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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2017-001556

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.

RESPONDENT SENATORS' RETURN TO PETITION FOR WRIT OF CERTIORARI

Respondents, by and through their undersigned counsel, and pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, hereby file this Return to Petitioners' Petition for Writ of Certiorari. Respondents respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari, as Petitioners are not entitled to an award of attorney's fees arising from Petitioners' constitutional challenge of Act 17 of 2011 and as the Court of Appeals' Opinion is in accord with all relevant statutory and case law.

Statement of the Case

Petitioners originally initiated this action to challenge the constitutionality of Act 17 of 2011 as a local or special law in violation of Article III, Section 34(IX) and Article VIII, Section 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 regard to Richland County, Act 312 of 2008 provided in Section 7-27-405 that Richland County 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. Petitioners 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 while 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 Respondents' motion by order filed on August 26, 2013, which found Act 17 to be unconstitutional on the grounds asserted by Petitioners. (R. pp. 2-11). 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 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). Respondents did not

appeal the Court's granting of Petitioners' Motion for Summary Judgment or the denial of the Motion to Reconsider.

Petitioners subsequently petitioned the Court for costs and fees pursuant to Section 15-77-300. (R. pp. 79-85). Both parties filed memoranda of law, and a hearing was held on the matter. (R. pp. 105-11, 112-19) The Court subsequently denied Petitioners' 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 Petitioners were not entitled to recover costs and fees against Respondents pursuant to Section 15-77-300, because Petitioners would not have been entitled to a recovery of costs and fees against the agency charged with executing Act 17. (R. pp. 15-19)

Petitioners filed a Motion to Reconsider, which was denied by order dated June 3, 2014. (R. pp. 21, 126-37)

Petitioners appealed the Circuit Court's denial of costs and fees to the Court of Appeals. The parties fully briefed the issues before the Court of Appeals. Oral arguments were held on October 13, 2016. The Court of Appeals affirmed the Circuit Court's denial of "attorney's fees, because the state action statute is not applicable to the Senators." *S.C. Pub. Interest Found. v. Courson*, 420 S.C. 120, 126, 801 S.E.2d 185, 188 (Ct. App. 2017), *reh'g denied* (June 23, 2017).

Petitioners filed a Petition for Writ of Certiorari with this Court on July 13, 2017. Respondents were served with the Petition for Writ of Certiorari on July 13, 2017.

Argument

I. LEGISLATIVE IMMUNITY PRECLUDES A RECOVERY OF ATTORNEY'S FEES FROM RESPONDENTS PURSUANT TO SECTION 15-77-300.

The Circuit Court and the Court of Appeals correctly held that legislative immunity bars an award of attorney's fees and costs under Section 15-77-300 of the South Carolina Code against

Respondents as individual members of the Senate. Furthermore, the Court of Appeals' decision is in accordance with other rulings of this Court.

"South Carolina recognizes the longstanding doctrine of legislative immunity." *S.C. Pub. Interest Found. v. Courson,* 420 S.C. 120 (Ct. App. 2017), *reh'g denied* (June 23, 2017) (citing *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E. 2d 341, 343) (1979). 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*, "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."

This Court's holdings are in accord with the United States Supreme Court on this issue, and this Court has recognized that legislators enjoy legislative immunity for their actions taken within the scope of their legislative duties. *See 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. *See id.* 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 Respondents were wholly within the context of their legislative duties. The underlying action simply challenged the constitutionality of Act 17 of 2011 and did not allege that Respondents took any action other than their involvement in the legislative process. The actions of Respondents were limited to the introduction of, debate on, and

vote on the bill that ultimately became Act 17 of 2011, which wholly and completely fall within the scope of their legislative activities.

Petitioners argue that Respondents waived the defense of legislative immunity with respect to the award of attorney's fees because Respondents did not plead legislative immunity in their Answer. The seeking of attorney's fees pursuant to Section 15-77-300 occurs 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, 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.

Petitioners contend that Respondents' defense of the enactment of Act 17 of 2011 does not qualify as a legislative activity protected under the sphere of legislative immunity. Petitioners rely upon *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008) to support this argument and further argue that the Court of Appeals' decision in this case conflicts with this Court's holding in *Layman*. Petitioners' reliance is misguided, however, as the circumstances leading to an award of attorney's fees in *Layman* and the circumstances in the underlying case are very different. Consequently, the Court of Appeals' decision does not conflict with *Layman*.

In *Layman*, this Court focused on the efficacy of "the State's and the Retirement System's defense of Act 153's contractual validity in the underlying litigation" when making a determination as to whether attorney's fees should be awarded under the state action statute. *Layman*, 376 S.C. at 449, 658 S.E.2d at 328. At issue in *Layman* was whether state law established a contract between the State and TERI participants. Concerning that statute, this Court stated "the TERI statute created an unambiguous contract between the State and TERI participants who entered the program prior to the enactment of Act 153, and that the State's unilateral alteration of

this agreement by applying the requirements of Act 153 to this class of TERI participants constituted a breach of contract." *Layman*, 368 S.C. at 448-49, 630 S.E.2d at 328. Essentially, this Court held that applying the requirements of Act 153 was so obviously a breach of contract that the State and RSIC should not have defended their actions. *See id.*

In the underlying action, however, the sole question was whether Act 17 of 2011 was constitutional. Petitioners argue that the Attorney General issued three Opinions "warning" that the enactment of Act 17 of 2011 would be unconstitutional, and Petitioners further argue that Respondents should not have defended their actions in Court, in part because they had been "warned." According to Petitioners, Respondents' defense of the Act is what obviates legislative immunity and should lead to the award of attorney's fees.

The present case is easily distinguishable from *Layman*. First, in *Layman*, the question of legislative immunity did not arise because the legislature was not a party to the case. Second, the controversy in *Layman* was whether a breach of contract occurred, while in the underlying matter, the question was whether an act of the General Assembly was constitutional. Unlike a contract dispute, an act of the General Assembly is presumed to be constitutional until a court finds otherwise.[1] Because that presumption exists and must be overcome by those challenging the Act, Petitioners cannot automatically reach the conclusion that the question of constitutionality is "unambiguous." In fact, even the Attorney General, in the Opinions cited by Petitioners, was not unequivocal in his analysis.[2] Therefore, the Appeals Court's Opinion does not conflict with this

[1] *See infra*, fn. 6.

[2] In the cited Attorney General's Opinions, the Attorney General stated that "only a court may declare legislation unconstitutional" and only deemed reviewed acts as "constitutional suspect [sic]." The Honorable Glenn F. McConnell, 2007 WL 3244888, at *4 (S.C.A.G. Aug. 14, 2007). In fact, in an Opinion addressed to Respondent Senator John Scott, Jr., the Attorney General provided, and Petitioners emphasized as well, that "[w]e do not address herein the constitutionality of Act 17 of 2011 [..., but] **a similar local law** [in relation to Act 17 of 2011 in question, here,] **was likely unconstitutional** as being in violation of Art. VIII, § 7." 2012 WL 6061812, n. 2 (emphasis supplied by Petitioners). In these Opinions erroneously relied upon by Petitioners, the Attorney General did not claim that the

Court's holding in *Layman*, as a wholly separate issue was decided in the case below, and Respondents have not obviously acted without substantial justification in defending the constitutionality of Act 17 of 2011.

Petitioners also rely on *Tenny* to support their claim that legislative immunity does not apply in this case. In doing so, Petitioners conveniently provide an excerpt of the Supreme Court's ruling in *Tenney* that defines legislative immunity as "the privilege of legislators to be free from arrest or civil process for what they do or say **in legislative proceedings**." *Tenney*, 341 U.S. at 372, 71 S.Ct. at 786 (emphasis supplied by Petitioners). In *Tenney*, the legislative activities at issue were related to conducting legislative hearings. Petitioners would enjoy if legislative immunity stopped there, but it does not. Legislative immunity extends beyond legislative conduct that occurs within the Senate or House chambers. Contrary to Petitioners' belief that "legislative immunity is a privilege or exemption for a legislator sued in his individual capacity" (Petition, p. 14), legislative immunity protrudes beyond the State House grounds and covers all action taken within the scope of legislative duties. *See Richardson v. McGill*, 273 S.C. 142, 255 S.E.2d 341 (1979). Defending a lawsuit that questions the constitutionality of an Act is most certainly a substantially justified action that furthers Respondents' legislative duties.

The authority to undertake legislative activities in South Carolina is vested in the General Assembly, comprised of the Senate and the House of Representatives. *See* S.C. Const. art. III, § 1. The Senate is comprised of forty-six members, each elected from a different geographic district within the State. *See* S.C. Const. art. III, § 6. In order for the Senate to exercise its constitutional authority to legislate, individual Senators must engage in legislative activities, and a majority of the Senators voting must vote favorably on the matter before the body. In this case, Respondents

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Act in question is unconstitutional, and even where he appears to have done so, these Opinions do not overcome the presumption under which Respondents are entitled to practice their legislative duties.

introduced the challenged legislation and voted for the bill. The Senate had taken action only after the vote was taken and a majority of those voting voted in favor of the bill. The legislative activities undertaken by each member in regard to Act 17 of 2011 are protected by legislative immunity. It logically follows, therefore, that legislative activity undertaken by the Senate as a body is also protected by legislative immunity. Discarding legislative immunity as a bar to awarding attorney's fees and costs under Section 15-77-300 against individual members of the Senate would have a chilling effect on the legislative activities undertaken by Senators and would constitute an impermissible deterrent to the uninhibited discharge of their legislative duties. That, in turn, would cast a pall over the ability of the Senate as a body to exercise its constitutional duties.

Therefore, the Circuit Court and the Court of Appeals correctly ruled that the doctrine of legislative immunity applies to Respondents' actions concerning Act 17 of 2011 and prevents the recovery of fees and costs against individual members of the Senate for challenges to legislative activities undertaken by those members.

II. PETITIONERS DO NOT SATISFY STATUTORY CRITERIA FOR AN AWARD OF ATTORNEY'S FEES PURSUANT TO SECTION 15-77-300.

The Circuit Court and the Court of Appeals correctly ruled that Section 15-77-300 does not apply to Respondents.

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(A) (Supp. 2016). A party awarded fees under Section 15-77-300 must demonstrate that, "first, the contesting party must be the prevailing party; second, the court must find that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find that there are no special circumstances that would make the award of attorney's fees unjust." *Tennis v. South Carolina Dept. of Social Services*, 355 S.C. 551, 560, 585 S.E.2d 312, 317 (Ct. App. 2003) (citing *Richland County v. Kaiser*, 351 S.C. 89, 96, 561 S.E.2d 260, 264 (Ct. App. 2002)). Embedded within that test is the assumption that an "agency" undertook "state action" that ultimately led to the award of attorney's fees. In the cited cases, it is clear-cut that the governmental entities involved fell within the scope of Section 15-77-300; thus, an inquiry into whether "state action" was undertaken by an "agency" was unnecessary. In this case, however, the challenged action was taken by a branch of state government operating pursuant to its constitutional authority rather than by a department of state government or a political subdivision. Therefore, the Court of Appeals was correct in addressing the question of "agency" in its Opinion. Likewise, in this matter, Respondents address these issues because they are relevant to the analysis of whether Petitioners are eligible for attorney's fees under Section 15-77-300.[3]

Respondents concede that Petitioners prevailed in their action challenging the constitutionality of Act 17 of 2011. However, Petitioners fail to satisfy the remaining elements necessary to be eligible for an award of attorney's fees under Section 15-77-300.

[3] The fact that the Court of Appeals did not address the "state action" issue in its Opinion does not mean that the Court disagreed with Respondents' argument that no state action occurred in this matter. It simply means that the Court of Appeals found the "agency" question to be dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 355 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal with the disposition of an independent issue is dispositive (citation omitted)).

A. THE SENATE IS NOT AN AGENCY FROM WHICH A PREVAILING PARTY MAY RECOVER ATTORNEY'S FEES UNDER SECTION 15-77-300.

Recovery of attorney's fees under Section 15-77-300 requires action by an agency. *See Tennis*, 355 S.C. 551, 585 S.E.2d 312; *See, generally,* S.C. Code Ann. § 15-77-300 (Supp. 2016). The term "agency" is not defined in Section 15-77-300. *See* S.C. Code Ann. § 15-77-300 (Supp. 2016). If an undefined statutory term is at issue in a case, the court must "look to its usual and customary meaning." *Perry v. Bullock*, 409 S.C. 137, 140-41, 761 S.E.2d 251, 253 (2014). In its decision, the Court of Appeals looked to Black's Law Dictionary for the usual and customary meaning of "agency" and found that the term is defined as "an official body, esp. within government, with authority to implement and administer particular legislation." *Courson*, 420 S.C. at 124, 801 S.E.2d at 187 (quoting *Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014)). The Court of Appeals then provided examples of the differences between the duties of a legislative body and that of an executive agency and held that "defining 'appropriate agency' under the state action statute to include the Senate would be a forced construction of the term" and that the "state action statute must be limited to executive branch agencies." *Id.*

The goal of statutory construction is to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co.,* 331 S.C. 19, 501 S.E.2d 725 (1998) (citing *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)). The Court of Appeals achieved this goal in its decision. To find that the term "agency" encompasses the Senate would ascribe to the Senate certain powers and duties that, if executed by a legislative body, would result in a violation of the separation of powers. Reading a statute in such a way as to constitute a constitutional violation is a plainly absurd result.

Article I, Section 8 of the South Carolina Constitution provides that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8; *see also McConnell v. Haley*, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011). At its simplest, the constitutional division of powers can be described as "[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). The Court of Appeals' decision falls squarely in line with this principle. If Petitioners' argument concerning the meaning of "agency" were to prevail, the Senate would have to possess the "authority to implement and administer particular legislation," in violation of the doctrine of the separation of powers, which would be a nonsensical interpretation under our constitution and supporting case law. *See Courson*, 420 S.C. at 124, 801 S.E.2d at 187 (quoting *Agency*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

Furthermore, in *Layman*, *supra*, this Court weighed in on the question of what constitutes an agency for the purposes of Section 15-77-300. For example, this Court provided, "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." *Layman*, 368 S.C. at 446, 630 S.E.2d at 326. Applying that reasoning to the question before the Court in this case means that the Senate is not an agency, as the Senate does not carry out the instructions of the State, but rather that the Senate, working with the House of Representatives, provides direction to the State and its subdivisions, in the form of departments, agencies, offices, boards, commissions, and its political subdivisions, concerning what activities are to be undertaken.

The Court of Appeals did not specifically address this issue with regard to Respondents. However, had the Court done so, the end result would have been the same, in that Respondents themselves are not an agency subject to the provisions of Section 15-77-300. Under no plausible definition of "agency" as it relates to Section 15-77-300, or otherwise, can a grouping of four Senators be defined as an agency.

Because the challenged action was not undertaken by an "agency," Petitioners are not eligible to receive an award of attorney's fees under Section 15-77-300.

B. LEGISLATIVE ACTION UNDERTAKEN BY THE GENERAL ASSEMBLY AND ITS MEMBERS DO NOT CONSTITUTE A STATE ACTION.

In order to recover attorney's fees under Section 15-77-300, Petitioners must demonstrate that the challenged action undertaken by Respondents constitutes "state action." *See* S.C. Code Ann. 15-77-300(A) (Supp. 2016). While this element is not addressed in *Tennis*, *Richland County*, or any other cases that Respondents reviewed, it is nevertheless a central feature of Section 15-77-300 and must be part of the analysis by the Court.

State action occurs when a department, agency, board, or commission undertakes to execute laws enacted by the General Assembly. The only action taken by Respondents in the underlying case was directly related to the legislative action necessary to enact Act 17 of 2011. These actions included introduction of the bill, debate concerning the merits of the bill, and ultimately the bill's enactment. When the General Assembly exercises its plenary legislative authority, it is not acting on behalf of the State but is rather acting as a representative of the people in determining the conditions, parameters, and 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. Because no "state action" occurred, Petitioners were not eligible to receive an award of attorney's fees under Section 15-77-300.

Petitioners' argument that Respondents' actions in the underlying action constitute "state action" are betrayed by Petitioners' own pleadings. Petitioners did bring the underlying action against the State, in that Petitioners named the State as a party separate from the Respondent Senators. Petitioners' own pleadings demonstrate that Petitioners themselves considered the State and Respondent Senators to be separate entities, and therefore, the actions of Respondent Senators cannot be the actions of the State. Petitioners are now attempting to transmute the legislative actions taken by Respondent Senators into State action by stating that Petitioners "brought this action against the State itself, by naming the Senators as Defendants in their official capacities." (Petition, p. 7). The only plausible explanation for this attempted sleight of hand is that Petitioners know that the Senate's actions generally, and Respondents' actions in particular, in the legislative arena are not "state actions." Thus, the Senate and its members, even when sued in their official capacity, are not subject to the provisions of Section 15-77-300. Petitioners' only hope of recovering attorney's fees in this matter hinges on convincing this Court that suing an individual Senator, or group of Senators as is the case here, is actually a suit against the State of South Carolina.

Petitioners cite *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.C. 358, 361, 116 L.Ed.2d 301 to support their argument that suing Respondents in their official capacities constitutes a suit against the State. In *Monell*, the United States Supreme Court addressed a very specific question concerning the meaning of "person" for the purposes of federal Section 1983 actions and held that local government officials sued in their official capacities are "persons" in

regard to those claims. Petitioners incorrectly read that case to apply here, because the Supreme Court, in a footnote, states that "official capacity suits generally represent only another way of pleading an action against entity of which an officer is an agent..." *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036, n. 55. In *Monell*, the person sued in his official capacity was the head of a governmental department, the New York City Department of Social Services, which executed the laws prescribed by the jurisdictional legislative body. This factor distinguishes *Monell* from the case before the Court, as the Senators are not executing laws prescribed by a jurisdictional legislative body since they are members of the legislative body and, as discussed below, Senators are not agents of the State.

When the head of an executive agency is sued in his official capacity, the person being sued is the lone person who is ultimately responsible for the agency's actions, and it makes sense to impute to the agency the decisions made by that person, and *vice versa*. For without the agency head, or some person acting in that capacity, the particular executive function that the agency is charged with carrying out cannot be performed. Conversely, the Senate can still operate to fulfill its constitutional duties with one or more members absent, because the Senate acts as a body, with the collective will of its membership, not with the actions of a single member or group of four Senators, as is the case with Respondents.

Senators are elected representatives of people in their respective districts; they are not agents of the State. In fact, Senators are not agents of the Senate unless the Senate takes some affirmative action to vest an individual Senator with that authority, as it does when it elects a President Pro Tempore. In context, it is clear that *Monell* does not extend as far as Petitioners would like. The holding in *Monell* and the provisions from note 55 cited by Petitioners do not support their argument.

Likewise, *Hafer* does not support Petitioners' argument. In *Hafer*, the United States Supreme Court, as in *Monell*, addressed a discrete issue related to federal Section 1983 claims. While the Supreme Court did note that "[s]uits against state officials in their official capacity therefore should be treated as suits against the State," that assertion is not applicable to this case for the same reasons cited above in the discussion of *Monell*. *Hafer*, 502 U.S. at 25, 112 S. Ct. at 361. It is clear from the context of the case that the Supreme Court's reference was to officials acting in an executive role, ones implementing or enforcing a duly enacted law, rather than the legislative entity that enacted the law.

Petitioners also cite *Layman v. State*, *supra*, to support their state action argument, and they further contend that the Court of Appeals' holding is not in accord with this Court's holding in *Layman*. Petitioners are incorrect on both accounts.

In *Layman*, this Court held, in relevant part, that "either the State or the Retirement System may be liable for attorney's fees under [Section 15-77-300]." *Layman,* 376 S.C. at 446, 658 S.E.2d at 326. This Court reasoned that either could be liable, as "the overriding principle of the state action statute is that as a state agency, the [executing agency] is obligated to carry out the instructions of the State."[4] *Id.* The *Layman* Court's specific use of the term "state agency," when explaining the proper use of Section 15-77-300, exemplifies that the Court of Appeals' ruling is in accordance with the decisions of this Court. Further, the *Layman* court discussed a "state agency" separately from its discussion of the legislature, just as the courts below have done in this case.

> Turning to the State's and the Retirement System's separation of powers argument, we find that although a judicial holding that the legislature "failed" in some legislative capacity might give rise to separation of powers concerns, this is not what we held in *Layman.* Instead, this Court held that the collective actions of the

[4] The Retirement Systems Investment Commission is an agency of the state government created by statute that is charged with executing laws enacted by the General Assembly. The RSIC falls squarely within the definition of "agency" and "state agency" identified by the Court of Appeals. As such, *Layman* serves to reinforce the Court of Appeals decision rather than undermine it.

> State and the Retirement System breached a contract with certain TERI participants.[5]

Layman, 376 S.C. at 446–47, 658 S.E.2d at 326. The above reference demonstrates exactly what the lower court in this case held: "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." *Courson*, 420 S.C. 120 (Ct. App. 2017). As a result, because the Senate's duties are entirely independent from those of executive agencies, such as the Retirement System in *Layman*, it makes sense that the Court in *Layman* would discuss a state agency and the legislature separately. Undoubtedly, the plain and ordinary meaning of "agency" is a "state agency" operating within the executive branch of government.

Petitioners are unable to establish that actions taken by the Senate, or any of its individual members, constitute state action because, in exercising its legislative duties, the Senate does not act on behalf of the State, and suing individual Respondents in their official capacity doesn't constitute state action. Senators are not agents of the State nor are they acting in an executive role. Therefore, Petitioners are not entitled to receive an award of attorney's fees under Section 15-77-300 because Respondents' actions did not constitute state action.

C. RESPONDENTS WERE SUBSTANTIALLY JUSTIFIED IN DEFENDING THE CONSTITUTIONALITY OF ACT 217 OF 2011.

Petitioners rely on an outdated and replaced definition of substantial justification to support their argument for attorney's fees under Section 15-77-300. As a result, Petitioners fail to address, much less overcome, the presumption in favor of substantial justification afforded under the current definition.

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[5] Petitioners erroneously rest on the opinion that the *Layman* Court awarded attorney's fees based on legislative activity. The *Layman* Court, instead, awarded attorney's fees to be paid by state agencies, not the legislature, for a breach of contract. *See Layman*, 376 S.C. at 448, 658 S.E.2d at 327.

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 by stating, "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*, 376 S.C. at 445, 658 S.E.2d at 326 (citing *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991)).

In 2010, the General Assembly amended Section 15-77-300 to include the following definition of "substantial justification":

> 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)(2) (Supp. 2016). "Where a statute has been amended, there is a presumption that the Legislature intended to change the law." *Key Corp. Capital v. County of Beaufort*, 373 S.C. 55, 60, 644 S.E.2d 675, 678 (2007) (citing *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 210, 442 S.E.2d 582, 583 (1994)). Petitioners fail to address and further provide no basis for overcoming this new presumption. There is no doubt that 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" if simply defending the constitutionality of actions that are mandated by a statute presumed constitutional. Thus, Petitioners' 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.

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). 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.

Further, under the current standard, there is no plausible argument that Petitioners could make to overcome the presumption. Petitioners' 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 had been a party, it would simply have been 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. In order to accept Petitioners ' argument that Respondents are entitled to fees, the Court must reach the absurd conclusion that the General Assembly amended Section 15-77-300 in a manner that provides state agencies with a safe harbor, while at the same time intending to open themselves up to the recovery of attorney's fees.

Petitioners' reliance on Attorney General's Opinions does not overcome this presumption. Petitioners contend that being so warned by the Attorney General, by way of receiving or being on notice of three Attorney General's Opinions, negates a substantial justification in defending this lawsuit and the passage of Act 17 of 2011. While it may be true that Respondents had knowledge of Attorney General's Opinions dealing with a similar issue presented in the courts

below, the fact of the matter is that "[i]t is well settled that although it may be persuasive authority, an Attorney General's opinion is not binding." *State v. Ramsey*, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014). As discussed above, this Court has long held that, for questions regarding the constitutionality of an act of the General Assembly, the act is entitled to a presumption of constitutionality. This presumption is founded on the principle that the legislative power is plenary and that the South Carolina Constitution is not a grant but rather a limit on this power.[6] Respondents have simply operated under this presumption in defending the act and were substantially justified in doing so because the judiciary "interprets and declares the laws." *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). Until the judiciary declared that Act 17 of 2011 was unconstitutional, the presumption in favor of constitutionality had not been overcome.

Accordingly, Petitioners are not entitled to recover fees and costs against Respondents, because Respondents were substantially justified in defending the action challenging the constitutionality of Act 17 of 2011.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR AWARDS OF ATTORNEY'S FEES

Petitioners direct the Court's attention to an award of attorney's fees following a 2005 Supreme Court decision in *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), wherein much of Act 187 of 2004, commonly referred to as the "Life Sciences Act," was declared

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[6]*See Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Unisys Corp. v. S.C. Budget and Control Bd. Div. of Gen. Serv. Info. Technology Management Office*, 346 S.C. 158, 551 S.E.2d 263 (2001); *Duncan v. York County*, 267 S.C. 327, 228 S.E. 2d 92 (1976); *Elliott v. McNair*, 250 S.C. 75, 156 S.E. 2d 421 (1967); *Grey v. Vaugneur*, 243 S.C. 604, 135 S.E.2d 229 (1964); *State ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E. 2d 231 (1956); *Gaud v. Walker*, 214 S.C. 451, 53 S.E. 2d 316 (1949); *Taylor v. Marsh*, 211 S.C. 36, 43 S.E. 2d 606 (1947); *Cothran v. Mallory*, 211 S.C. 387, 45 S.E.2d 599 (1947); *McLure v. McElroy*, 211 S.C. 106, 44 S.E.2d 101(1947); *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 44 S.E. 2d 88 (1947); *Ellerbe v. David*, 193 S.C. 332, 8 S.E. 2d 518 (1940); *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625 (1936); *Heslep v. State Highway Dep't of S.C.*, 171 S.C. 186,171 S.E. 913 (1933); *Waterloo School Dist. No. 14 v. Cross Hill School Dist. No. 6*, 106 S.C. 292, 91 S.E. 257 (1917); *State ex rel. George v. City Council of Aiken*, 42 S.C. 222, 20 S.E. 221 (1894).

unconstitutional, as supporting the argument in this case. The primary difference between this case and *Sloan v. Wilkins* is that, in this case, Petitioners sued a group of four individual Senators, while in *Sloan*, Petitioners sued the President of the Senate in his official capacity, and the President Pro Tempore of the Senate intervened. The distinction is extremely important in that, as discussed above, individual Senators are not agents of the Senate and, therefore, cannot act on behalf of the Senate as a body in the way that the President Pro Tempore can act on behalf of the Senate. Thus, the levy imposed in *Sloan* was against the Senate, not against individual members.

Petitioners also draw the Court's attention to an award of attorney's fees following a 2016 Supreme Court decision in *S.C. Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016). In that case, Petitioner South Carolina Public Interest Foundation successfully argued that a particular proviso was unconstitutional. Following that decision, the South Carolina Public Interest Foundation filed a motion with this Court seeking attorney's fees pursuant to Section 15-77-300. The Court awarded the South Carolina Public Interest Foundation five thousand dollars. However, the Court's Order granting attorney's fees did not specify the authority under which the Court made the award and further made the award pursuant to the South Carolina Public Interest Foundation's "request" rather than the proper motion, thus leaving the authority[7] for the award ambiguous. Nevertheless, as in *Sloan v. Wilkins*, the parties in the *Lucas* case were Speaker of the House of Representatives acting on behalf of the House of Representatives and the President Pro Tempore of the Senate acting on behalf of the Senate. Thus, the levy imposed in *Lucas* was against the Senate and the House of Representatives, not against individual members.

The Court of Appeals' Opinion in this case does not conflict with *Sloan* or *Lucas* because, in this case, individual members of the Senate were parties to the action rather than the elected

[7] For example, the Court may award attorney's fees pursuant to Rule 222 of the SCARP. Under Rule 222, Petitioners in *Sloan* and *Lucas* would have arguably been eligible to recover some amount from Respondents.

leaders of the Senate and the House of Representatives, acting in a representative capacity on behalf of the Senate and the House of Representatives. Furthermore, any lingering ambiguity about the award of fees in *Sloan* or *Lucas* has been resolved by the Court of Appeals' Opinion in a manner consistent with this Court's holdings and other relevant state law.

The remaining cases cited by Petitioners as examples of awards of attorney's fees in conflict with the Court of Appeals' decision all concern actions taken by counties and county officials. These cases are not relevant to the question before the Court because Section 15-77-300 applies also to "any political subdivision of the State." *See* S.C. Code Ann. § 15-77-300 (Supp. 2016). Counties are political subdivisions of the State. Therefore, it should be expected that, under the correct circumstances, attorney's fees would be awarded under Section 15-77-300 against counties.

Furthermore, all of the cases cited by Petitioners concerning actions taken by counties and county officials relate to the execution of duly enacted laws. In fact, the Court of Appeals discussed that the "appropriate agency" under Section 15-77-300 is one that is "responsible for implementing or administering legislation after its enactment." *Id.* The county or county officials named in the cases supplied by Petitioners are acting as, or on behalf of, an executive or regulatory body for a political subdivision that is responsible for implementing or administering duly enacted laws. The Court of Appeals clearly contemplated these facts. As a result, the Court of Appeals' decision is in accordance with the rulings of this Court that awarded attorney's fees in cases involving counties and county officials.

Finally, Petitioners misunderstand what the Court of Appeals held when the Court referred to "executive agencies" or "executive branch agencies" in its Opinion. Petitioners erroneously

equate "executive agencies" and "executive branch agencies" with the "Executive Department."[8] It is clear from reading the Opinion that the Court of Appeals' reference to "executive agencies" or "executive branch agencies" means organs of government that "implement and administer particular legislation" and that serve as "[an] executive or regulatory body.[9]" Within state government, that can mean the "Executive Department," but it can also mean departments, agencies, offices, boards, and commissions that execute laws but fall outside of the "Executive Department." Furthermore, because Section 15-77-300 explicitly includes local subdivisions of the State, the terms "executive agencies" and "executive branch agencies" also include those organs of local government that execute laws. Rather than being instructive as to why Section 15-77-300 should apply to Respondents, the cases that Respondents cite actually provide an illustration of circumstances in which the statute applies and give excellent examples of why Respondents are different and do not fall within the scope of Section 15-77-300.

IV. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DECIDING THAT SECTION 15-77-300 DOES NOT APPLY TO RESPONDENTS.

The appropriate standard of review for an award of attorney's fees under Section 15-77-300 is abuse of discretion. *Heath v. Aiken County*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). "An abuse of discretion occurs when a court's decision is controlled by an error of law or is without evidentiary support." *Mictronics, Inc. v. S.C. Dep't of Revenue,* 345 S.C. 506, 510, 548 S.E.2d 223, 225 (Ct.App.2001).

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[8] "Executive Department" is a defined term in the South Carolina Code.

> The executive department of this State is hereby declared to consist of the following officers, that is to say: The Governor and Lieutenant Governor, the Secretary of State, the State Treasurer, the Attorney General and the solicitors, the Adjutant General, the Comptroller General, the State Superintendent of Education, the Commissioner of Agriculture and the Director of the Department of Insurance.

S.C. Code Ann. § 1-1-110 (2005). *See also* S.C. Const. art. IV.

[9] In the context of the case before the Court, the Court of Appeals specifically addressed the question of agency from the perspective of "state agency," because Petitioners were alleging that the actions of Respondents constituted a state action.

The Circuit Court did not abuse its discretion in holding that Section 15-77-300 does not apply to Respondents and that Respondents are not liable for attorney's fees pursuant to the doctrine of legislative immunity. As evidenced in the arguments above, the Circuit Court, within its discretion, considered the elements of the state action statute. The facts of this case are undisputed, and there have been no errors of law. Even more, even if the Circuit Court had found that the state action statute applied to Respondents and that legislative immunity did not cover the challenged actions, Section 15-77-300 is permissive in nature. Given that the statute is permissive, the Circuit Court is granted discretion in deciding whether or not to award attorney's fees when interpreting the statute to a apply to a particular case. In this case, the Circuit Court decided not to award attorney's fees. The Court of Appeals carefully analyzed this issue. By affirming the Circuit Courts' decision, the Court of Appeals correctly decided that the Circuit Court did not abuse its discretion in denying Petitioners' motion for attorney's fees.

For these reasons, Respondents argue that the Court of Appeals did not abuse its discretion by denying Petitioners' motion for attorney's fees and that this Court should deny Petitioner's Petition for a Writ of Certiorari.

CONCLUSION

Based on the arguments presented, Respondents respectfully request that this Court deny Petitioners' Petition for Writ of Certiorari, as Petitioners are not entitled to an award of attorney's fees arising from Petitioner's constitutional challenge of Act 17 of 2011 and as the Court of Appeals' Opinion is in accord with all relevant statutory and case law.

[Signature Page Follows]

August 15, 2017

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
AUG 15 2017
S.C. SUPREME COURT

Appellate Case No. 2017-001556

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.

PROOF OF SERVICE

I hereby certify that I have served Respondent Senator John E. Courson's, Respondent Senator Darrell Jackson's, Respondent Senator Joel Lourie's, and Respondent Senator John L. Scott, Jr.'s **Return to Petition for Writ of Certiorari** upon counsel of record for each of the other parties by mailing one copy to each of them at the addresses below via the United States Postal Service on August 15, 2017.

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