. (R. p. 12) The Respondents did not appeal the Court's granting of the Appellants' Summary Judgment motion or the denial of the Motion to Reconsider.

The Appellants subsequently petitioned the Court for costs and fees pursuant to Section 15-77-300. (R. pp. 79-85) The parties filed memoranda of law and a hearing was held on the matter. (R. pp. 105-11, 112-19) The Court subsequently denied Appellants' Petition by order filed March 19, 2014, on the grounds that the doctrine of legislative immunity shields members of the General Assembly from a recovery of costs and fees. Section 15-77-300 does not apply to members of the General Assembly, and the Appellants were not entitled to recover costs and fees against the Respondents pursuant to Section 15-77-300 because the Appellants would not have been entitled to a recovery of costs and fees against the agency charged with executing Act 17. (R. pp. 15-19)

The Appellants filed a Motion to Reconsider which was denied by order dated June 3, 2014. (R. pp. 21, 126-37)

The Appellants now appeal the Circuit Court's denial of costs and fees.

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## ARGUMENT

### I.

#### THE DOCTRINE OF LEGISLATIVE IMMUNITY PROHIBITS THE RECOVERY OF COSTS AND FEES AGAINST MEMBERS OF THE SENATE.

The Circuit Court was correct when it held that individual members of the General Assembly are immune from a recovery for attorney's fees and costs under Sections 15-77-300 and 15-37-10 of the South Carolina Code.

As the trial court correctly indicates, the doctrine of legislative immunity provides federal, state, and local officials with immunity for any action taken "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783 (1951); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). As Justice Frankfurter stated in *Tenney*: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

The South Carolina Supreme Court agrees with the United States Supreme Court on this issue and has recognized that legislators enjoy legislative immunity for their actions taken within the scope of their legislative duties. *Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979). In *Richardson*, a local official sued a state legislator for defamatory remarks. The Court held that the state legislator was protected by legislative immunity because he made the statement during the performance of his legislative duties. The Court stated: "A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts in the performance of their duties." *Id.* at 146, 255 S.E.2d at 343.

In the present case, the actions taken by the Respondents were wholly within the context of their legislative duties. The present action simply challenges the constitutionality of Act 17 of

2011 and does not allege that the Respondents took any action other than their involvement in the legislative process. The actions of the Respondents were limited to the introduction of the bill that ultimately became Act 17 of 2011 and voting for the bill on the floor of the Senate, which wholly and completely falls within the scope of their legislative activities.

However, the Appellants argue that the Respondents waived the defense of legislative immunity with respect to the award of attorney's fees because the Respondents did not plead legislative immunity in their Answer. However, attorney's fees sought pursuant to Section 15-77-300 occur not as part of the underlying action but after the matter is concluded and is undertaken by separate petition pursuant to Section 15-77-300. As a result, the Respondents were entitled to present any applicable defense to the subsequent Petition for attorney's fees and failure to plead this defense in the underlying action should not serve as a waiver in a subsequent separate proceeding.

Therefore, the Circuit Court correctly ruled that the doctrine of legislative immunity would apply and prevents the recovery of fees and costs against individual members of the Senate.

## II.

### SECTION 15-77-300 APPLIES TO STATE ACTION UNDERTAKEN BY EXECUTIVE BRANCH AGENCIES AND DOES NOT APPLY TO MEMBERS OF THE SENATE.

The Circuit Court correctly ruled that Section 15-77-300 applies to state agencies and simply does not apply to members of the General Assembly.

Section 15-77-300 provides in relevant part:

(A) In any civil action brought by the State, any political subdivision of the State or **any party who is contesting state action**, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against **the appropriate agency** if:

(1) the court finds that **the agency** acted without substantial justification in pressing its claim against the party; and

(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction. [emphasis added]  
S.C. Code Ann. § 15-77-300 (Supp. 2013).

As this Court is well aware, the cardinal rule of statutory construction is to ascertain the intent of the General Assembly. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), citing *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1993). When interpreting a statute, the court must give words their plain and ordinary meaning. *Id.* The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *S. Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 412 S.E.2d 377 (1991). Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). Statutes must be read as a whole and sections which are part of

the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992).

Further, fee-shifting statutes are an exception to the American Rule that provides that litigants are responsible for their own fees. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997)(“Attorney’s fees are not recoverable unless authorized by contract or statute.”) Further, government fee-shifting statutes also constitute a waiver of sovereign immunity. *M.A. Mortenson Co. v. U.S.*, 996 F.2d 1177, 1180 (D.C. Cir 1993). As a result, government fee-shifting statutes should be strictly construed to only provide the relief necessary to serve the purpose of providing litigants access to the courts to challenge governmental action. *See U.S. v. Horn*, 29 F.3d 754, 762 (1st Cir. 1994)(analyzing claim for fees against federal government requires application of rule that “a waiver of sovereign immunity always is to be construed strictly in favor of the federal government, and must not be enlarged beyond such boundaries as its language plainly requires.”).

Section 15-77-300 allows a prevailing party who is contesting “state action” to recover reasonable costs and fees. The deficiency in the Appellants’ argument begins with their misapprehension of the term state action. When the General Assembly exercises its plenary legislative authority, it is not acting on behalf of the State, but rather is acting as representatives of the people in determining the conditions, parameters, and the extent to which an official or agency may act on the State’s behalf. The General Assembly does not engage in state action, but instead empowers an official or agency to undertake state action.

Further, the statute clearly allows fees and costs to be recovered against “the appropriate agency” and only if “the agency” acted without substantial justification. Undoubtedly, the plain and ordinary meaning of “agency” is a “state agency” operating within the executive branch of

the government. Other parts of the code clearly indicate that these terms are intended to apply to the executive branch. For example, Section 1-23-10(1) defines "Agency" or "State Agency" as "each state board, commission, department, executive department or officer, other than the legislature, the courts, the South Carolina Tobacco Community Development Board, or the Tobacco Settlement Revenue Management Authority, authorized by law to make regulations or to determine contested cases." S.C. Code Ann. § 1-23-10 (Supp. 2013). Clearly, when the entire statute is construed together, it is intended to allow a prevailing party to recover costs and fees from a state agency or department of the executive branch, not individual members of the General Assembly.

The Appellants are correct that the primary purpose of Section 15-77-300 is to ease access to the courts for litigants who are challenging state action. This purpose does support a sound public policy of allowing litigants aggrieved by a state action to seek redress in the courts when the litigant might not otherwise be able to afford to bring suit. However, it is a challenge to the state action that an agency undertakes pursuant to the General Assembly's grant of authority that this section means to compensate.

The contention that "agency" means "state agency" is also supported by the Court's analysis of substantial justification in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). In that case, the Court reasoned: "in deciding whether a **state agency** acted with substantial justification, the relevant question is whether the **agency's** position in litigating the case had a reasonable basis in law and fact." [emphasis added] *Id.* at 445, 326.

Further, there is no indication from the plain language of this statute that the General Assembly ever intended to waive legislative immunity and subject individual members of the

General Assembly to a recovery of fees and costs for actions taken solely within the sphere of their legislative duties.

Section 15-77-300 does not even have to be construed in the light most favorable to the Respondents to ascertain that there is no reasonable construction of the terms “appropriate agency” or “agency” that would support any contention that this section applies to an individual or a group of members of the General Assembly. Any construction that attempts to “shoehorn” members of the General Assembly into the meaning of “agency” would simply transverse the bounds of logic and reason.

Further, the existence of the doctrine of legislative immunity in this State’s jurisprudence lends even further credence to the argument that Section 15-77-300 does not apply to legislators. Surely, if the General Assembly intended to waive legislative immunity with respect to the award of attorney’s fees against members of the General Assembly they would have used language that more clearly encompassed the exercise of legislative power. However, as argued above, the terms used clearly are intended to apply to the exercise of executive authority by state agencies.

Therefore, the Circuit Court correctly held that Section 15-77-300 is intended to apply to state agencies in the executive branch and does not apply to members of the Senate.

### III.

**THE APPELLANTS ARE NOT ENTITLED TO RECOVER FEES AND COSTS AGAINST THE RESPONDENTS BECAUSE THE APPELLANTS WOULD NOT HAVE BEEN ENTITLED TO RECOVER FEES AND COSTS AGAINST THE APPROPRIATE AGENCY CHARGED WITH EXECUTING ACT 17 OF 2011.**

The Circuit Court correctly found that Appellants would not be entitled to costs and fees even if they had named the “appropriate agency” charged with executing Act 17 of 2011 as a party and, as a result, are not entitled to recover costs and fees against the Respondents.

In the present case, the Appellants named the Respondent Senators and the State of South Carolina as parties, but for some unknown reason, declined to name the combined Richland County Board of Registration and Elections created by Act 17 of 2011. However, even if they had named the combined board, which is “the appropriate agency”, as a party, they would still not be entitled to fees and costs.

In order to be entitled to fees and costs, the Appellants must be the prevailing party and the agency must have been without substantial justification in pressing its claim against the Appellants.

Prior to 2010, Section 15-77-300 provided no guidance to the courts to determine the existence of substantial justification. Correspondingly, the Supreme Court defined substantial justification as: “In deciding whether a state agency acted with substantial justification, the relevant question is whether the agency’s position in litigating the case had a reasonable basis in law and fact.” *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

In *Layman*, the Retirement Systems were simply defending their actions that were mandated by a statute that had not been declared unconstitutional. The difficulty presented with the interpretation of substantial justification in *Layman* is that it put state agencies in the position of determining whether or not to follow a statutory mandate on the basis of whether the agency believed that the statute would eventually be determined to be unconstitutional while under the threat of a substantial award of attorney's fees. This placed state agencies in a position directly counter to the General Assembly's sole constitutional authority to enact laws, not to mention the sole authority of the courts to interpret the constitution. Further, this interpretation could have provided agencies with the justification of refusing to enforce statutes that it determined to be unconstitutional simply to avoid an award of attorney's fees, which would have resulted in an even greater tip in the balance of constitutional power.

However, in 2010, the General Assembly addressed the practical difficulties highlighted by *Layman* by amending Section 15-77-300 to provide guidance as to what constitutes substantial justification. The General Assembly added the portion of the statute that provides: "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction." S.C. Code Ann. § 15-77-300 (Supp. 2013). The primary deficiency in the Respondents' argument is that they fail to acknowledge or account for this change in the statutory language.

The Appellants fail to address and provide no basis to overcome this new presumption. There is no doubt the General Assembly intended to change the analysis by which the court determines the existence of substantial justification and in doing so intended to provide state agencies with a "safe harbor" when they were simply defending the constitutionality of actions

that are mandated by a statute that is presumed constitutional. As a result, the general rule applies which states that “when the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intends to change the existing law.” *Key Corp. Capital v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007). Thus, the Appellants’ reliance on the previous standard is misplaced and is immaterial to a determination of whether costs and fees should be awarded under the current statute.

Further, under the current standard, there is no plausible argument the Appellants could make to overcome the presumption. The Appellants’ entire case centers on whether Act 17 of 2011, which combined the Richland County Boards of Registration and Elections, is constitutional. Even if the combined board were a party, it would simply be defending its authority to exist under a statute that had not been declared unconstitutional. Certainly, this action would fall squarely within the presumption provided by the 2010 amendment to Section 15-77-300.

Thus, even if the combined board, which is the appropriate agency for purposes of Section 15-77-300, had been a party to this suit and defended the constitutionality of Act 17 of 2011, the Appellants would not have been able to recover costs and fees. Therefore, if the Appellants would not be entitled to costs and fees from “the appropriate agency”, the conclusion that they are not entitled to costs and fees from any other party is inescapable.

In order to accept the Appellants’ argument that the Respondents are entitled to fees requires the Court to find that the General Assembly amended Section 15-77-300 in a manner that provides state agencies with a safe harbor but at the same time intended to open themselves up to a recovery of attorneys fees. This interpretation would require the Court to leap a gulf of logic and land on a result that is simply absurd.

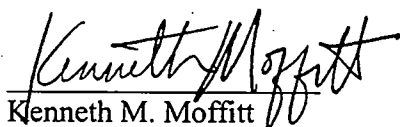
Finally, the Supreme Court has long held that questions regarding the constitutionality of an act of the General Assembly “are to be resolved in light of the familiar and well-settled general rule that every presumption must be indulged in favor of the constitutionality of an act of the Legislature, and that courts should not declare a statute unconstitutional unless the invalidity is manifest beyond a reasonable doubt.” *Poulnot v. Cantwell*, 129 S.C. 171, 176, 123 S.E. 651, 654 (1924); *see also, Davis v. Greenville County*, 322 S.C. 73, 504 S.E.2d 307 (1996); *Westvaco Corp. v. S.C. Dept. of Revenue*, 321 S.C. 59, 467 S.E.2d 739 (1995); *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994); *Henderson v. Evans*, 268 S.C. 127, 232 S.E.2d 331 (1977); *Pelzer, Rodgers & Co. v. Campbell and Co.*, 15 SC 581 (1881). The Respondents simply defended an act entitled to this presumption and were substantially justified in doing so, just like a state agency would be if faced with the same challenge.

Therefore, the Appellants are not entitled to recover fees and costs against the Respondents because the Appellants would not have been entitled to recover fees and costs against the agency charged with executing Act 17 of 2011.

## CONCLUSION

Therefore, on the grounds stated above, the decision of the Circuit Court should be affirmed because the doctrine of legislative immunity protects members of the General Assembly from a recovery of costs and fees, Section 15-77-300 does not apply to members of the General Assembly, and the Appellants were not entitled to recover costs and fees against the Respondents pursuant to Section 15-77-300, because the Appellants would not have been entitled to a recovery of costs and fees against the agency charged with executing Act 17 of 2011.

Respectfully submitted,



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LOURIE, AND SCOTT, IN THEIR  
OFFICIAL CAPACITIES AS  
MEMBERS OF THE SOUTH  
CAROLINA SENATE

October 28, 2014

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-07790

Appellate Case No. 2014-001412

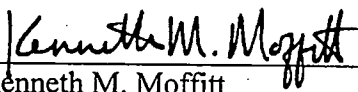
South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ..... Appellants,

vs.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr. and The State of South Carolina, ..... Respondents.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of Respondents' Final Brief in the above captioned case has been served upon opposing counsel by placing a copy in an envelope, postage prepaid, and mailing it via first class mail to their respective addresses of record, this 28<sup>th</sup> day of October, 2014.

  
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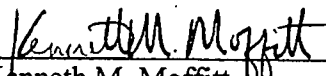
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Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr. and The State of South Carolina, ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents' complies with Rule 211(b), SCACR.

  
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October 28, 2014

29 Jan

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**APPELLANTS' FINAL REPLY BRIEF**

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October 17, 2014

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Appellants submit this Reply Brief to address matters raised by the Respondents' Brief and to point out several arguments that the Respondents did not address.

**I. LEGISLATIVE IMMUNITY DOES NOT PROHIBIT AN AWARD OF ATTORNEYS' FEES AS COSTS.**

Respondents argue that legislative immunity prevents an award of attorneys' fees as costs in this action. Respondents cite *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) and *Bogan v. Scott Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998) in support of their arguments for legislative immunity.

**A. Common Law Legislative Immunity Does Not Govern These Facts.**

In *Tenney*, the Supreme Court of the United States traced the origins of legislative immunity from the English common law through the speech and debate clause of Article 1, section 6 of the United States Constitution. The Supreme Court described legislative immunity as "the privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings." *Id.*, 341 U.S. 367, 372, 71 S.Ct. 783, 786 (emphasis added).

In *Tenney*, the plaintiff asserted that legislators had conducted legislative hearings in violation of his constitutional rights. He sought compensatory and punitive damages under one of the Civil Rights Acts. In explaining the rationale for legislative immunity, the Supreme Court stated,

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

*Id.*, 341 U.S. 367, 377, 71 S.Ct. 783, 788 (emphasis added). The *Tenney* Court found that the defendant legislators were "acting in the sphere of legitimate legislative activity." *Id.*, 341 U.S.

367, 376, 71 S.Ct. 783, 788. The Court ruled that the defendants were entitled to legislative immunity because “Investigations, whether by standing or special committees, are an established part of representative government.” *Id.*, 341 U.S. 367, 377, 71 S.Ct. 783, 789 (emphasis added).

In *Bogan*, the plaintiff sought to recover damages under 42 U.S.C. § 1983 for violation of her First Amendment rights. The plaintiff argued that local legislators had proposed, voted on, and signed legislation eliminating her government employment position in retaliation for her exercise of First Amendment rights. In *Bogan*, the Supreme Court ruled that legislative immunity barred not only the damages, but also granted absolute immunity from suit for all legitimate legislative activities. The Court summarized its holding:

[Defendants below] further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts and therefore reverse the judgment below.

*Id.*, 523 U.S. 44, 46, 118 S.Ct. 966, 969 (1998) (emphasis added). In referring to *Tenney*, the *Bogan* Court ruled, “We explained that legislators were entitled to absolute immunity from suit in common law.” *Bogan v. Scott Harris*, 523 U.S. 44, 49, 118 S.Ct. 966, 970.

South Carolina adopted the rule of legislative immunity from the English common law, as demonstrated by S.C. Code Ann. § 14-1-50: “All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.” Judge Hemphill recited the history of its adoption in *Bruce v. Riddle*, 464 F. Supp. 745 (D.S.C. 1979).

The applicability of the legislative immunity defense in South Carolina was not at issue in *Tenney v. Brandhove*, [341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)], but the Court did make some enlightening observations about its availability here and in virtually all other states. After discussing the evolution of legislative immunity in the English common law, the Court observed in footnote 3 that the South Carolina Constitution of 1776 had protected the privilege by a general

provision in Art. VII preserving English law. Although that provision no longer exists in the current South Carolina Constitution, the same purpose is served by § 14-1-50 of the S.C. Code which, provides that "All, and every part of, the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." Thus, the holdings in *Tenney v. Brandhove* and in other decisions based on legislative immunity as it evolved from the common law of England are fully applicable to actions brought in any federal or state court of South Carolina alleging causes of action arising out of the constitutions or statutes of either the United States or the State of South Carolina.

Id. 464 F. Supp. at 747-48.

The facts of the Supreme Court cases *Tenney* and *Bogan* are distinguishable from the facts of the case at bar. In *Tenney* and *Bogan*, the activities that were the subject of the claims against the legislators were activities that the legislators carried out as part of their legislative duties. The legislators in *Tenney* were "acting in the sphere of legitimate legislative activity." *Id.*, 341 U.S. 367, 376, 71 S.Ct. 783, 788. In *Bogan*, the Defendants were accused of proposing, voting on, and signing a piece of legislation to eliminate the plaintiff's governmental position. Proposing, voting on, and signing a piece of legislation are all inherently "legislative activities," and again, the defendants were entitled to absolute legislative immunity.

In the case at bar, the award of attorneys' fees would not be based on any legislative activity of the Respondents. Rather, the award of attorneys' fees is a part of an award of costs, and derives not from legislative activity, but from the Respondents' conduct in litigation. Legislative immunity does not apply in this context.

There are other reasons why legislative immunity does not apply to the Respondent Senators. First, legislative immunity is a privilege or exemption for a legislator sued in his individual capacity. Respondents were sued in their official capacities as representatives of the government of South Carolina. Second, legislative immunity prevents an award of compensatory or punitive damages. The Plaintiffs did not seek compensatory or punitive damages from these

Senators. Plaintiffs sought only declaratory judgment to challenge the constitutionality of an Act of the General Assembly. Third, as demonstrated below, legislative immunity is an affirmative defense which these Respondent Senators failed to plead, and it should be deemed waived. This Court should rule that legislative immunity does not prevent an award of attorneys' fees, awarded as costs in this action.

**B. Respondents Did Not Plead Common Law Legislative Immunity in a Timely Manner.**

The South Carolina Constitution does not contain a speech and debate clause, as does the U.S. Constitution, but it does grant a constitutional exemption from civil litigation to individual members of the General Assembly while that body is in session. South Carolina Constitution, Art. III, § 14. That section provides an affirmative defense that must be pled, and if it is not pled timely, it is waived.

An exemption or privilege from service of civil process is regarded as a personal privilege or exemption which may be and generally is waived if not claimed at the proper time by the person in whose favor it runs. 62 Am.Jur.2d, *Process*, § 156.

Here, the husband plainly waived any right to protection he had, afforded by the constitutional provision. He participated freely and voluntarily and subjected himself to cross-examination. Several other hearings were held between February 23 and October 1, 1982 in which he participated.

*Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70 (1984). The Court ruled that the defendant had waived his privilege. Likewise, these Respondents failed to plead legislative immunity as an affirmative defense in their answer, and therefore this affirmative defense is waived.

**C. Respondents Did Not Claim Absolute Immunity as a Defense.**

Respondents do not argue that they were immune from suit (absolute immunity); instead, they appear to have conceded that they are subject to suit for declaratory judgment that an Act of the General Assembly is unconstitutional, and rightly so. Indeed, the appellate courts of this State have heard and adjudicated many such cases.

The Supreme Court of South Carolina ruled that members of the Williamsburg County Legislative Delegation were absolutely immune from an award of damages for allegedly slanderous statements, on the basis of legislative immunity.

A sound public policy has long recognized an absolute immunity of members of legislative bodies for acts of the performance of their duties. Accordingly, an absolute privileges recognized as to defamatory statements made by legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry.

*Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). The immunity at issue in *Richardson* was the immunity from compensatory and punitive damages for the tort of defamation, but the Supreme Court of South Carolina also ruled that the legislators were absolutely immune from suit.

Judge Anderson, writing for the Court of Appeals in his customary scholarly manner, explained **absolute immunity** in the context of prosecutorial immunity in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (2001). Absolute immunity is immunity from suit, not simply immunity from an award of damages. "There are weighty reasons why judicial officers should be shielded and the proper discharge of their official duties from harassing litigation at the suit of those who think themselves wronged by their decisions and that injustice has been done." *Id.* 347 S.C. 227, 235, 553 S.E.2d 496, 501 *quoting Yaselli v. Goff*, 12 F.2d 396, 399 (2d Cir. 1926), *affirmed in toto*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed 395 (1927).

Judge Anderson also quoted Judge Learned Hand explaining the justification for absolute immunity from suit, and not merely immunity from damages.

*The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.* Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a

jury of his good faith. *There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.* As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. *In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.*

*Id.* 347 S.C. 227, 238, 553 S.E.2d 496, 502, quoting, *Gregoire v. Biddle*, 177 F.2d 579, 581 ((2d Cir. 1949) (*emphasis added by S.C. Court of Appeals*)). Thus, legislative immunity, when properly applied is absolute immunity from suit, not just from damages.

Respondents do not argue that legislative immunity prohibits the Court from hearing this case (as it did in *Bogan*), but merely from awarding attorneys' fees as a part of the costs under S.C. Code Ann. § 15-77-300. If legislative immunity applied, it would provide immunity not only from an award of compensatory and punitive damages, but also an absolute immunity from suit. Appellants were awarded declaratory judgment. The award of attorneys' fees, as costs, inherently follows the award of declaratory judgment.

Respondents did not appeal the Circuit Court's ruling that the act in question was unconstitutional. They opposed Plaintiffs' claim for attorneys' fees. After the Respondents litigated the merits of the case and lost, a tardy claim of legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

## **II. THE STATUTORY EXCEPTION FOR THE BOARD DOES NOT PREVENT AN AWARD OF ATTORNEYS' FEES AGAINST THE RESPONDENTS.**

The General Assembly recently enacted a limitation on the award of attorneys' fees by redefining "substantially justified." The statutory limitation states: "The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction."

S.C. Code Ann. § 15-77-300(A). Appellants did not sue the Richland County Board of Elections and Voter Registration. The Appellants do not seek to recover attorneys' fees from the Board under § 15-77-300, but from the Senators in their official capacities.

Respondents argue that the recent statutory exception prevents an award of attorneys' fees against the Board, and therefore that this Court should rule that this exception also prevents an award of attorneys' fees these Respondents. Respondents' argument is not justified by the text of the statute, and their interpretative gloss on the statute would invite the Court to attempt to "leap the chasm in two bounds."

First, Respondent Senator have not argued that this statutory protection applies to them in this case. Instead, they argue that if the Appellants had brought suit against the Board, the Board could have asserted this statutory defense (Respondents' Brief, p. 14). The Respondents proffer policy reasons for the enactment of the statutory exception, but the policy reasons do not support an extra-statutory application of the exception to Respondent Senators.

Second, Respondents have not shown that they have met statutory prerequisites to claim this statutory exception. Respondents do not argue that they were following "a statutory or constitutional mandate" in the conduct of this litigation. The Attorney General did not view defending this unconstitutional act to be "a statutory or constitutional mandate" to the State. The Attorney General, representing the State of South Carolina, in keeping with his prior opinions, conceded that the act was unconstitutional. These Respondents could have just as easily conceded that the act was unconstitutional. These Respondents have no "constitutional or statutory mandate" to defend an unconstitutional act.

Third, Respondents have not pled, asserted, or demonstrated that they were entitled to claim the statutory exception, either in their arguments to the Circuit Court, or in their arguments

to this Court. The statutory exception is in the nature of an affirmative defense. These Respondents have not cited any particular “constitutional or statutory mandate” requiring them to defend this unconstitutional act. If they had pled or asserted some “constitutional or statutory mandate,” the Appellants could have challenged that assertion, and the issue could have been joined, debated, and litigated. As it is, the Respondents have made no such pleading or assertion. Therefore, they are not entitled to take advantage of the statutory exception.

### **III. RESPONDENTS FAILED TO ADDRESS SEVERAL IMPORTANT ARGUMENTS IN THE APPELLANTS’ BRIEF.**

#### **A. The Supreme Court of South Carolina Previously Awarded Attorneys’ Fees and Costs to Mr. Sloan against the Members of the General Assembly.**

Respondents failed to address the Supreme Court’s prior award of costs and attorneys’ fees to Mr. Sloan in another action in which he challenged an unconstitutional act of the General Assembly, *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005). If the Circuit Court and the Respondents had been correct in their position on legislative immunity, then surely the Supreme Court of South Carolina would not have so cavalierly ordered the House and the Senate to pay costs and attorneys’ fees to Mr. Sloan in 2005. This prior award goes to the heart of Respondents’ argument that they are immune from the award of costs and attorneys’ fees, but the Respondents failed to address this important argument.

Furthermore, in 2005, both the South Carolina House of Representatives and the South Carolina Senate **paid the award** of costs and attorneys’ fees to Mr. Sloan, without protest, and without making a Motion to Alter or Amend the judgment of fees and costs, as awarded by the Supreme Court of South Carolina. If they had been immune from such an award, surely they would have raised an objection. .

**B. The State Itself and Political Subdivisions Are Not Subdivisions of the Executive Department, but § 15-77-300 Subjects Them to an Award of Attorneys' Fees.**

Respondents argue that the statutory phrase, “the appropriate agency,” means only an agency of the Executive Department. Appellants demonstrated in their brief that the State itself can be liable for attorneys’ fees under S.C. Code Ann. § 15-77-300. Furthermore, a political subdivision can be liable for attorneys’ fees under this section. Respondents failed to address Appellants’ argument that the term “agency” or “appropriate agency” must mean something other than a subdivision in the Executive Department as the Respondents contend. Section 15-77-300 explicitly allows attorneys’ fees against **“the State or any political subdivision of the State.”** *Id.* the Supreme Court awarded attorneys’ fees against the State itself in *Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008). The State itself is not a subset of the Executive Department.

Courts have also awarded attorneys’ fees against political subdivisions. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney’s fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney’s fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney’s fees under § 15-77-300 against the City, City Council members, and City Administrator); *see also Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006); *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). Political subdivisions are not a subset of the Executive Department. Respondents failed to address these many authorities that are contrary to their position.

Despite their argument that “appropriate agency” means a subdivision of the Executive Department, Respondents are not consistent on this point. Respondents also argue that the Richland County Board of Elections and Voter Registration, is “the appropriate agency” when

they argue that that the Board would have been entitled to take advantage of the statutory exception to the award of attorneys' fees (Respondents' Brief, p. 14). The Board is not an agency of the Executive Department; it is a part of Richland County. Nevertheless, the Respondents assert that it is "the appropriate agency" for purposes of utilizing the statutory exception to an award of attorney's fees under this section. "Appropriate agency" is not limited to an agency of the Executive Department.

**C. Respondents Failed to Object to Any Particular Entry of Attorneys' Fees or to Total the Amount of Attorneys' Fees Claimed.**

Appellants incurred total attorneys' fees and costs of \$33,824.57 in prevailing in the Circuit Court. In response to the fee petition, Respondents did not object to any specific entry Appellants claimed as attorneys' fees, nor did Respondents argue that the total fee claimed was unreasonable in any way (R. pp. 105-111). On appeal, Respondents have also made no objection to any particular entry or to the total claimed by the Appellants. In their Brief, Respondents failed to address Appellants' arguments on this point.

Appellants' actual attorneys' fees and costs were reasonable, and Appellants are entitled to an award of attorneys' fees and costs.

**IV. SOVEREIGN IMMUNITY DOES NOT PREVENT AN AWARD OF ATTORNEYS' FEES AS COSTS.**

Respondents concede that "government fee-shifting statutes also constitute a waiver of sovereign immunity. *M. A. Mortenson Co. v. U.S.* 996 F.2d 1177, 1180 (D.C. Cir. 1993)." Respondent's Brief, p. 11. *Mortenson* held that the United States was subject to monetary sanctions under Rule 37 for violations of orders related to discovery. In that case, the United States and argued that such sanctions were in violation of its sovereign immunity. The federal Equal Access to Justice Act ("EAJA") allows an award of fees to a litigant, if the government litigates

without a good faith basis in fact and law. The *Mortenson* court found that EAJA was a sufficient statutory waiver of sovereign immunity and authorization for an award of attorneys' fees and costs under Rule 37. Similarly, in the case at bar, the South Carolina fee-shifting statute, § 15-77-300, constitutes a waiver of sovereign immunity for an award of attorneys' fees and costs in litigation in which the State is a party.

Furthermore, Appellants Initial Brief set out in some detail the explicit waivers of sovereign immunity both by the Supreme Court of South Carolina and the General Assembly. Respondents failed to address these waivers of sovereign immunity. Sovereign immunity, to the extent it still exists, protects the General Assembly from compensatory or punitive damages arising from discretionary or legislative acts of the General Assembly. The attorneys' fees statute at issue, § 15-77-300, does not authorize attorneys' fees to be paid for acts of legislative discretion, and the Appellants are not seeking attorneys' fees for acts of legislative discretion. The statute, like EAJA, authorizes payment of attorneys' fees for conducting litigation without a good faith basis in fact and in law to support the position taken by the government. That is exactly the situation in this case. The Respondents have attempted to defend the indefensible. Such conduct is the explicit statutory reason for an award of attorneys' fees under § 15-77-300. Sovereign immunity does not prevent an award of attorneys' fees under this section.

Respondents failed to plead sovereign immunity as an affirmative defense. Sovereign immunity is an affirmative defense that must be pled and proven. In justification of that failure to plead sovereign immunity as an affirmative defense, the Respondents argue that Appellants sought the attorneys' fees "after the matter [was] concluded" (Respondents Brief, p. 9). Accordingly, Respondents did not, and do not, argue that the defense of sovereign immunity prohibits the Court from hearing this case, but merely from awarding attorneys' fees as a part of the costs under

S.C. Code Ann. § 15-77-300. If sovereign immunity were truly applicable, it would provide Respondents immunity from an award of compensatory and punitive damages. Appellants did not seek, and do not seek, an award of damages.

Respondents appear to have conceded that they are subject to suit for declaratory judgment that an act of the General Assembly is unconstitutional. A ruling that the Respondents are subject to an award of costs (including attorney's fees) seems to be far less of an affront to sovereign immunity than a judgment declaring an act of the General Assembly unconstitutional. Sovereign immunity or legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

### **CONCLUSION**

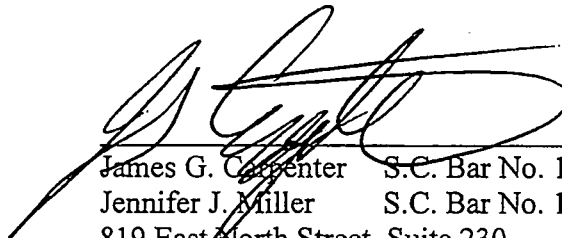
Legislative immunity bars an award of compensatory or punitive damages against individual legislators for actions taken in their capacity as legislators. It also would prevent a court from hearing such a lawsuit. However, Appellants did not seek compensatory and punitive damages; they sought and were awarded declaratory judgment. Legislative immunity does not bar an award of attorneys' fees against legislators in their official capacities after they litigated the case to conclusion without raising the affirmative defense of legislative immunity. Furthermore, the Supreme Court of South Carolina previously awarded costs and attorneys' fees against the House and Senate when Mr. Sloan successfully challenged another unconstitutional act.

Because § 15-77-300 explicitly authorizes an award of attorneys' fees against the State itself and against political subdivisions, the interpretation of "agency" advanced by the Respondents in by the Circuit Court cannot be a correct interpretation.

Finally, Respondents have failed to address many important arguments raised by the Appellants. Appellants have demonstrated an entitlement to an award of attorneys' fees.

Appellants pray the Court to reverse the judgment of the Circuit Court and to award Appellants their actual attorneys' fees and costs from these Respondents.

Respectfully submitted,  
THE CARPENTER LAW FIRM, P.C.



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James G. Carpenter    S.C. Bar No. 1136  
Jennifer J. Miller    S.C. Bar No. 13611  
819 East North Street, Suite 230  
Greenville, SC 29601  
Telephone: (864) 235-1269  
Facsimile: (864) 331-3083  
Attorneys for Appellants

October 17, 2014

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Appellate Case No. 2014-001412

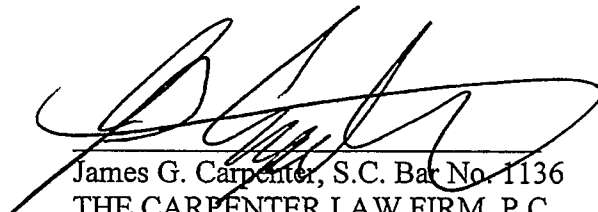
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**Certificate of Service**

The undersigned attorney hereby certifies that he has served a copy of the foregoing Appellants' Final Reply Brief on counsel for Defendants by US Mail, postage prepaid on Friday, October 17, 2014 to the following persons:

J. Emery Smith, Jr.  
PO Box 11549  
Columbia, SC 29211

Michael R. Hitchcock  
P.O. Box 142  
Columbia, SC 29202



James G. Carpenter, S.C. Bar No. 1136  
THE CARPENTER LAW FIRM, P.C.  
819 E. North Street  
Greenville, South Carolina 29601  
Tel. (864) 235-1269  
Fax (864) 331-3083  
Attorneys for Plaintiffs



WHEN IT'S WORTH FIGHTING FOR

JAMES G. CARPENTER  
james.carpenter@carpenterlawfirm.net  
SERVING S.C. AND N.C.

September 13, 2016

The Honorable Jenny Abbott Kitchings  
Clerk of SC Court of Appeals  
PO Box 11629  
Columbia, SC 29211

Re: *South Carolina Public Interest Foundation et al. vs. Courson, et al*  
Appellate Case Number 2014-01412

Dear Ms. Kitchings:

I write pursuant to SCACR 208 (b)(7) to bring to the Court's attention a recent "pertinent and significant authorit[y]." The South Carolina Supreme Court entered an Order August 25, 2016, awarding my clients attorneys' fees under S.C. Code Ann. § 15-77-300 from members of the General Assembly (enclosed). This authority addresses the main issue in the case at bar.

This authority supports the argument of the Appellants' Brief, p. 12 that the Supreme Court has previously awarded costs and attorneys' fees to Mr. Sloan from the House and the Senate. Second it supports the argument on Reply Brief, p. 8 that the Respondents failed to address this argument in the Respondents' Brief. Third, it refutes the Respondents' argument asserting Legislative Immunity in Respondents' Brief, pp. 8-9. Fourth, it refutes Respondents' argument that S.C. Code Ann. § 15-77-300 does not apply to members of the General Assembly, in Respondents' Brief, pp. 10-13.

Respectfully submitted,

THE CARPENTER LAW FIRM, PC

James G. Carpenter

CC: J. Emery Smith, Jr.  
Edward H. Bender  
Kenneth M. Moffett

# The Supreme Court of South Carolina

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Petitioners,

v.

James H. "Jay" Lucas, as Speaker of the S.C. House of Representatives, Henry D. McMaster, as President of the S.C. Senate, and The State of South Carolina, Respondents.

Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, Intervenor.

Appellate Case No. 2015-001443

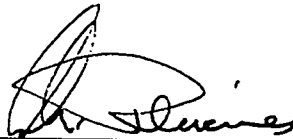
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## ORDER

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After careful consideration of the petitioners' request for attorneys' fees and costs, we award \$5,000.00 in attorneys' fees.

IT IS SO ORDERED.



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FOR THE COURT

C.J.

Columbia, South Carolina

August 25, 2016

cc:

James G. Carpenter, Esquire  
Alan McCrory Wilson, Esquire  
Kenneth M. Moffitt, Esquire  
J. Emory Smith, Jr., Esquire  
Michael J. Anzelmo, Esquire  
Blake Terence Williams, Esquire  
Charles Fennell Reid, Esquire  
Patrick G. Dennis, Esquire  
Richard L. Pearce, Esquire  
Edward Houseal Bender, Esquire



WHEN IT'S WORTH FIGHTING FOR

JAMES G. CARPENTER  
*james.carpenter@carpenterlawfirm.net*  
SERVING S.C. AND N.C.

October 4, 2016

The Honorable Jenny Abbott Kitchings  
Clerk of SC Court of Appeals  
PO Box 11629  
Columbia, SC 29211

Re: *South Carolina Public Interest Foundation et al. vs. Courson, et al*  
Appellate Case Number 2014-01412

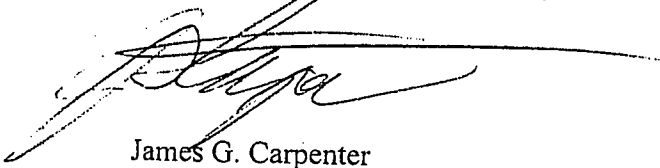
Dear Ms. Kitchings:

I write pursuant to SCACR 208(b)(7) to bring to the Court's attention additional recent "pertinent and significant authorit[y]." On September 13, 2016, I wrote to inform the Court of a recent ruling from the South Carolina Supreme Court awarding my clients attorneys' fees against members of the General Assembly pursuant to S.C. Code Ann. § 15-77-300.

Those Defendants have now paid the award of fees, and I enclose copies of the checks made payable to my client, the South Carolina Public Interest Foundation, on behalf of the Speaker of the House, the President of the Senate, and the President Pro Tem of the Senate.

Thank you very much. If you need anything else, please telephone me.

Sincerely yours,  
THE CARPENTER LAW FIRM, PC



James G. Carpenter

CC: J. Emery Smith, Jr.  
Edward H. Bender  
Kenneth M. Moffett

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COMPTROLLER GENERAL

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CURTIS M. LOFTIS, JR. STATE TREASURER

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STATE TREASURER

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CURTIS M. LOFTIS, JR. STATE TREASURER

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GREENVILLE SC 29616

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*Edward D Sloan Jr*

**THE STATE OF SOUTH CAROLINA**  
**In The Court of Appeals**

South Carolina Public Interest Foundation and William  
B. Depass, Jr., individually, and on behalf of all others  
similarly situated, Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson,  
Senator Joel Lourie, Senator John L. Scott, Jr., and The  
State of South Carolina, Respondents.

Appellate Case No. 2014-001412

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Appeal From Richland County  
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 5486  
Heard October 13, 2016 – Filed May 11, 2017

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**AFFIRMED**

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James G. Carpenter, of Carpenter Law Firm, PC, of  
Greenville, for Appellants.

Deputy Solicitor General J. Emory Smith, Jr., of  
Columbia, for Respondent The State of South Carolina;  
Edward Houseal Bender and Kenneth M. Moffitt, both of  
Columbia, for Respondents John E. Courson, Darrell  
Jackson, Joel Lourie, and John L. Scott, Jr.

---

**HUFF, J.:** The South Carolina Public Interest Foundation (SC Public Interest) appeals the circuit court's order denying SC Public Interest's motion for attorney's fees and costs, arguing the state action statute, section 15-77-300 of the South Carolina Code (Supp. 2016), applies to Senators John E. Courson, Darrell Jackson, Joel Lourie, and John L. Scott, Jr. (the Senators). We affirm.

## **FACTS/PROCEDURAL HISTORY**

On March 15, 2011, the Senators introduced legislation in the South Carolina Senate to consolidate the Richland County Board of Voter Registration and the Richland County Election Commission. The legislation also changed the appointment process for board members and established criteria for board members of the newly-created board. Upon its passage, the legislation became Act 17 of 2011.

In 2012, SC Public Interest filed this action in the circuit court in Richland County seeking a declaratory judgment that Act 17 was unconstitutional and requesting costs and attorney's fees pursuant to the state action statute, section 15-77-300 of the South Carolina Code. SC Public Interest brought the action against the Senators and the state of South Carolina arguing Act 17 was unconstitutional as local legislation that violated the South Carolina Constitution Article III, Section 34, and as a law for a specific county in violation of South Carolina Constitution Article VIII, Section 7. SC Public Interest and the Senators filed cross motions for summary judgment. On August 26, 2013, the circuit court granted SC Public Interest's motion for summary judgment and found Act 17 unconstitutional. The circuit court withheld ruling on SC Public Interest's request for costs and attorney's fees until SC Public Interest filed a motion supported by affidavit of counsel. The Senators moved to alter or amend the judgment and the circuit court denied the motion. SC Public Interest moved for attorney's fees and filed an affidavit in support of the motion. On March 19, 2014, the circuit court issued an order denying SC Public Interest's motion for costs and attorney's fees. The circuit court stated individual members of the General Assembly were immune from a recovery of costs and attorney's fees under the state statute, Section 15-77-300, as well as the general civil action costs provision of Section 15-37-10 of the South Carolina Code (2005). The circuit court found the state action statute did not apply to members of the General Assembly because it only applied to executive branch agencies. SC Public Interest filed a motion to alter or amend the circuit court's order denying the motion for attorney's fees, which the circuit court denied. This appeal followed.

## STANDARD OF REVIEW

"The decision to award or deny attorneys' fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.*

In this case, the issue of whether the statute applies depends on the court's interpretation of the term "appropriate agency" pursuant to the state action statute. "The interpretation of a statute is a question of law, which this [c]ourt reviews de novo." *Id.*

## LAW/ANALYSIS

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Grimsley v. S.C. Law Enft Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012). The best evidence of legislative intent is the plain language of the statute. *Perry v. Bullock*, 409 S.C. 137, 140, 761 S.E.2d 251, 253 (2014). "When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation." *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. If the term at issue is not defined in the statute, the court must "look to its usual and customary meaning." *Perry*, 409 S.C. at 140-41, 761 S.E.2d at 253.

The relevant portion of the state action statute provides:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs *against the appropriate agency* if:

1) the court finds that *the agency* acted without substantial justification in pressing its claim against the party;

and

(2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

The *agency* is presumed to be substantially justified in pressing its claim against the party if the *agency* follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

S.C. Code Ann. § 15-77-300 (Supp. 2016) (emphasis added).

Because "agency" is not defined in article 5 of Chapter 77 of the South Carolina Code, the court must look to the usual and customary meaning of agency to ascertain the legislature's intent.<sup>1</sup> Black's Law Dictionary defines agency as "an official body, esp. within the government, with authority to implement and administer particular legislation." *Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014). A state agency is an "executive or regulatory body of a state." *State Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014). Under either of these definitions, the Senate is not a state agency based on the customary meaning of agency. Senators are responsible for performing legislative duties such as writing legislation, approving appointments by the Governor, and representing their constituents. Senators are generally not responsible for implementing or administering legislation after its enactment; rather, that responsibility generally lies with executive agencies. While the Senate is a body of the state government, it exists in an entirely separate, but co-equal, branch of government than executive agencies. Accordingly, because the Senate's duties are entirely different from those of executive agencies, defining "appropriate agency" under the state action statute to include the Senate would be a forced construction of the term based on

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<sup>1</sup> The supreme court previously refused to look to other parts of the South Carolina Code to define "agency" for the purposes of the state action statute. See *Willis Constr. Co. v. Sumter Airport Comm'n*, 308 S.C. 505, 510, 419 S.E.2d 240, 242 (Ct. App. 1992) (noting agency is not defined in Article 5 of Chapter 77 and rejecting party's argument that agency under the state action statute should be defined using the South Carolina Tort Claims Act's definition found in Chapter 78 of Title 15).

the customary meaning of agency. Therefore, agency under the state action statute must be limited to executive branch agencies.

Furthermore, South Carolina recognizes the longstanding doctrine of legislative immunity for legislators carrying on their legislative duties. *See Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (holding a legislator was absolutely immune from liability for comments made during the performance of his legislative duties). Legislative immunity "has long been recognized in Anglo-American law," being rooted in the "'Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and [] 'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)). Legislative immunity protects legislators from "deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good." *Tenney*, at 377. The public good is undermined by any restriction placed on a legislator's ability to exercise legislative discretion, including the fear of personal liability. *See Bogan*, at 52-53. Although few South Carolina cases discuss legislative immunity, this court has addressed similar public policy considerations for immunity for other types of public officials carrying out their official duties. *See Williams v. Condon*, 347 S.C. 227, 242-43, 553 S.E.2d 496, 505 (Ct. App. 2001) (noting qualifying a prosecutor's immunity would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (quoting *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976))); *O'Laughlin v. Windham*, 330 S.C. 379, 384, 498 S.E.2d 689, 692 (Ct. App. 1998) ("[J]udicial immunity is vital for the continuation of an independent judiciary and for the preservation of judicial integrity."); *id.* at 385, 498 S.E.2d at 692 (holding the adoption of the Tort Claims Act did not modify common law judicial immunity in part because of the "presumption of legislative intent to preserve common law principles"). Therefore, because nothing in the plain language of the statute indicates the General Assembly intended to waive legislative immunity, legislative immunity prevents the state action statute from applying to Senators.

## CONCLUSION

We hold the circuit court properly denied SC Public Interest's motion for attorney's fees because the state action statute is not applicable to the Senators.

**AFFIRMED.**

**LOCKEMY, C.J., and MCDONALD, J., concur.**

MEMORY TRANSMISSION REPORT

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**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

South Carolina Public Interest Foundation and William  
B. Depass, Jr., individually, and on behalf of all others  
similarly situated, Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson,  
Senator Joel Lourie, Senator John L. Scott, Jr., and The  
State of South Carolina, Respondents.

Appellate Case No. 2014-001412

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Appeal From Richland County  
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 5486  
Heard October 13, 2016 – Filed May 11, 2017

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**AFFIRMED**

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Deputy Solicitor General J. Emory Smith, Jr., of  
Columbia, for Respondent The State of South Carolina;  
Edward Houseal Bender and Kenneth M. Moffitt, both of  
Columbia, for Respondents John E. Courson, Darrell  
Jackson, Joel Lourie, and John L. Scott, Jr.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

---

Appellate Case No. 2014-001412

---

South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ..... Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr., and The State of South Carolina, ..... Respondents.

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PETITION FOR REHEARING

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May 17, 2017

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**RECEIVED**

MAY 22 2017

**SC Court of Appeals**

Appellants submit this Petition for Rehearing pursuant to SCACR 221(a) to address points “overlooked or misapprehended” by the Court. The Court’s decision was based on two points: the definition of “agency” in S.C. Code Ann. § 15-77-300, and the doctrine of legislative immunity.

**I. THE STATE AND POLITICAL SUBDIVISIONS ARE “AGENCIES.”**

This Court ruled that the statutory phrase, “the appropriate agency,” means only an agency of the Executive Department. By focusing on “agency” or “appropriate agency” instead of “the State or any political subdivision of the State,” under the Court’s analysis, the tail is wagging the dog. This statute gives a right to fees to anyone litigating with “the State or a political subdivision of the State.”

(A) In any civil action **brought by the State, any political subdivision of the State** or any party who is contesting state action, unless the prevailing party is **the State or any political subdivision of the State**, the court may allow the prevailing party to recover reasonable attorney’s fees to be taxed as court costs against the **appropriate agency** if:

- (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney’s fees unjust.

S.C. Code Ann. § 15-77-300 (emphasis added). Petitioners suggest that a fair reading of the statute is that “appropriate agency” refers back to “the State [or] any political subdivision of the State.” Instead of repeating those same words for a third and a fourth time, the General Assembly simply substituted “appropriate agency” and “agency” as a shorter term.

Under the plain language of the statute, the **State itself** can be liable for attorneys’ fees under S.C. Code Ann. § 15-77-300. Furthermore, the statute explicitly contemplates that a **political subdivision** can be liable for attorneys’ fees under this section. Accordingly, the term

“agency” or “appropriate agency” must mean something other than a subdivision in the Executive Department as the Court ruled.

This interpretation was confirmed when the Supreme Court awarded attorneys’ fees against **the State itself** in *Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008). The State itself is not a subset of the Executive Department. Accordingly, Petitioners respectfully suggest that the terms “agency” and “appropriate agency” are generic terms referring back to the statutory language in the previous section: “the State or any political subdivision of the State.” Petitioners respectfully suggest that construction is the only one that makes sense in the context of the statute.

Furthermore, South Carolina Courts have also awarded attorneys’ fees against **political subdivisions** under § 15-77-300. *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (Court awarded attorney’s fees under § 15-77-300 against the County and County Council members); *Eargle v. Horry County*, 344 S.C. 449, 545 S.E.2d 276 (2001) (Court awarded attorney’s fees under § 15-77-300 against the County and County Administrator); *Simpkins v. City of Gaffney*, 315 S.C. 26, 431 S.E.2d 592 (1993) (Court awarded attorney’s fees under § 15-77-300 against the City, City Council members, and City Administrator); *see also Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492, 497 (2006); *Burton v. York County Sheriff’s Dept.*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). Political subdivisions are not a subset of the Executive Department. Petitioners respectfully suggest that this Court failed to consider these many authorities that are **contrary** to its opinion.

Finally, Petitioners respectfully suggest that reasoning from the greater to the lesser, if the State itself can be liable for attorneys’ fees under § 15-77-300, then certainly a subdivision of the State, namely the Senate and the named Senators in their official capacities can be liable for attorneys’ fees under § 15-77-300. *See Layman v State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

## **II. LEGISLATIVE IMMUNITY DOES NOT PROHIBIT AN AWARD OF ATTORNEYS' FEES AS COSTS.**

This Court ruled that legislative immunity prevents an award of attorneys' fees as costs in this action. This Court cited *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) and *Bogan v. Scott Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998) in support of its ruling based upon legislative immunity. Petitioners respectfully suggest that the court misapprehended or overlooked the following points:

### **A. Legislative Immunity Does Not Govern These Facts.**

Legislative immunity protects individual members of the General Assembly from compensatory or punitive damages arising from discretionary or legislative acts in the General Assembly. The attorneys' fees statute, § 15-77-300, does not authorize attorneys' fees to be paid for acts of legislative discretion, and the Appellants are not seeking attorneys' fees for acts of legislative discretion.

Respondents conceded that "government fee-shifting statutes also constitute a waiver of sovereign immunity. *M. A. Mortenson Co. v. U.S.* 996 F.2d 1177, 1180 (D.C. Cir. 1993)." Respondent's Brief, p. 11. *Mortenson* held that the United States was subject to monetary sanctions under Rule 37 for violations of orders related to discovery. In that case, the United States and argued that such sanctions were in violation of its sovereign immunity. The federal Equal Access to Justice Act ("EAJA") allows an award of fees to a litigant, if the government litigates without a good faith basis in fact and law. The *Mortenson* court found that EAJA was a sufficient statutory waiver of sovereign immunity and authorization for an award of attorneys' fees and costs under Rule 37. Similarly, in the case at bar, the South Carolina fee-shifting statute, § 15-77-300, constitutes a waiver of sovereign immunity for an award of attorneys' fees and costs in litigation in which the State is a party.

The statute, like EAJA, authorizes payment of attorneys' fees for conducting litigation without a good faith basis in fact and in law to support the position taken by the government. That is exactly the situation in this case. The Respondents attempted to defend the indefensible. Such conduct is the explicit statutory reason for an award of attorneys' fees under § 15-77-300. Legislative immunity does not prevent an award of attorneys' fees under this section.

In *Tenney*, the Supreme Court of the United States traced the origins of legislative immunity from the English common law through the speech and debate clause of Article I, section 6 of the United States Constitution. The Supreme Court described legislative immunity as "the privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings." *Id.*, 341 U.S. 367, 372, 71 S.Ct. 783, 786 (emphasis added).

In *Tenney*, the plaintiff asserted that legislators had conducted legislative hearings in violation of his constitutional rights. He sought compensatory and punitive damages under one of the Civil Rights Acts. In explaining the rationale for legislative immunity, the Supreme Court stated,

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

*Id.*, 341 U.S. 367, 377, 71 S.Ct. 783, 788 (emphasis added). The *Tenney* Court found that the defendant legislators were "acting in the sphere of legitimate legislative activity." *Id.*, 341 U.S. 367, 376, 71 S.Ct. 783, 788. The Court ruled that the defendants were entitled to legislative immunity because "Investigations, whether by standing or special committees, are an established part of representative government." *Id.*, 341 U.S. 367, 377, 71 S.Ct. 783, 789 (emphasis added).

In *Bogan*, the plaintiff sought to recover damages under 42 U.S.C. § 1983 for violation of her First Amendment rights. The plaintiff argued that local legislators had proposed, voted on, and signed legislation eliminating her government employment position in retaliation for her exercise of First Amendment rights. In *Bogan*, the Supreme Court ruled that legislative immunity barred not only the damages, but also granted absolute immunity from suit for all legitimate legislative activities. The Court summarized its holding:

[Defendants below] further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts and therefore reverse the judgment below.

*Id.*, 523 U.S. 44, 46, 118 S.Ct. 966, 969 (1998) (emphasis added). In referring to *Tenney*, the *Bogan* Court ruled, “We explained that legislators were entitled to absolute immunity from suit in common law.” *Bogan v. Scott Harris*, 523 U.S. 44, 49, 118 S.Ct. 966, 970.

South Carolina adopted the rule of legislative immunity from the English Common Law, as demonstrated by S.C. Code Ann. § 14-1-50: “All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.” Judge Hemphill recited the history of its adoption in *Bruce v. Riddle*, 464 F. Supp. 745 (D.S.C. 1979).

The applicability of the legislative immunity defense in South Carolina was not at issue in *Tenney v. Brandhove*, [341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)], but the Court did make some enlightening observations about its availability here and in virtually all other states. After discussing the evolution of legislative immunity in the English common law, the Court observed in footnote 3 that the South Carolina Constitution of 1776 had protected the privilege by a general provision in Art. VII preserving English law. Although that provision no longer exists in the current South Carolina Constitution, the same purpose is served by § 14-1-50 of the S.C. Code which, provides that “All, and every part of, the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section.” Thus, the holdings in *Tenney*

*v. Brandhove* and in other decisions based on legislative immunity as it evolved from the common law of England are fully applicable to actions brought in any federal or state court of South Carolina alleging causes of action arising out of the constitutions or statutes of either the United States or the State of South Carolina.

Id. 464 F. Supp. at 747-48.

The facts of the Supreme Court cases *Tenney* and *Bogan* are distinguishable from the facts of the case at bar. In *Tenney* and *Bogan*, the activities that were the subject of the claims against the legislators were activities that the legislators carried out **as part of their legislative duties**. The legislators in *Tenney* were “acting in the sphere of legitimate legislative activity.” *Id.*, 341 U.S. 367, 376, 71 S.Ct. 783, 788. In *Bogan*, the Defendants were accused of proposing, voting on, and signing a piece of legislation to eliminate the plaintiff’s governmental position. Proposing, voting on, and signing a piece of legislation are all inherently “legislative activities,” and again, the defendants were entitled to absolute legislative immunity.

In the case at bar, the award of attorneys’ fees would not be based on any legislative activity of the Respondents. Rather, the award of attorneys’ fees is a part of an award of costs, and derives not from legislative activity, but from the Respondents’ **conduct in litigation**. Legislative immunity does not apply in this context.

#### **B. Legislative Immunity Does Not Prevent Official Capacity Lawsuits.**

Another reason why legislative immunity does not apply to the Respondent Senators is that legislative immunity is a privilege or exemption for a legislator sued in his **individual** capacity. Respondents were sued in their **official** capacities as representatives of the government of South Carolina. Second, legislative immunity prevents an award of compensatory or punitive damages. The Plaintiffs did not seek compensatory or punitive damages from these Senators. Plaintiffs sought only declaratory judgment to challenge the constitutionality of an Act of the General Assembly. Third, as demonstrated below, legislative immunity is an affirmative defense which

these Respondent Senators failed to plead, and it should be deemed waived. Petitioners respectfully suggest that legislative immunity does not prevent an award of attorneys' fees, awarded as costs in this action.

**C. Respondents Did Not Timely Plead Legislative Immunity.**

The South Carolina Constitution does not contain a speech and debate clause, as does the U.S. Constitution, but it does grant a constitutional exemption from civil litigation to individual members of the General Assembly while that body is in session. South Carolina Constitution, Art. III, § 14. That section provides an affirmative defense that must be pled, and if it is not pled timely, it is waived.

An exemption or privilege from service of civil process is regarded as a personal privilege or exemption which may be and generally is waived if not claimed at the proper time by the person in whose favor it runs: 62 Am.Jur.2d, *Process*, § 156.

Here, the husband plainly waived any right to protection he had, afforded by the constitutional provision. He participated freely and voluntarily and subjected himself to cross-examination. Several other hearings were held between February 23 and October 1, 1982 in which he participated.

*Eaddy v. Eaddy*, 283 S.C. 582, 584, 324 S.E.2d 70 (1984). The Court ruled that the defendant had waived his privilege. Likewise, these Respondents failed to plead legislative immunity as an affirmative defense in their answer, and therefore this affirmative defense is waived.

Respondents did not appeal the Circuit Court's ruling that the Act in question was unconstitutional. They opposed Plaintiffs' claim for attorneys' fees. After the Respondents litigated the merits of the case and lost, a tardy claim of legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

Respondents appear to have conceded that they are subject to suit for declaratory judgment that an act of the General Assembly is unconstitutional. A ruling that the Respondents are subject to an award of costs (including attorney's fees) seems to be far less of an affront to sovereign

immunity than a judgment declaring an act of the General Assembly unconstitutional. Sovereign immunity or legislative immunity does not bar an award of costs, including attorneys' fees under § 15-77-300.

### **III. THE SUPREME COURT TWICE AWARDED PETITIONERS ATTORNEYS' FEES AND COSTS AGAINST THE MEMBERS OF THE GENERAL ASSEMBLY.**

This Court failed to address the Supreme Court's prior award of costs and attorneys' fees to Mr. Sloan when he challenged an unconstitutional act of the General Assembly, *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005). This Court also failed to address the supplemental authority cited by the Petitioners, the recent ruling of the South Carolina Supreme Court in *South Carolina Public Interest Foundation v. Lucas*, Appellate Case Number 2015-001443, an award of costs and attorneys' fees under § 15-77-300, and the checks evidencing payment from the Speaker of the House, the President of the Senate, and the President pro tem of the Senate. If this Court's opinion on legislative immunity had been correct, then surely the Supreme Court of South Carolina would not have ordered the House and the Senate officials to pay costs and attorneys' fees to Mr. Sloan in 2005 and again on August 25, 2016 under § 15-77-300.

Furthermore, in response to both awards, both the South Carolina House of Representatives and the South Carolina Senate and their officers **paid the award** of costs and attorneys' fees to Mr. Sloan and the South Carolina Public Interest Foundation without protest and without making a Motion to Alter or Amend the judgment of fees and costs. If these officials and these bodies had been immune from such an award, surely they would have raised an objection.

These awards go to the heart of Petitioners' argument that Respondents are not immune from the award of costs and attorneys' fees, but this Court failed to address these awards and their payments.

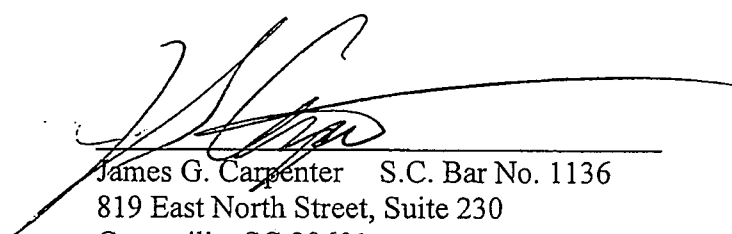
## CONCLUSION

Section 15-77-300 explicitly authorizes an award of attorneys' fees against the State itself and against political subdivisions, neither of which are subdivisions of the Executive Department. Accordingly, this Court's interpretation of "agency" by cannot be correct.

Legislative immunity does not bar declaratory judgment; nor does it bar an award of attorneys' fees against legislators in their official capacities, for their conduct in litigation, particularly when they failed to raise it timely, as an affirmative defense.

Finally, the Supreme Court has twice awarded Petitioners attorneys' fees and costs to against members of the General Assembly. Petitioners pray the Court to reverse its judgment, reverse the judgment of the Circuit Court, and award Petitioners their attorneys' fees and costs.

Respectfully submitted,  
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Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

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Appellate Case No. 2014-001412

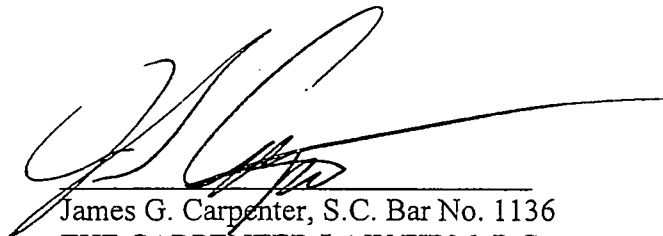
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**Certificate of Service**

The undersigned attorney hereby certifies that he has served a copy of the foregoing  
Petition for Rehearing on counsel for Defendants by US Mail, postage prepaid on  
Wednesday, May 17, 2017 to the following persons:

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MAY 22 2017  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2014-001412

**RECEIVED**  
MAY 25 2017  
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South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf  
of all others similarly situated, ..... Appellants,

vs.

Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, Senator John L. Scott, Jr.  
and The State of South Carolina, ..... Respondents.

**RESPONDENTS' REPLY IN OPPOSITION TO APPELLANTS'  
PETITION FOR REHEARING**

May 25, 2017

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Pursuant to Rules 240 and 221(a) of the South Carolina Appellate Court Rules, Respondents Senator John E. Courson, Senator Darrell Jackson, Senator Joel Lourie, and Senator John L. Scott, Jr. respectfully submit this Reply in Opposition to Appellants' Petition for Rehearing and ask the Court to deny Appellants' Motion for Rehearing.

### **ARGUMENT**

#### **I. APPELLANTS FAIL TO STATE THAT THE COURT OVERLOOKED OR MISAPPREHENDED POINTS DISCUSSED IN THIS CASE.**

This Court held that the circuit court properly denied Appellants' motion for attorney's fees, as Section 15-77-300 of the South Carolina Code is not applicable to the Respondent Senators. *See S.C. Pub. Interest Found. v. Courson*, No. 2014-001412, 2017 WL 1957180, at \*3 (S.C. Ct. App. May 11, 2017).

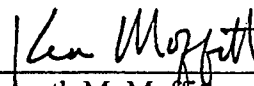
A party petitioning for a rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." SCACR 221(a). "The purpose of such a petition is to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). The purpose "is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." *Id.*

In their petition, Appellants claim this Court overlooked or misapprehended the following points: (1) the State and its political subdivisions are "agencies"; (2) legislative immunity does not prohibit an award of attorneys' fees as costs; and (3) the Supreme Court has twice awarded petitioners attorneys' fees and costs against the members of the General Assembly. In 2012, the South Carolina Public Interest Foundation filed this action. *See S.C. Pub. Interest Found.*, 2017 WL 1957180, at \*1. In 2013, the circuit court heard and decided this case. *See id.* In 2014, the circuit court denied Appellants' motion for costs and attorney's fees against Respondent Senators.

*See id.* Since 2014, this case has continued through the appellate process, and a hearing was held in 2016. Appellants are merely repeating points previously raised throughout the history of this case. The points presented by Appellants have been thoroughly questioned and considered by this Court. The fact that Appellants disagree with the Court's holding is not grounds for a rehearing. Should this Court grant Appellants' Petition for Rehearing, Appellants would just be trying this case a second time in an effort to receive a result they approve of, which is repugnant to the purpose of Rule 221(a) of the South Carolina Appellate Court Rules.

Accordingly, Respondents pray the Court to deny Appellants' Petition for Rehearing.

Respectfully submitted,



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in their official capacities as members  
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Columbia, South Carolina

May 25, 2017

# The South Carolina Court of Appeals

South Carolina Public Interest Foundation and William  
B. Depass, Jr., individually, and on behalf of all others  
similarly situated, Appellants,

v.

Senator John E. Courson, Senator Darrell Jackson,  
Senator Joel Lourie, Senator John L. Scott, Jr., and The  
State of South Carolina, Respondents.

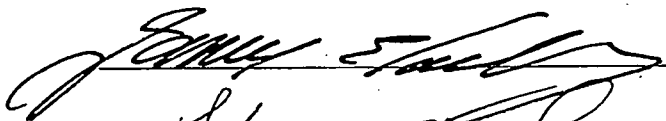
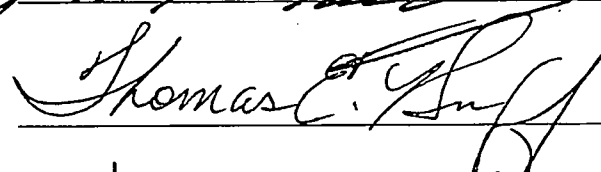
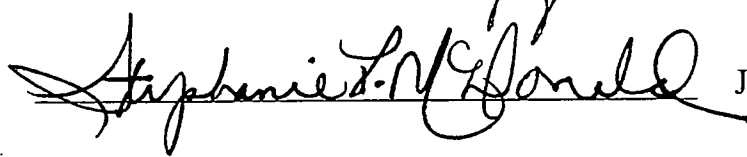
Appellate Case No. 2014-001412

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.  
 J.  
 J.

Columbia, South Carolina

cc:

**FILED**

June 23, 2017.

James G. Carpenter, Esquire  
J. Emory Smith, Jr., Esquire  
Edward Houseal Bender, Esquire  
Kenneth M. Moffitt, Esquire  
Daina Michelle Riley, Esquire  
The Honorable G. Thomas Cooper, Jr.