THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

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Appellate Case No. 2016-000428

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

v.

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

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**RETURN TO PETITION FOR REHEARING**

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This suit has the same shortcomings that it had when decided by the Supreme Court. The Plaintiffs lack standing because they have no injury, and public importance standing is absent because no need for future guidance exists. No known problems have occurred with water withdrawals and nothing in the records suggest that any are eminent. In short, the suit is premature, and for the Court to rule on it now would be to render an advisory opinion. *Sangamo Weston, Inc. v. National Sur. Corp.*, 414 S.E.2d 127, 130, 307 S.C. 143, 148 (1992)(this Court has made quite clear that it "will not issue advisory opinions . . . .")

**NO PUBLIC IMPORTANCE STANDING EXISTS**

Appellants put standing last among their arguments, but it should have come first. Regardless of whether the public trust doctrine extends to non-tidal rivers, Appellants must still establish that they meet the criteria for public importance standing which is a need for future guidance. They fail to do so. The majority found no public importance standing because "there is no need for 'future guidance'" *Jowers v. South Carolina Department of Health and Environmental Control*, 2017 WL 3045982, at *7 (2017); *see, ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008)("The key to the public importance analysis is whether a resolution is needed for future guidance"). The Opinion also emphasized that "we 'must be cautious with this exception, lest it swallow the rule.' *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)." The *Infrastructure Bank* case found a need for future guidance because the Plaintiff "present[ed] a colorable claim that the Board is unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board." No such cloud is present in the instant case because it does not question the legitimacy of a public body

Appellants cite the requirement for future guidance but fail to apply it. They instead make conclusory statements about the disposal of what they claim are public trust resources. The dissent stated that this Court had "applied the doctrine in a wide range of cases where we determined an underlying societal interest required resolution," but the cited cases involved concrete disputes such as the challenge to the Board composition in the *Infrastructure Bank* case that could have affected decisions of that body. 2017 WL 3045982, at *9 (S.C., 2017). The dissent also found that the circuit court judge erred in relying on the lack of previous challenges to the Act because, if the absence of challenges were a factor, "no party could ever raise a novel issue without meeting traditional standing requirements." *Id.* Respectfully, the issues as to the Surface Water Withdrawal Act are not novel. The statute was passed in 2010, over seven years ago, and has been in effect, unchanged, since January 1, 2011. Act No. 247, § 1 2010 S.C. Acts. The issues Appellants attempt to raise about the way the law is written do not pertain to a new law, and are therefore, not new themselves. These questions may never need to be addressed. The water withdrawals may never result in actual injury to Appellants or any other South Carolina citizen.

## THE PUBLIC TRUST DOCTRINE HAS NOT BEEN APPLIED TO NON-TIDAL WATERS IN THIS CASE

Both the majority and the dissent addressed the public trust doctrine which is where the Appellants place their focus. The majority found that "it is not necessary that we determine whether the public trust doctrine even applies in this case" but noted that this Court had "never held the public trust doctrine prohibits the State from allowing riparian landowners to use the water in the waterway." 2017 WL 3045982, at *7 Although the dissent applied the public trust

doctrine based upon a quotation from a law review article in *Sierra Club v. Kiawah Resort Associates*, 456 S.E.2d 397, 402, 318 S.C. 119, 128 (1995), that case addressed only land below the mean high water mark on tidal waters ("In South Carolina, the state owns the property below the high water mark of a navigable stream. *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972). This property is part of the Public Trust."). Appellants cite no South Carolina case holding that the public trust doctrine applies to non-tidal rivers or the waters therein[1]. Instead they rely on a Federal case that is not controlling as to South Carolina interests. *Illinois Central R. Co. v. Illinois,* 146 U.S. 387, 435 (1892). *IllinoisCentral* applied tidal law to the Great lakes because they are "inland seas" that "possess all the general characteristics of open seas" except for being fresh water and non-tidal. The waters at issue in this case are, of course, not "inland seas." Therefore, *IllinoisCentral* is not controlling and no basis exists for determining whether the public trust doctrine applies to the withdrawal of waters from non-tidal rivers in South Carolina.[2]

## THE PUBLIC TRUST HAS NOT BEEN VIOLATED AND REMEDIES EXIST SHOULD FUTURE PROBLEMS OCCUR

The inquiry should stop here, but even if this Court recognized a public trust interest in non-tidal rivers, that interest has not been violated, and remedies exist for any future problems. Although Appellants claim that the authorized withdrawals are a permanent transfer of public

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1 They cite the Constitutional provision addressing navigation of waterways (S.C. Const. art. XIV, §4), but that authority does not establish a public trust interest in the consumption of the waters of non-tidal rivers.

2 Appellants misinterpret case law in stating that South Carolina has adopted *Illinois's* analysis. The cases they cite quote generalities from that case, but they are not pertinent to whether the waters of non-tidal rivers are public trust property. Appellants also rely on *National Audubon Society v. Superior Court*, 658 P.2d 709, 719, 189 Cal.Rptr. 346, 356, 33 Cal.3d 419, 434 (1983), but that California case, is not controlling in South Carolina.

trust assess, the State has the authority to allocate waters of the state. Even in a case concerning tidal waters, this Court held that "the waters of the ocean and its bays, and of public watercourses and lakes, so far as they lie within the jurisdiction of a state, are part of the public domain, and the state may authorize the diversion of such waters for any purpose it deems advantageous to the public. . . ." *Rice Hope Plantation v. South Carolina Public Service Authority*, 59 S.E.2d 132, 144, 216 S.C. 500, 529 (1950). Therefore, even if non-tidal waters were subject to a public trust interest, the State can allocate those waters as it has under the Surface Water Withdrawal Act.

Although Appellants claim and the dissent found that the Act does not grant DHEC inherent authority to modify a registered user's withdrawals as conditions may require, protections for the public exist. The majority stated that "the Drought Response Act protects the State's interest in the water in navigable streams. S.C. Code Ann. §§ 49-23-10 to -100 (2008 & Supp. 2016)" (2017 WL 3045982, at *8). The dissent found that relief limited, but regardless of the relief available under the Drought Act, State officials could bring a common law action to challenge the Act as applied or a common law challenge to the reasonableness of the withdrawal.[3] Moreover, the majority correctly found that "[t]he plaintiffs may still challenge

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3 *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*, 229 S.E.2d 718, 719, 267 S.C. 463, 467 (S.C. 1976) ("While it is the general rule, as stated in *Greenville County Fair Ass'n v. Christenberry*, 198 S.C. 338, 17 S.E.2d 857 (1941), that public officials may not contest the validity of a statute, the rule is not an inflexible one and we are of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action."); *Weaver v. Recreation Dist.*, 492 S.E.2d 79, 80, 328 S.C. 83, 85 (S.C.,1997)("[County] Council has sufficient interest in the matter, and the matter is of such public concern, as to confer standing" to challenge the Act at issue); *Town of Hilton Head Island v. Morris*, 324 S.C. 30, 484 S.E. 2d 104 (1997)(local governments challenge constitutionality of statute but standing not addressed).

an agricultural use as unreasonable, they are still entitled to injunctive relief when they prove the required elements, and they may still recover damages[4] when they satisfy the applicable standard of proof. 2017 WL 3045982, at *7 (S.C., 2017)

## CONCLUSION

Appellants have not overcome the barrier of lack of standing. In fact, their Petition demonstrates why public importance standing should not apply here. Without any actual injury due to the Act, they make a sweeping challenge to the Surface Water Withdrawal Act and ask this Court to extend the Public Trust Doctrine to non-tidal waters and find violations of the public trust. These questions should not be decided in their favor when they have no actual injury and they may never be harmed. No need now exists for future guidance. Should conditions warrant, Appellants may bring a challenge in the future to an unreasonable use. Remedies also exist under the Act for excessive use, under the Drought Response Act, and in an action brought by a public official.

The Petition should be denied.

Respectfully submitted,

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4 Although §49-4-110(B) states that "[n]o private cause of action for damages arising directly from a surface water withdrawal by a permitted or registered surface water withdrawer may be maintained unless the plaintiff can show a violation of a valid permit or registration," this Court need not determine whether this provision would limit any common law damage action that Appellants might have if injured because they have not been injured whatsoever.

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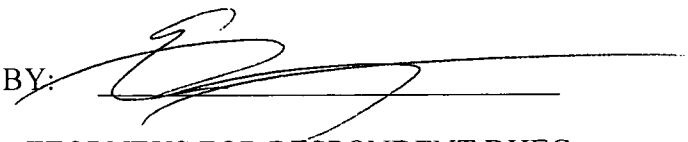
BY: 

August 24, 2017

ATTORNEYS FOR RESPONDENT DHEC

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have served the Appellants and Amicus with DHEC's Return to the Petition for Rehearing by mailing copies to each of their attorneys at the address below via the United States Mail this August 24, 2017.

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