THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2017-01638

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

The South Carolina House of Representatives, The South Carolina Senate, The Honorable James H. "Jay" Lucas, as Speaker of the South Carolina House of Representatives, The Honorable Hugh K. Leatherman, in his Capacity as President Pro Tempore of the South Carolina Senate, and The State of South Carolina, ... Respondents.

APPELLANTS' SUPPLEMENTAL BRIEF

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STATEMENT OF THE ISSUE

DOES CODIFICATION OF AN UNCONSTITUTIONAL ACT IMMUNIZE IT FROM AN ACTIVE, ONGOING, CONSTITUTIONAL CHALLENGE?

STATEMENT OF THE CASE

On October 18, 2016, Appellants the South Carolina Public Interest Foundation and Edward D. Sloan, Jr. petitioned this Court to exercise its original jurisdiction and rule that Act 275 of 2016 violates the South Carolina Constitution, Article III, Section 17: "Every Act . . . shall relate to but **one subject**, and that shall be expressed in the title."

Respondents enacted Act 275 of 2016 on June 2, 2016. Even though all Respondents consented to this Court's exercise of original jurisdiction, this Court declined to exercise its original jurisdiction by Order entered February 13, 2017.

Meanwhile, due to time-related exigencies, on January 27, 2017, the South Carolina Public Interest Foundation and Edward D. Sloan, Jr. filed a similar action in the Circuit Court. On July 6, 2017, the Circuit Court granted the Respondents' Motions to Dismiss.

On or about July 25, 2017, Appellants filed a Notice of Appeal with the Court of Appeals. Appellants filed their Initial Brief on or about August 25, 2017.

On October 26, 2017, the Attorney General wrote to the Clerk of the Court of Appeals suggesting that this action should be transferred to the Supreme Court, because it challenges the Constitutionality of an Act of the General Assembly.

On or about November 17, 2017, the State filed its Initial Brief.

December 18, 2017, the House and Senate Respondents filed their Initial Briefs.

On January 11, 2018, Appellants filed their Initial Reply Brief.

On January 10, 2018, the Respondent Senate held first reading of S.0882, "An Act to Adopt Revised Code Volumes 15A and 18 of the Code of Laws of South Carolina . . . ." The re-codified Volume 15A contained Title 44, and the re-codified Volume 18 contained Titles 56 and 57. Similarly, Act 275 relates primarily to Titles 56 and 57, with some references to Titles 1, 11, 12, 38, and 44.

S.0882 passed unanimously in both Respondent houses. In less than a month, S.0882 became law. The Governor signed S.0882 on February 5, 2018, making it Act 129 of 2018.

On March 9, 2018, the Speaker of the House moved to file a supplemental brief, contending that Act 129's recodification of Volumes 15A and 18 of the Code immunized Act 275 from Appellants' active, ongoing, Constitutional challenge.

The Respondents themselves, the House and the Senate, enacted the recodification. They assert that they possessed the power to immunize their unconstitutional Act by codification.

ARGUMENT

CODIFICATION OF AN UNCONSTITUTIONAL ACT DOES NOT IMMUNIZE IT FROM AN ACTIVE, ONGOING, CONSTITUTIONAL CHALLENGE.

I. THE SPEAKER'S CASES ARE DISTINGUISHABLE ON THE FACTS.

The Speaker of the House relies on five cases to support his contention that codification immunizes Act 275 from an active, ongoing, Constitutional challenge: *S.C. Tax Comm'n. v. York Elec. Coop.*, 275 S.C. 326, 270 S.E.2d 626 (1980); *Colonial Life and Accident Ins. Co. v. S. C. Tax Commission*, 233 S.C. 129, 103 S.E.2d 908 (1958); *State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1966); *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599 (1914); and *Parks v. Laurens Cotton Mills*, 75 S.C. 560, 56 S.E. 234 (1907). None of these cases involved an active, ongoing, Constitutional challenge to an Act that was being codified.

Second, none of these cases involved the House and the Senate as litigants.

Third, none of these cases involved a codification as an apparent response to the active, ongoing, Constitutional challenge.

Fourth, none of these cases involved piecemeal, partial recodifications, but rather comprehensive, mostly decennial, recodifications of the entire Code.

York Electric was decided in 1980. It addressed a constitutional challenge to the General Appropriations Act of 1971. Nine years had passed between the enactment and the Constitutional challenge. In the meantime, the General Assembly had enacted the 1976 Code, a comprehensive revision of the Code of South Carolina. Accordingly, the codification corrected any defects in the enactment of the earlier Act.

In *Colonial Life*, the challenged provision was part of the 1951 Appropriations Act. The codification bill was signed into law in 1952, adopting the 1952 Code of Laws. *Colonial Life* was not decided until 1958, and this Court held that in such circumstances a

constitutional challenge to the enactment of an earlier Act was foreclosed by the subsequent inclusion of that Act in the Code.

In *State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1916), the defendant challenged the constitutionality of a statute, but the earlier statute had been codified in the 1912 Code, and his challenge was in 1916. His challenge was barred by the recodification.

In *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599 (1914), the defendant sought to set aside a landlord's lien based on acts from 1866, 1869, 1878, 1880, as opposed to whole Codes enacted in 1882, 1902 and 1912. The defendant raised the challenge in 1914, long after the acts had been incorporated into comprehensive recodifications. The Court ruled that the comprehensive adoptions of the entire Code corrected any defects in the enactment of the individual acts.

In *Parks v. Laurens Cotton Mills*, 75 S.C. 560, 56 S.E. 234 (1907), the Defendant cotton mill argued that an act of the General Assembly was unconstitutional because its title did not correspond to the substance of its provisions. The Act in question was from 1894, but its provisions had been included in the comprehensive code of 1902. This case was decided five years later in 1907. The comprehensive recodification cured the defect in the enactment.

Not one of these cases supports the Speaker's argument that a codification initiated while an active, ongoing, constitutional litigation is pending immunizes an act from the challenge. All these cases are distinguishable.

Accordingly, this Court faces a new issue, an issue of great public importance: *Does codification immunize an unconstitutional Act from an active, ongoing Constitutional challenge, thereby ending the litigation*?

The *Colonial Life* the Court quoted with approval a concurring opinion from *Nexsen v. Ward*, which addressed the rationale for the ruling:

> [I]t was intended that the report of the [Code] commissioner should be declared, by an act of the Legislature to be the only general statutory law of the state, so as to enable any person to ascertain the general statutory law of the state, without being compelled to search beyond the Code of Laws then of force, and the statutes subsequently enacted.
>
> This construction gives effect to all the provisions of said section, and any other construction would defeat the great change which was intended to be made by the Constitution, in the codification of the General Statutes.

Nexsen v. Ward, 96 S.C. 313, 80 S.E. 599, 607 (1914).

That makes perfect sense. By the same logic, where the challenge to the act's constitutionality is filed *before* its codification, no such extra-statutory search is necessary. The rule simply has no application in that circumstance.

Furthermore, in *Colonial Life* (which involved a tax law passed in 1951 and codified in 1952, but not challenged until 1958), the Court concluded: "Section 96 of Article I of the 1951 Act having been invalid until its incorporation, in 1952, into the 1952 Code of Laws, **assessment of license taxes thereunder for the year 1951 was improper**, and respondent is entitled to refund of the amount of such license tax and interest thereon as it paid for that year." *Colonial Life and Accident Ins. Co. v. S. C. Tax Commission*, 233 S.C. 129, 152, 103 S.E.2d 908, 920 (1958) (emphasis added). Thus, even though the defect was "cured" by codification, that cure was not effective until codification actually occurred; the cure was **not retroactive**.

Similarly, in the case at bar, the Constitutional challenge was initiated before the codification, and it is ongoing. *Colonial Life* shows that the codification "cure" is not absolute; it can be overridden in the appropriate circumstances. Since Appellants' suit was filed before codification, the defect is not remedied by codification; but rather the cure is

tolled during the pendency of the litigation. The Appellants' claim remains viable, and this Court retains jurisdiction to rule on the constitutionality of Act 275.

II. RESPONDENTS' ACTIONS VIOLATE SEPARATION OF POWERS AND DUE PROCESS.

Respondents' efforts to immunize their unconstitutional Act from judicial review interfere with the workings of this Court, a co-equal branch of government, thereby violating the Separation of Powers. "In the government of this State, 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. Constitution, Art. I, § 8.

They also deny the Appellants the Due Process rights: the opportunity to have their claims heard and ruled on, and judicial review. "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Constitution, Art. I, § 3.

A. Violation of Separation of Powers.

This Court is fully empowered and commissioned to make such Constitutional judgments.

> **Deciding** whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and **is a responsibility of this Court as ultimate interpreter of the Constitution**.

South Carolina Public Interest Foundation v. Judicial Merit Selection Commission, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) *quoting Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2D 663, 691 (1962).

In *South Carolina Public Interest Foundation v. Judicial Merit Selection Commission*, this Court ruled that it had the inherent authority to decide the constitutionality of the acts of the General Assembly and the actions of the executive branch:

> [T]he South Carolina Code specifically gives this Court the power to review the decisions of administrative agencies that are under the umbrella of the executive branch. *See* S.C.Code Ann. § 1-23-380A (2005) (outlining the procedures for appealing a final decision of an administrative agency). In addition, this Court can review the actions of the General Assembly when the actions are unconstitutional. *See Hanvey v. Oconee Mem. Hosp.,* 308 S.C. 1, 4, 416 S.E.2d 623, 625 (1992) (stating that the Court can overturn an act of the General Assembly when the enactment is unconstitutional).

Id., 369 S.C. 139, 144, 632 S.E.2d 277, 279 (2006).

In prior cases before this Court, the Respondent members of the General Assembly have proffered dubious and unsupported arguments in an effort to escape the consequences of their clearly unconstitutional enactments. *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016). In *Lucas*, this Court rightly rejected such efforts and upheld the South Carolina Constitution by striking an unconstitutional legislative enactment. The case at bar is similar.

In addition, the litigants themselves, the House and the Senate, performed the codification in an effort to immunize their prior unconstitutional Act, and thereby foreclose any judgment from this Court. The codification was not an unrelated, random, or routine act. It was not a part of a comprehensive recodification of the entire Code. The codification related to Volume 15A and 18 of the Code only; it was focused on codifying the provisions

of Act 275. The litigants themselves, the House and the Senate, assert the power to hamstring this Constitutional challenge, to take the case out of this Court's hands, and, having lost prior Constitutional challenges, they have the motivation to do so.

In this case, the members of the General Assembly are attempting to short-circuit the judicial review process and prevent this Court from making a clear judicial pronouncement as to the constitutionality of Act 275. By attempting to interfere with the proper functioning of this Court, and by attempting to short-circuit its processes, Respondents violate the Separation of Powers doctrine. These efforts of the General Assembly are not entitled to deference.

B. Violation of Appellants' Due Process Rights.

Respondents' actions also violate the Due Process rights of the Appellants. The fundamental elements of procedural Due Process are notice, an opportunity to be heard in a meaningful way, and judicial review.

> Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). **The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.** S.C. Const. art. 1, § 22; *Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control,* 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

Kurschner v. City of Camden Planning Com'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (emphasis added).

Appellants, like all South Carolina citizens, possess a liberty interest in having their elected representatives follow the Constitution. The Due Process Clause protects "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013),

quoting Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Certainly an expectation that the elected representatives would follow the Constitution is one of "those fundamental rights and liberties which are 'objectively deeply rooted in this Nation's history and tradition.'" *Id.* In this country, no man is above the law.

Because it is the litigants themselves who are trying to do away with the Constitutional case against them, that effort violates the Appellants' Due Process rights. If the Respondents succeed, Appellants will have no "opportunity to be heard" on their Constitutional claims in a meaningful way, and no opportunity for judicial review.

III. THE EXCEPTIONS TO THE MOOTNESS DOCTRINE APPLY.

The Speaker's argument is a variant of the doctrine of mootness. South Carolina courts have recognized three exceptions to the doctrine of mootness.

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *E.g., id.; Sloan v. Department of Transp.,* 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); *Byrd v. Irmo High Sch.,* 321 S.C. 426, 468 S.E.2d 861 (1996). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis v. State,* 345 S.C. at 568, 549 S.E.2d at 596. Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.; accord Sloan v. Department of Transp.,* 365 S.C. at 303, 618 S.E.2d at 878.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) ("Ladson Road").

A. This Matter Is Capable of Repetition, Yet Evading Review.

This matter falls within the first exception to the doctrine of mootness: it is capable of repetition, but evades review. It is not difficult to see that this scenario is capable of

repetition. These Appellants often challenge unconstitutional acts of the General Assembly.

Rather than correcting their ways and conforming to the Constitution, the General Assembly could simply do again what it did in this case: codify the unconstitutional act before any challenge can reach this Court, and contend that their unconstitutional Act was thereby immunized from Constitutional challenge.

The South Carolina Supreme Court applied this standard of "capable of repetition yet evading review" in the *Ravenel Bridge* case, which held that the manner of selection of the source of procurement of the Ravenel Bridge was unlawful, being by requests for proposals instead of by invitation for competitive sealed bids.

> The DOT contends this case should be dismissed as moot because the construction contracts have been awarded and fully performed. We disagree.
>
> "[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State,* 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Sloan v. Dept. of Transportation, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). In the *Ravenel Bridge* case, this Court ruled that use of the requests for proposal process was designed to accelerate the procurement process. The Court ruled, "Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits." *Id.*

> The standard is *capable* of repetition, not *likelihood* of repetition.
>
> The party bringing the action need only show the issue raised is *capable* of repetition and **is not required to prove there is a "reasonable expectation" the issue will arise again.** *Byrd [v. Irmo High School],* 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

Sloan v. Greenville County, 356 S.C. 531, 554-555, 590 S.E.2d 338, 351 (2003) (italics in original; bold and underline added). As shown by past practices, the General Assembly is capable of continuing to violate the Constitution, and if this Court allowed it, capable of attempting to immunize its unconstitutional acts through codification, which, would thereby allow their unconstitutional Acts to evade review.

In *Sloan v. Department of Transportation* (*Ladson Road*), this Court explained its reasoning on the standard of capable of repetition, yet evading review.

> We find the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition, yet will usually evade review. For example, here an emergency procurement came four years into the construction project, which was then **completed within about six months.** The project was completed only a few months after Sloan filed suit and well before the parties filed motions for summary judgment. Therefore, the "capable of repetition but evading review" exception to mootness applies here.

Id., 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) (footnote omitted).

This exception to the mootness doctrine should also apply here. In the case at bar, the codification took less than one month. In the course of a month, judicial review would be impossible.

B. This Matter is of Great Public Importance.

This case also falls within the second exception, an issue of great public importance. The analysis that supports public importance standing also supports a public importance exception to the doctrine of mootness.

> In our discussion of Sloan's **standing** to bring this action, this court has already found in an analogous case that the "expenditure of public funds pursuant to a competitive bidding statute is of **immense public importance**." *Sloan [v. School District],* 342 S.C. at 524, 537 S.E.2d at 303. **The same rationale applies with respect to mootness**.

Sloan v. Greenville County, 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis

added).

In *Sloan v. Department of Transportation (Ladson Road)*, this Court analyzed the great public importance exception to the doctrine of mootness:

> This Court has noted "the limited nature of the exception for questions of 'imperative and manifest urgency.'" *Sloan v. Greenville County,* 361 S.C. 568, 571, 606 S.E.2d 464, 466 (2004) (*Greenville County II*). In *Greenville County II,* we held that **where judicial guidance exists** on the legal issue presented, **there is no imperative and manifest urgency** for an advisory opinion.
>
> **In the instant case, however, there is no case law** specifically addressing the DOT's authorization of an emergency procurement. Because this is a matter of public importance which **could occur** at any time (given the inherent unpredictability of emergencies), we find there is an urgent nature to this issue.
>
> Accordingly, even though the Ladson Road Project was completed in 2005, we will address the other issues raised in the case.

Id., 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008). To the knowledge of the undersigned, there is no case law on the subject of whether codification of an unconstitutional act terminates an ongoing, active Constitutional challenge, and this kind of activity "could occur at any time."

The Court made a similar ruling in the other *Sloan v. Department of Transportation* case. **"[D]espite the mootness in the present case,** we find Sloan has standing **to raise this issue**." *Id.,* 365 S.C. 299, 304-5, 618 S.E.2d 876, 879 (2005). This Court should address the issue, even though it might be technically moot, as it did in the *Sloan v. Department of Transportation* cases.

C. This Matter May "Affect Future Events or Have Collateral Consequences."

Finally, the third exception to mootness applies. This ruling may "affect future events or have collateral consequences." This Court in *Sloan v. S.C. Department of Transportation* (*Ladson Road*), also found this third exception to the doctrine of mootness.

"Moreover, a decision on the merits of this case certainly will affect future events, *to wit,* how the DOT decides to authorize emergency procurements in the future." *Id.,* 379 S.C. at 169, 666 S.E.2d at 240. Likewise, this Court in the other prior *Sloan v. S.C. Department of Transportation* case (Ravenel Bridge) ruled that its decision would affect future events. *Sloan v. S.C. Department of Transportation*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005).

Considering how this exception applies in this case, there is no end to the mischief that the General Assembly could create if it were permitted to immunize an unconstitutional act from challenge by a simple codification. All such legal challenges could be short-circuited. There are no cases that interpret and apply this Constitutional provision, and this ruling will provide guidance to the entire State. Like the decisions in both *Sloan v. S.C. Department of Transportation* cases, a decision in this case will reiterate to the General Assembly and to the public at large that no man is above the law, and that the General Assembly is not free to violate the Constitution and immunize its unconstitutional behavior from legal challenge by a simple, partial, piecemeal codification.

CONCLUSION

Appellants pray the Court to rule that Act 129's recodification of Volumes 15A and 18 does not immunize Act 275 from Constitutional challenge because the challenge was already in litigation in a timely manner, prior to the enactment of Act 129; to reverse the judgment of the Circuit Court; to rule that Act 275 violates Article III, Section 17 of the South Carolina Constitution; and to grant Appellants such other and further relief as the Court deems just and proper.

Respectfully submitted,
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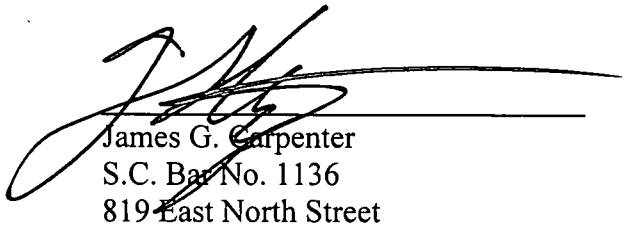

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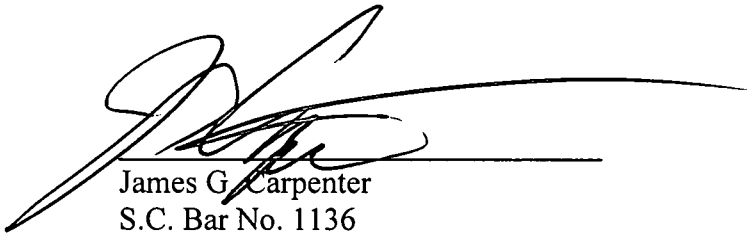

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