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. 2017-001638

South Carolina Public Interest Foundation and
Edward S. 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.

THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES AND THE HONORABLE JAMES H. "JAY" LUCAS, AS SPEAKER OF THE HOUSE OF REPRESENTATIVES, REPLY BRIEF TO RESPONSE BRIEF OF APPELLANTS TO SUPPLEMENTAL BRIEF OF RESPONDENTS THE SOUTH CAROLINA HOUSE OF REPRESENTATIVES AND THE HONORABLE JAMES H. "JAY" LUCAS, AS SPEAKER OF THE HOUSE OF REPRESENTATIVES

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ARGUMENT

Appellants challenged the constitutionality of Act 275 of 2016 under the "one subject" rule set out in Article III, Section 17 of the South Carolina Constitution. Respondents denied that Act 275 of 2016 in any way violates Article III, Section 17.

After this lawsuit was filed, the General Assembly passed Act 129 of 2018, a codification act that revised two volumes of the Code of Laws of 1976 and adopted all cumulative supplements into the Code. Act 275 was part of this codification act, and under long-standing South Carolina law, this codification act eliminates a defect, if any, under Article III, Section 17 and is therefore dispositive of Appellants' appeal. *See, e.g., S.C. Tax Comm'n v. York Elec. Co-op., Inc.*, 275 S.C. 326, 331–33, 270 S.E.2d 626, 629–30 (1980).

I. Appellants' effort to distinguish the "codification" cases in Respondents' supplemental brief misconstrues the cases.

Appellants argue that the cases cited in Respondents' supplemental brief are distinguishable from this case. Appellants attempt to distinguish the cases cited in Respondents' supplemental brief by noting that those cases involve a codification of the entire South Carolina Code. Appellants are incorrect, and their argument lacks a complete analysis and understanding of the codification cases and relevant codification authority.

The authority and duty to codify the general statutory law of the State was originally contained in Article VI, Section 5 of the South Carolina Constitution and provided for the codification of all the general statutes of the State every ten years. *See Nexsen v. Ward*, 96 S.C. 313, 318, 80 S.E. 599, 600–01 (1914); *Park v. Laurens Cotton Mills*, 75 S.C. 560, 568, 56 S.E. 234, 237 (1907). When the Constitution was amended and certain sections re-written, the power and duties of the Code Commissioner were moved to Chapter 13 of Title 2 to the Code of Laws of

South Carolina (1976). Additionally, the requirement of a codification of the entire Code every ten years was removed.

Section 2-13-90 of the 1976 Code of Laws now authorizes the Legislative Council and the Code Commissioner to revise volumes of the Code from time to time if *in their judgment* the supplement of any volume becomes "too bulky for convenient use." S.C. Code § 2-13-90. The revised volumes must be submitted to the General Assembly for consideration and approved by a bill passed under the formalities for the passage of any law under the Constitution. The result is that the replacement volume shall "to the extent of its contents" be the only general permanent statutory law of the State. *Id.* Similarly, Section 2-13-170 provides that the Code as prepared by the Commissioner shall be declared by the General Assembly, by an act passed under the formalities for the passage of laws under the Constitution, to be the "only general permanent statutory law of the State." *Id.* § 2-13-170.

Appellants argue that the codification of Act 275 does not cure a defect, if any, under the one subject rule because Act 129 of 2018 was not a "decennial" codification of the entire South Carolina Code. While it is true that the cases upon which Respondents rely dealt with codifications of the entire Code, the analysis and logic of those cases applies with equal force here. Act 129 of 2018 was initiated and passed pursuant to the current codification procedure of § 2-13-90 and § 2-13-170 of the 1976 Code of Laws, just as codifications in previous cases were initiated and passed pursuant the procedures then in effect.

For all of the supposed distinctions they claim exist, Appellants fail to address the most important issue in these cases: A codification bill must follow all of the formalities for the passage of laws under the Constitution. That has not changed, from the earliest case law cited (*Park v. Laurens Cotton Mills*, from 1907) to the current statutes and the passage of Act 129 of 2018. Each

codification bill discussed in the cases had three readings in each Chamber of the General Assembly, was enrolled, ratified, and then sent to the Governor to sign, veto, or allow to become law without the Governor's signature. This is the same process that must be followed for any act passed in South Carolina, and it is the process that was followed with respect to Act 129, which codified the challenged Act 275.

In *Colonial Life & Accident Insurance Co. v. S.C. Tax Commission*, this Court emphasized the importance of a codification bill going through the formalities prescribed for the passage of laws. *See* 233 S.C. 129, 147–48, 103 S.E.2d 908, 917 (1958) (citing *Nexsen*, 96 S.C. 313, 80 S.E. 599). Like the act at issue there, Act 129 of 2018 went through all of the formalities for an act to become law. Because Act 129 revised volumes 15A and 18 and adopted the cumulative supplements to all other volumes into the Code of Laws, Act 275 was made a part of the only general permanent statutory law of the State of South Carolina. Accordingly, if there was any defect to Act 275 under the one subject rule—which Respondents deny—it was cured by the passage of Act 129 of 2018 codifying the provisions of Act 275 into the Code. *See York Elec. Co-op., Inc.*, 275 S.C. at 331–33, 270 S.E.2d at 629–30; *Colonial Life & Accident Ins. Co.*, 233 S.C. at 145–48, 103 S.E.2d at 916–17; *State v. Freeland*, 106 S.C. 220, 222, 91 S.E. 3, 3 (1916); *Nexsen*, 96 S.C. 313, 80 S.E. 599; *Park*, 75 S.C. 560, 56 S.E. 234. Therefore, Appellants' challenge to Act 275 is moot.

II. Appellants' "immunization" argument demonstrates their lack of understanding of the case law.

Appellants repeatedly accuse Respondents of attempting to "immunize" their alleged unconstitutional acts by recodifying the Code. Appellants' argument misstates the facts and misconstrues the law. It is clear from this Court's decisions that codification can "cure" a potential constitutional defect under Article III, Section 17. This makes eminent sense because the South

Carolina General Assembly always has the ability to cure a potentially defective act by passing additional legislation. That is substantially different than what Appellants are alleging. Appellants imply that the codification act was some sort of legislative trick. But Appellants have no support whatsoever for this allegation. Indeed, their allegation is simply not true.

As with this case, each of the cases cited in Respondents' supplemental brief relates to an alleged violation of the one subject rule under Article III, Section 17. In fact, most of those cases found that there was a violation of Article III, Section 17. What Appellants fail to address is that a challenge to legislation under the one subject rule is different than many constitutional challenges. Appellants' challenge to Act 275 is an attack on the *procedure* by which Act 275 was passed. There is no allegation that any specific provision in Act 275 is *substantively* unconstitutional. The inclusion of Act 275 in the subsequent codification act corrected any alleged defect in the manner of its passage. This point may be best stated in *Nexsen*. There, this Court stated:

> It is further contended by plaintiff in error that the embodiment in the Code of an unconstitutional law is an error which the legislature did not intend to sanction by its act adopting the Code. If the infirmity of the act relates to matter upon which the Constitution prohibits any legislation at all, of course, the act would be void, it matters not where found, nor how often adopted. Where, however, the defect is not inherent in the subject matter itself, but relates simply to its manner of passage under a defective title, it is, of course, permissible for the legislature to re-enact the measure under a proper title.

Id. 96 S.C. at 320, 80 S.E. at 601 (citing *Central Ga. Ry. Co. v. Georgia*, 31 S.E. 531 (Ga. 1898)).

This Court addressed a one subject lawsuit again in *S.C. Tax Commission v. York Electric Cooperative, Inc.* In *York*, the Court addressed an Article III, Section 17 constitutional challenge to the "South Carolina Uniform Disposition of Unclaimed Property Act." The Court found that the Unclaimed Property Act violated the "one subject rule" because it was included in the General

Appropriations Act of 1971 and was not related to the raising and expenditure of tax monies. 275 S.C. at 330–31, 270 S.E.2d at 628–29. Despite expressly finding that the Unclaimed Property Act was unconstitutional under the one subject rule, this Court found that the unconstitutionality "at the time of its enactment . . . is now of no consequence, since it was reenacted as a part of the codification of the 1976 Code of Laws . . . and declared by the General Assembly to be a part of the general statutory law of the State." *Id.* at 331–32, 270 S.E.2d at 629.

And in *Colonial Life & Accident Insurance Co. v. S.C. Tax Commission*, this Court similarly found that the challenged act was unconstitutional under Article III, Section 17, this time because it was not sufficiently referenced in the title to the general appropriations act. The Court in *Colonial Life* then turned the codification issue:

> Did such codification validate this legislation, which had been invalid, for the reasons before stated, when it existed only as a part of the act? If it was properly incorporated into the 1952 Code, it became, without reference to the title of the act of which it had been a section, and therefore despite the inadequacy of that title, a part of the only general statutory law of the state.

233 S.C. at 145, 103 S.E.2d at 916.

Appellants strain to distinguish this long line of cases by claiming that they do not apply when an act is under a current challenge. There is no support for this argument. Moreover, placing such a restraint upon the General Assembly—prohibiting the passage of subsequent legislation—would make no sense.

Appellants' argument that the passage of Act 129 of 2018 was "an apparent response to the active, ongoing, Constitutional challenge" fares no better. Once again, there is no support for this proposition. Rather than a response to this lawsuit, the codification of volumes of the Code and the adoption of the cumulative supplement into the Code is a routine practice that is provided for by statute in Title 2, Chapter 13. More importantly, it is irrelevant whether the passage of Act

129 was an act of routine matter or a matter of design. Instead, the important issue is that a codification bill (like Act 129 of 2018) is subject to the formalities prescribed for the passage of laws. *See Colonial Life & Accident Ins. Co.*, 233 S.C. at 147–48, 103 S.E.2d at 917 (citing *Nexsen*, 96 S.C. 313, 80 S.E. 599).

III. None of Appellants' "Separation of Powers," "Due Process," and "Exceptions to Mootness" arguments can revive their challenge to Act 275.

The majority of Appellants' response argues that the passage of Act 129 of 2018 violates the "Separation of Powers," "violate the Due Process Rights of the Appellants," and is subject to the "exceptions to the doctrine of mootness." *See* Appellants' Suppl. Br. 6–13. These arguments lack any merit, are not responsive to Respondents' supplemental brief, and appear to be an attempt at a "Hail Mary" pass to keep this case alive.

Separation of Powers

In Appellants' final paragraph under their "Separation of Powers" section, they finally set forth the two bases upon which they are alleging that Respondents are violating the "Separation of Powers doctrine." Appellants claim that Respondents are (1) "attempting to interfere with the proper functioning of this Court," and (2) "attempting to short-circuit [this Court's] processes." Appellants' Suppl. Br. 8. These arguments are without merit.

Respondents are in no way interfering with the proper functioning of this Court or attempting to "short-circuit" its processes. In fact, Respondents are relying on legal precedent from this Court in making its arguments in their supplemental brief. To the contrary, Appellants have cited no relevant case law in support of their "Separation of Powers" argument.

Due Process

Equally without merit is Appellants' claim that Respondents' have violated their rights to due process. Appellants cite from one case that provides a general description of procedural due

process. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008). Despite the language they cite, Appellants have failed to identify any liberty or property interest that is being deprived by Respondents other than their claim that they "possess a liberty interest in having their elected representatives follow the Constitution." Appellants' Suppl. Br. 8.

Appellants argue that Respondents' are "trying to do away with the Constitutional case against them" and "that effort violates the Appellants' Due Process rights." Appellants further assert that if "Respondents succeed" in getting this case dismissed, Appellants will have no "opportunity to be heard." Appellants' Suppl. Br. 9. That is simply not true. Appellants have already been provided the opportunity to file their supplemental brief in response to this issue in addition to fully briefing the "one subject" issue. Finally, if "Respondents succeed" and this Court finds that the legislative act of passing Act 129 of 2018 effectively "cured" any possible "one subject" defect in Act 275, there can be no violation of due process.

Mootness

Although they invoke various exceptions to the mootness doctrine, Appellants' argument essentially boils down to their claim that the General Assembly could constantly flout the one subject rule and then pass a codification act before this Court has a chance to decide whether the one subject rule has been violated, which would prevent this Court from passing on a question of constitutional significance. *See* Appellants' Suppl. Br. 9–13. In other words, they implicitly acknowledge that Act 129 of 2018 may have cured any defect so that there is no existing controversy here, *cf. Sloan v. Greenville Cty.*, 356 S.C. 531, 590 S.E.2d 338 (2003) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." (alteration omitted)), but this Court still should nevertheless issue an opinion on their one subject challenge anyway.

Asking this Court to disregard the mootness doctrine here raises multiple problems. *First*, it impugns the integrity of the General Assembly. Without saying so directly, Appellants accuse the General Assembly of plotting to violate the one subject rule repeatedly and then use codification to defeat subsequent lawsuits. Courts, however, refuse to impugn a legislature's motives. *See S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) (noting the "the hazards of delving into legislative intent or motive and attributing unconstitutional motives to state legislatures"); *State v. Cardozo*, 5 S.C. 297, 312 (1874) ("Public and proper motives are alone to be attributed to the Legislature.").

Second, Appellants' position is nothing more than an invitation to issue an advisory opinion. Of course, courts in this State have no authority to do so. *See O'Shields v. McLeod*, 257 S.C. 477, 481–82, 186 S.E.2d 408, 409 (1972).

Third, Appellants' mootness argument shows a lack of understanding of the General Assembly's role under our Constitution generally and of the codification process specifically. To ignore mootness here, issue an opinion, and then (as Appellants surely want) decide future one subject lawsuits, the only potential way to guarantee that a future case is not also mooted by codification is to prohibit the General Assembly from passing any legislation affecting an act challenged under the one subject doctrine while that lawsuit is pending.

But such a rule would disrupt the careful balance of authority under the Constitution. The General Assembly is vested with "[t]he legislative power of this State." S.C. Const. art. III, § 1. That includes the power to pass legislation that relates to previous legislation, including legislation that is intended to cure a defect in the previous legislation. *See, e.g., York Elec. Co-op., Inc.*, 275 S.C. at 332–33, 270 S.E.2d at 629–30. This Court has made clear the respect that the judicial department must show for its coequal branches. *See, e.g., S.C. Pub. Interest Found. v. Judicial*

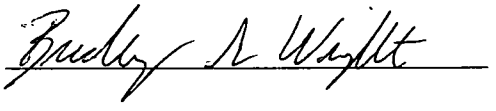
Merit Selection Comm'n, 369 S.C. 139, 142–43, 632 S.E.2d 277, 278–79 (2006). That respect means that the courts of this State should not prohibit the General Assembly from taking any constitutional action, such as passing a codification bill under Chapter 13 of Title 2.

Not only is such a rule antithetical to the South Carolina Constitution, but it would also result in a waste of judicial resources. *Cf. City of Columbia v. Assa'ad-Faltas*, 420 S.C. 28, 34, 800 S.E.2d 782, 785 (2017) (observing that the State has "limited judicial resources"). If the General Assembly could not act while a one subject lawsuit was pending and the plaintiff in such a lawsuit prevailed, then the General Assembly could pass an act (or acts) curing the one subject violation. But there is no need to make the General Assembly wait. It could instead pass that same act while the lawsuit was pending, allowing courts to focus on other cases, rather than on one in which a decision would have no real difference in the ultimate outcome, as in either scenario, the General Assembly would have fixed any problem.

CONCLUSION

This appeal should be dismissed.

Respectfully Submitted,



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June 28, 2018
Columbia, SC

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served *The South Carolina House of Representatives and the Honorable James H. "Jay" Lucas, as Speaker of the House of Representatives' Reply Brief to Response Brief of Appellants to Supplemental Brief of Respondents The South Carolina House of Representatives and the Honorable James H. "Jay" Lucas, as Speaker of the House of Representatives* by depositing a copy in the United States Mail, postage prepaid, on June 28, 2018, addressed to all attorneys of record, as follows:

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