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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Edgar W. Dickson, Circuit Court Judge

Case No. 2018-000395

Gerard E. Ziegler; Brenda Barrington III; James Stephen Green, Jr.; William A. Harbeson; David Messinger; South Carolina Public Interest Foundation; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated .....Appellants,

v.

Dorchester County; Dorchester County Council; Charles D. Chinnis, George H. Bailey, Sr., Jay Byars, Willie R. Davis, Carroll S. Duncan, Larry Hargett and William R. Hearn, Jr., in their official capacities as members of Dorchester County Council, ...Respondents.

SUPPLEMENTAL BRIEF OF APPELLANTS

W. Andrew Gowder, Jr.
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, SC 29405
(843) 727-2229

Michael T. Rose
Mike Rose Law Firm, PC
406 Central Avenue
Summerville, SC 29483
(843) 870-1821

Attorneys for Appellants

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TABLE OF AUTHORITIES

CASES:

STATUTE

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The court has requested the parties to submit a brief addressing whether this case presents a justiciable controversy. The Appellants respectfully assert that this case is justiciable and presents a question of constitutional and statutory interpretation to the court that is necessary and appropriate for it to decide.

FACTS

The complaint is an action for declaratory and injunctive relief to obtain a declaration that Dorchester County combined two purposes into one ballot question- whether the County should issue bonds in the amount of $30 million for libraries and $13 million for public parks- in violation of Article X, § 14(4) of the South Carolina Constitution. R.14-15; 22-26. Though the plaintiffs obtained a South Carolina Attorney General Opinion on September 30, 2016 that a court would likely find the form of that ballot question violative of the South Carolina Constitution and statutes because it included both library facilities and park facilities in a single question and provided the County with that opinion, R. 30-38, the county proceeded to place the question as combined (R.42) on the ballot before the voters on November 8, 2016. The final vote was 60.46% yes and 39.54% no on the ballot question. See Respondents' Final Brief, p. 4.

ARGUMENT

1. This action for a declaratory judgment presents an actual, justiciable controversy.

This case is brought pursuant to the South Carolina Uniform Declaratory

Judgments Act, which provides in pertinent part:

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

S.C. Code Ann. § 15-53-20.

A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy. *Holden v. Cribb*, 349 S.C. 132, 137-38, 561 S.E.2d 634, 637-38 (Ct. App. 2002). A justiciable controversy must be present before any action can be maintained. *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 120, 804 S.E.2d 854, 860 (2017), citing *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical or abstract character." *Sloan v. Greenville Cnty.*, 356 S.C. 531 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

Certainly, there is an actual controversy over the constitutionality of this specific ballot question. The plaintiffs, relying on the reasoning and opinion of the S.C. Attorney General's Opinion, asserted before the referendum that the ballot question violated the South Carolina Constitution and the results of the vote based on that illegal ballot are a nullity. The respondents contend that the ballot complies

with the constitution and otherwise with South Carolina law and the results of the vote on that question are final and binding. The plaintiffs' complaint puts the legitimacy of that ballot question and vote before the court based on its interpretation of the South Carolina Constitution and statutory and common law. The case is brought before the court by plaintiffs with standing who are entitled to a decision from the court based on constitutional and statutory interpretation. The dispute raised by the pleadings are neither "contingent, hypothetical or abstract." *Sloan v. Greenville Cnty.*, 356 S.C. at 546, 590 S.E.2d at 346.

2. The plaintiffs have standing to bring this action before the court.

"A plaintiff must have standing to institute an action." *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. at 117, 804 S.E.2d at 858, citing *Sloan v. Greenville Cnty.*, 356 S.C at 547, 590 S.E.2d at 347. Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Black's Law Dictionary* 1625 (10th ed. 2014). South Carolina recognizes three types of standing: (1) standing conferred by statute; (2) "constitutional standing"; and (3) public importance standing. *ATC South, Inc. v. Charleston County.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008).

Plaintiffs have alleged standing as taxpayers and public importance standing. R.16-19. The complaint alleges that each individual is a citizen, resident and taxpayer of the County, has standing as plaintiff as a taxpayer and would be required to pay taxes to finance parks and libraries if the referendum passed. R. 16-17.

The Dorchester County Taxpayers' Association and the South Carolina Public Interest Foundation are South Carolina nonprofit corporations dedicated to the public interest and bring this action on their behalf and on behalf of citizens and taxpayers based on the great public importance of the issues raised in this action capable of being repeated that require judicial guidance. R. 17-18. Each plaintiff is alleged to have a personal stake in the subject matter and an overriding public purpose as the basis of the suit on behalf of their fellow taxpayers regarding the proper use and allocation of tax receipts by the County. R. 18-19.

A party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing. *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013). Nor must that party show they have an interest greater than other potential plaintiffs. *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007). This court has recognized:

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

S.C. Pub. Interest Found., 804 S.E.2d at 858-59 citing *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

Courts must take these competing policy concerns into consideration and

must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed. *ATC South*, 669 S.E.2d at 341. However, as this Court has acknowledged, since many issues may be of public interest, or importance, "[t]he key . . . is whether a resolution is needed for future guidance." *Id.* at 199, 669 S.E.2d at 341; *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 79-80, 753 S.E.2d 846, 853 (2014)("Whether [public importance standing] applies in a particular case turns on whether resolution of the dispute is needed for future guidance. . .. [T]he need for future guidance generally dictates when [public importance standing] applies."). *S.C. Pub. Interest Found. v. S.C. DOT*, 804 S.E.2d at 859 (whether SCDOT may inspect bridges within private, gated communities is one of public importance as it involves both the conduct of a government entity and the expenditure of public funds; a decision on the merits of the issue may have far-reaching consequences for the safety of citizens and future guidance is needed since there is no judicial guidance addressing the issue and there was evidence SCDOT would inspect this type of property in the future.)

This case is similar in its posture and nature to other constitutional and tax related cases with many other cases in which one of these defendants, the South Carolina Public Interest Foundation and other related defendants have been involved. See *S.C. Pub. Interest Found.*, 804 S.E.2d at 859 n.6 (footnote listing the

following cases: *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v. Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. S.C. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004).

Taxpayer and public interest standing have been specifically alleged in the complaint and are entitled to be regarded as admitted for purposes of review under Rule 12(c), SCRCP. *Russell v. Columbia*, 305 S.C. 86, 76, 406 S.E.2d 338 (1991). Further, based on the nature of the issues raised, which involves the interpretation of a constitutional provision, the validity of an election, municipal financing and the spending of taxpayer dollars, the public importance of the issue is self-evident. See, *Sloan v. Hardee*, 371 S.C. 495, 497 n.1, 640 S.E.2d 457, 458 (2007); *Sloan v. DOT*, 379 S.C. 160, 169-71, 666 S.E.2d 236, 241 (2008)(procurement matter involving expenditure of public funds of sufficient public importance to provide standing to challenging taxpayers); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005)(constitutional interpretation a matter of sufficient public interest as to confer standing); *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance).

Given the overriding importance of the issues involving a public election and

taxpayer funds, these plaintiffs, all Dorchester County taxpayers or public interest corporations acting on behalf of citizens and taxpayers, have standing as taxpayers under the public importance standing afforded South Carolina law.

3. The issue is ripe for decision and not moot.

This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 714-15 (1973). "'A case becomes moot when judgment, if rendered, will have no practical effect upon [an] existing controversy.'" *Holden v. Cribb*, 349 S.C. 132, 137-38, 561 S.E.2d 634, 637-38 (Ct. App. 2002), quoting *Seabrook v. City of Folly Beach*, 337 S.C. 304, 306, 523 S.E.2d 462, 463 (1999).

In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. 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. Finally, 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. *Holden* 561 S.E.2d at 637-38, *quoting Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)(case not moot even though

Holden had withdrawn her bid and the judicial sale had been canceled, the issues she raised were "capable of repetition, yet evading review," and would affect the future conduct of these parties and others attending public sales).

A similar result can be found in *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996) where the court found that short-term student suspensions, by their very nature, are completed long before an appellate court can review the issues they implicate and clearly fit into the evading review exception of the mootness doctrine. Likewise, in *Sloan v. DOT*, 379 S.C. 160, 167-68, 666 S.E.2d 236, 240 (2008) the court found that the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition yet will usually evade review. And, in *S.C. Pub. Interest Found.*, 421 S.C. at 121-22, 804 S.E.2d at 860-61 the court acknowledged that although the controversy that gave rise to this appeal was resolved because SCDOT had already inspected the bridges, the should be addressed because it is one which is capable of repetition yet will evade review. In that case, the court added, "[w]hen asserting the controversy falls under this exception, "[t]he 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." *Id., quoting Sloan v. Greenville Cnty.*, 356 S.C. at 554-55, 590 S.E.2d at 351.

In this case, the matter is not moot even though the vote on the ballot has

taken place because the issue raised by the pleadings is whether the ballot was properly constructed under the constitution: did it contain more than one purpose and does that inclusion invalidate the ballot question under the state constitution? The outcome of the vote is not relevant to that question. Further, the question is an important one from a policy perspective and one that is capable of repetition yet evading review. Ballot referendum questions are worded and finalized only weeks before the election: few declaratory judgment actions could be filed, briefed, tried and finally decided in that period of time. Just like the suspensions in *Byrd* or the bridge inspections in *S.C. Public Interest Foundation*, this is an important public matter that has a short shelf life, factually, but deserves a review by the courts.

This case is not moot, since the ballot language is still very much in question despite the election and the matter is capable of repetition yet evading review. Unless prohibited by this Court, Dorchester County and other local governments with bonding authority could combine multiple purposes into one referendum ballot question in the future in very similar or expanded ways.

4. This case raises a legal question of constitutional interpretation, not a political question.

It is the duty of this Court to interpret and declare the meaning of the Constitution. *Abbeville Cty. Sch. Dist. v. State*, 335 S.C. 58, 67, 515 S.E.2d 535, 539 (1999) citing *State ex rel. Rawlinson v. Anson*, 76 S.C. 395, 57 S.E. 185 (1907).

The nonjusticiability of a political question is primarily a function of the

separation of powers. *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 142-43, 632 S.E.2d 277, 278 (2006), citing *Baker v. Carr*, 369 U.S. 186, 210-11, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). "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." *Id.*; *See Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986) (stating the political question doctrine, which derives from the separation of powers doctrine, excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch).

In the *Judicial Merit Selection Case* cited above, this court found that the question of whether a judicial candidate was qualified based on residency was exclusively the decision of legislature under the state constitution, so it was a nonjusticiable political question. *S.C. Pub. Interest Found.*, 632 S.E.2d at 144. The court distinguished that case from cases where it was proper for the court to review the decisions of administrative agencies under the executive branch or review the actions of the legislature when those actions are challenged as unconstitutional. *Id.* Here, the nature of the challenge is that the ballot does not comply with the

statutory and constitutional requirements that the ballot contain a single issue, so it is clearly within the jurisdiction of this court.

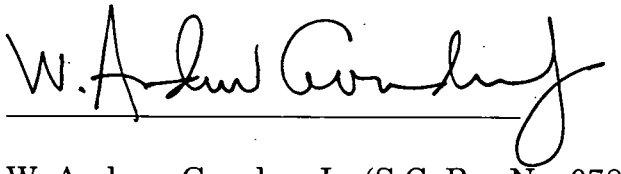
This case is more like *Gantt v. Selph*, 423 S.C. 333, 341, 814 S.E.2d 523, 527 (2018) than *Judicial Merit Selection* or *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013). In *Gantt*, the court found that the authority to decide whether a school board member met the residency requirements for the Richland County School Board had not been granted exclusively to the school board, so the issue was properly challenged as a declaratory judgment and was properly before the court. "In the absence of exclusive authority vested in another branch of government, Respondents are entitled to pursue relief pursuant to the Uniform Declaratory Judgments Act...." *Gantt*, 814 S.E.2d at 527.

Also, in *Sloan v. Hardee*, 371 S.C. at 500, 640 S.E.2d at 459-460 this court found that the case was justiciable because, rather than being asked to consider the qualifications of a judicial candidate, the sole issue was whether the Commissioners were serving in violation of the statutory terms. The court found that defining the meaning of the phrase "more than one consecutive term" within a statute was clearly within the prerogative of this Court. *Cf. Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 629, 207 S.E.2d 75, 78 (1974) (judicial interpretation of a statute is determinative of its meaning and effect).

Here, the interpretation of a provision of the South Carolina Constitution is uniquely the province of the courts to decide. Also, there is no statutory provision vesting the evaluation of ballot referendum questions exclusively in another branch of government, so these appellants are entitled to pursue this relief under the UDJA.

CONCLUSION

For these reasons and the arguments presented in its earlier briefs and pleadings submitted to this Court, the Appellants respectfully request that the Court reverse the trial court and remand this case for further proceedings in the Circuit Court.



W. Andrew Gowder, Jr. (S.C. Bar No. 07895)
Austen & Gowder, LLC
1629 Meeting Street, Suite A
Charleston, South Carolina 29405
Phone: (843)727-2229

Michael T. Rose (S.C. Bar No. 04910)
Mike Rose Law Firm, PC
406 Central Avenue
Summerville, South Carolina 29483
Phone: (843)871-1821
Attorneys for Appellant

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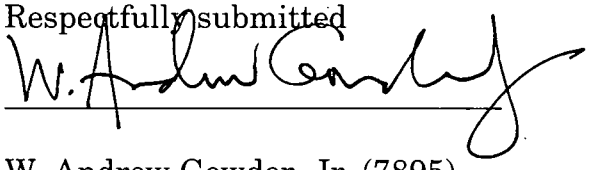
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that Supplemental Brief of Appellants complies with the provisions of Rule 211(b), SCACR.

Respectfully submitted



W. Andrew Gowder, Jr. (7895)
Austen & Gowder, LLC
1629 Meeting Street, Suite A
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Supplemental Brief of Appellants has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this the 4th day of October, 2018 to:

Stephen A. Matthews
Haynsworth Sinkler Boyd, PA
PO Box 11889
Columbia, SC 29211

Rachel N. Fete
Assistant to W. Andrew Gowder, Jr.