THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

Case No. 2016-CP-18-1975
Appellate Case No. 2018-000395

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SC Court of Appeals

Gerard E. Ziegler; Brenda Barrington III; James Stephen Greene, 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,

RESPONDENTS' SUPPLEMENTAL BRIEF ON JUSTICIABILITY

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TABLE OF CONTENTS

STATEMENT OF ISSUE BRIEFED HEREIN 1

STATEMENT OF THE CASE 1

FACTS OF THE CASE 1

STANDARD OF REVIEW 1

INTRODUCTION 2

JUSTICIABILITY ISSUES RAISED TO THIS POINT 3

BACKGROUND RELEVANT TO JUSTICIABILITY 3

ARGUMENT 6

- I. JUDICIALLY MANAGEABLE STANDARD 6
- II. STANDING 6
- III. MOOTNESS 8
- IV. RIPENESS AND THE PATH TO THE COURTHOUSE 9

CONCLUSION 12

TABLE OF AUTHORITIES

<u>CASES</u>

Alexander v. Houston, 403 S.C. 615, 744 S.E.2d 517 (2013) 2, 6

American Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) 2

Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947) 8

Baker v. Carr, 369 U.S. 186 (1962) 2

Douan v. Charleston County Council, 357 S.C. 601, 594 S.E.2d 261 (2003) 4

Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006) 1

Hamilton v. Pallozzi, 848 F.3d 614 (4th Cir.), *cert. denied*, 138 S. Ct. 500, 199 L. Ed. 2d 384 (2017) 1

Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997) 2

Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008) 2

Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970) 1, 2

S.C. Pub. Interest Found. v. S.C. Dep't of Transportation, 421 S.C. 110, 804 S.E.2d 854 (2017) 7

Sloan v. Greenville Cty., 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) 8

Smith v. Hendrix, 265 S.C. 417, 219 S.E.2d 312 (1975) 11

Smith v. S.C. Ret. Sys., 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999) 10, 11

South Carolina Dep't of Mental Health v. State, 301 S.C. 75, 390 S.E.2d 185 (1990) 8

Taylor v. Roche, 271 S.C. 505, 248 S.E.2d 580 (1978) 10, 11, 12

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008) 1

<u>STATUTES</u>

S.C. Code Ann. § 4-10-300 *et seq.* 8

S.C. Code Ann. § 4-15-10 *et seq.* (2016 Supp.) 4

S.C. Code Ann. § 4-15-60 (1986) 5, 7

S.C. Code Ann. § 6-1-920(18)(h) (2004) 6

S.C. Code Ann. § 7-1-40 (1976) 10

S.C. Code Ann. § 7-5-10(A) (2016 Supp.) 4

S.C. Code Ann. § 7-5-10(C) (2016 Supp.) 4

S.C. Code Ann. § 7-13-10 (1976) 4

S.C. Code Ann. § 7-13-70 (1976) [repealed by Act No. 196, 2014 S.C. Acts ___] 4

S.C. Code Ann. § 7-13-355 (2016 Supp.) 4

S.C. Code Ann. § 7-17-10 *et seq.* (2016 Supp.) 5, 10

S.C. Code Ann. § 7-17-10 *et seq.* (2017 Supp.) 7

OTHER AUTHORITIES

19 S.C. Jurisprudence, Constitutional Law, § 6.1 (1994 Supp.) 2

E. Chemerinsky, *A Unified Approach to Justiciability*, 22 CONNECTICUT LAW REVIEW 677 (1991) 2

M. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM LAW REVIEW 1538 (2012) 2

P. Edwards and N Polsby, *Overview: Electoral Reform – Introduction: The Judicial Regulation of Political Processes-In Praise of Multiple Criteria*, 9 YALE LAW & POLICY REVIEW 190 (1991) 2

R. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARVARD LAW REVIEW 1274 (2006) 2

RULES

SCRCivP Rule 19(b) 2

CONSTITUTIONAL PROVISIONS

S.C. Const., art. X 10

STATEMENT OF ISSUE BRIEFED HEREIN

At the request of the Court, Respondents in this supplemental brief address the question of whether this case involves a justiciable controversy.

STATEMENT OF THE CASE

Respondents incorporate herein their STATEMENT OF THE CASE from RESPONDENTS' FINAL BRIEF.

FACTS OF THE CASE

Respondents incorporate herein their recitation of FACTS OF THE CASE from RESPONDENTS' FINAL BRIEF.

STANDARD OF REVIEW

> '[T]he existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.' While this question has not been raised, we raise it on our own motion, since the parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.

Power v. McNair, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970). As the issue is raised here *sua sponte*, the review is necessarily *de novo*. Moreover, as noted under STANDARD OF REVIEW in RESPONDENTS' FINAL BRIEF, the facts in this matter, including facts related to justiciability, are not in dispute. Thus, the issue of justiciability here involves only a question or questions of law; and review by this Court of such questions is *de novo*. See *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109–10, 662 S.E.2d 40, 41 (2008).[1]

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[1] See also *Hamilton v. Pallozzi*, 848 F.3d 614, 619–20 (4th Cir.), *cert. denied*, 138 S. Ct. 500, 199 L. Ed. 2d 384 (2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal. . . . As to justiciability, we review the factual findings for clear error and the legal conclusions *de novo*.").

INTRODUCTION

Justiciability has several aspects.[2] "Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the invocation of declaratory judgment action." *Power v. McNair*, *supra*, 255 S.C. at 153–54, 177 S.E.2d at 553. The "concept of justiciability encompasses several doctrines, including ripeness, mootness, and standing." *Jackson v. State*, 331 S.C. 486, 491 at fn. 2, 489 S.E.2d 915, 917 at fn. 2 (1997), citing 19 S.C. Jurisprudence, *Constitutional Law,* § 6.1 (1994 Supp.). It may also involve political-question issues, such as those involving the constitutional separation of powers. *Alexander v. Houston*, 403 S.C. 615, 744 S.E.2d 517 (2013), cited in Order, R. pp. 3-4; see also *Baker v. Carr*, 369 U.S. 186 (1962). Another type of political and non-justiciable question is described as one "lack[ing] judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, *supra*, 369 U.S. at 217.[3] Yet another aspect, although not often described in terms of justiciability, arises from the inability to provide adequate relief due to the absence of a necessary party.[4] See SCRCivP Rule 19(b), regarding joinder of an indispensable party.

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[2] See E. Chemerinsky, *A Unified Approach to Justiciability*, 22 CONNECTICUT LAW REVIEW 677 (1991).

[3] See R. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARVARD LAW REVIEW 1274 (2006). This issue most often arises (as here) in the regulation of political processes. See P. Edwards and N. Polsby, *Overview: Electoral Reform – Introduction: The Judicial Regulation of Political Processes-In Praise of Multiple Criteria*, 9 YALE LAW & POLICY REVIEW 190 (1991). It also arises, at times, in other contexts, for example, in environmental regulation and foreign affairs. See *American Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), and *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

[4] See, for example, M. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM LAW REVIEW 1538 (2012), discussing at pp. 1551 *et seq.* the case-or-controversy

JUSTICIABILITY ISSUES RAISED TO THIS POINT

Three aspects of justiciability were discussed or at least identified in the pleadings and briefings below, in the Order below, and in the parties' original briefs in this Court.

First, the Answer of Defendants-Respondents, at ¶ 14 (R. pp. 56-57) noted with respect to the non-declaratory relief requested by the Plaintiffs-Appellants (an injunction against the holding of the referendum), that the Defendants-Respondents had no further responsibility or authority with respect to the referendum and that the entity that did (the Board of Elections and Voter Registration of Dorchester County (the "Election Board")) was not an agent of the Defendants-Respondents.

Second, in their memorandum in support of their motion for judgment on the pleadings (R. p. 126), in argument to the court below (R. pp. 106-107), and in briefing to this Court (RESPONDENTS' FINAL BRIEF, pp. 26-27, § VI), Defendants-Respondents argued the impossibility of crafting a coherent, judicially manageable rule for determining what would constitute "different purposes" that would require legislative bodies (county councils) to formulate separate ballot questions.

And third, the trial court adverted briefly to the separation-of-powers issue (Order, R. pp. 3-4), in determining that it was nonetheless obliged to determine if a challenged legislative action was constitutional.

BACKGROUND RELEVANT TO JUSTICIABILITY

The relevant facts and statutes for analyzing justiciability issues that may now be present in this case are the following.

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necessity of defendant standing, that is, that the defendant be the one adverse to the plaintiff and capable of having effective relief granted against him.

1. On July 18, 2016, Defendant-Respondent Dorchester County Council adopted its Ordinance 16-03, calling for the referendum at issue to be held in conjunction with the general election on November 8, 2016. Complaint, ¶ 33 and Ex. 2. R. pp. 21 and 40-43. The election was to be pursuant to the County Bond Act, S.C. Code Ann. § 4-15-10 *et seq.* (2016 Supp.)

2. Responsibility for conducting the referendum belonged to the Election Board, not to any of the Defendants-Respondents, pursuant to S.C. Code Ann. § 7-5-10(C) (2016 Supp.), S.C. Code Ann. § 7-13-70 (1976) [repealed by Act No. 196, 2014 S.C. Acts ___], and S.C. Code Ann. § 7-13-10 (1976).

3. The Election Board and its members were not appointed by, are not controlled by, are not removable by, and are not agents of any of the Defendants-Respondents, pursuant to S.C. Code Ann. § 7-5-10(A) (2016 Supp.).

4. There is no provision in the South Carolina Code of Laws subjecting the Election Board to a subsequent direction from Defendant-Respondent County Council to remove a question once the Election Board has placed it on the ballot.

5. The form of a ballot question to be voted upon in a general election had to be final and submitted to the Election Board not later than August 15 of the year of the general election. S.C. Code Ann. § 7-13-355 (2016 Supp.). That deadline passed more than five weeks before the Plaintiffs-Appellants sent their demand to Defendant-Respondent County Council that the form of question be changed. Complaint, ¶ 36 and Ex. 4. R. pp. 22 and 50-51.

6. The Election Board had no power to change the form of the question submitted. *Douan v. Charleston County Council*, 357 S.C. 601, 594 S.E.2d 261 (2003).

7. Plaintiffs-Appellants filed this action on October 13, 2016, against Dorchester County, Dorchester County Council, and the individual members of the Dorchester County Council in their official capacities. Neither the Election Board nor any other election official was named as a defendant or otherwise brought into this lawsuit. Summons and Complaint. R. pp. 12 *et seq.*

8. Plaintiffs-Appellants sought two forms of declaratory relief, those being declarations that the referendum question was, and any results thereof would be, invalid, and that any bonds issued pursuant thereto would be invalid. Complaint, § VI(A). R. pp. 26-27.

9. Plaintiffs-Appellants further sought an injunction, against the holding of the referendum. No injunction was sought against the issuance of bonds. Complaint, § VI(B). R. p. 7.

10. The ballot question as formulated by the Referendum Ordinance was voted upon on November 8, 2016. The tally was 60.46% in favor and 39.54% opposed, with a total of 56,635 votes cast. There were 62,567 votes cast in the County in the United States Presidential Election held that same day.

11. Plaintiffs-Appellants did not thereafter protest or contest the referendum pursuant to the procedures set out in S.C. Code Ann. § 7-17-10 *et seq.* (2016 Supp.); nor did Plaintiffs-Appellants or any other person institute a new action pursuant to S.C. Code Ann. § 4-15-60 (1986) of the County Bond Act.

ARGUMENT

I. JUDICIALLY MANAGEABLE STANDARD

The political-question issue (whether a judicially manageable standard can be discovered for determining what are, or are not, such separate issues as to require separate ballot questions) remains. Defendants-Respondents incorporate their argument on this point from RESPONDENTS' FINAL BRIEF, pp. 26-27, § VI.

Plaintiffs-Appellants contend in rebuttal that, however difficult formulation of a clear and manageable rule may be, it is clear that in the present case, libraries and parks are categorically different. See REPLY BRIEF OF APPELLANTS, pp. 4-5, § VIII. The General Assembly, however, apparently disagrees; and separation-of-powers and respect for co-equal branches are at the heart of the political question aspect of justiciability. See *Alexander v. Houston*, *supra*. The General Assembly, in its statute listing the types of "public facilities" that can be supported with a developmental impact fee, lists eight categories, each one internally cohesive: first are water-service related facilities, then sewer-related facilities, then solid waste, then roads and bridges, then stormwater, then public safety (police, fire, and emergency), then capital equipment for certain services. The last, single entry reads as follows: "(h) parks, libraries, and recreational facilities." S.C. Code Ann. § 6-1-920(18)(h) (2004). Apparently in the view of the General Assembly, "parks, libraries, and recreational facilities" cohere more closely to each other than water does to sewer, or sewer to either stormwater or solid waste.

II. STANDING

The adversarial interests of the two parties are clear. Defendants-Respondents, who propose to issue Dorchester County general obligation bonds – already long delayed, at unknown additional cost – as soon as this litigation is cleared, have an interest in a determination by this

Court that allows them to issue the voter-approved bonds as soon as possible. The question is whether the Plaintiffs-Appellants likewise have a sufficiently particularized interest.

This Court most recently outlined its standing jurisprudence in *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017), in which it recognized "three types of standing: (1) standing conferred by statute; (2) 'constitutional standing'; and (3) public importance standing." *Id.*, 421 S.C. at 117, 804 S.E.2d at 858.

The statutes that relate to challenges to election procedures generally (S.C. Code Ann. § 7-17-10 *et seq.* (2017 Supp.)) and to County Bond Act appeals specifically (S.C. Code Ann. § 4-15-60 (1986)) do not identify or describe any parties with standing.

With regard to constitutional standing, where persons "are unable to show they suffered a concrete and particularized injury distinct from that shared by other taxpayers . . .; . . . [they] do not have constitutional standing." *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, *supra*, 421 S.C. at 118, 804 S.E.2d at 858. That is also the case here, both with regard to the initial claim for relief from the holding of the referendum and with regard to the claim for relief from the issuance of bonds. The Plaintiffs-Appellants have alleged no particularized injury different from that shared by other voters and taxpayers.

With regard to public-importance standing, this Court stated:

> [P]ublic importance standing . . . is to "[a]llow[ ] interested citizens a right of action in our judicial system when issues are of significant public importance to ensure [ ] ... accountability and the concomitant integrity of government action." . . . [S]ince many issues may be of public interest, or importance, "[t]he key ... is whether a resolution is needed for future guidance." . . . The issue . . . is one of public importance as it involves both the conduct of a government entity and the expenditure of public funds. . . . Additionally, future guidance is needed since there is no judicial guidance addressing the issue and there is evidence [that the challenged conduct will re-occur].

Id., 421 S.C. at 118–19, 804 S.E.2d at 858–59.

The case at hand "involves the conduct of a government entity and the expenditure of public funds." In addition, as Plaintiffs-Appellants allege a constitutional principle that would forbid combining "multiple purposes" into a single question, the fact that the General Assembly has mandated that combined-question process for referenda under the Capital Project Sales Tax Act (S.C. Code Ann. § 4-10-300 *et seq.*) and that at least 14 counties have already utilized that process, it is likely that the challenged conduct will re-occur and that future guidance is needed.

III. MOOTNESS

The referendum has been held. The request for injunctive relief against the holding of the referendum is therefore moot. The request for a declaratory judgment against the validity of the ballot question form that the electorate voted on could also be considered moot, for that same reason.[5] The issuance of bonds pursuant to the referendum, however, is still very much a live issue. See CONCLUSION below. And the sole determining question regarding whether bonds can be validly issued is the validity of the referendum and the favorable vote thereon. Consequently, the issue presented here – whether a favorable bond referendum that, within a single question,

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[5] Even if the referendum having been completed were deemed to moot not only the request for an injunction against it but also the request for a declaration that its holding and its result were invalid and of no effect, two principles of South Carolina jurisprudence would allow the courts of this State to hear and decide it, nonetheless. First, there is "the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest." *Sloan v. Greenville Cty.*, 356 S.C. 531, 553, 590 S.E.2d 338, 350 (Ct. App. 2003), citing *Ashmore v. Greater Greenville Sewer District,* 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947). In addition, even though "the issue presented was moot, 'appeal [may be] allowed because it raises a question that is capable of repetition, but which usually becomes moot before it can be reviewed.'" *Sloan v. Greenville Cty.*, 356 S.C. at 554, 590 S.E.2d at 350, citing *South Carolina Dep't of Mental Health v. State,* 301 S.C. 75, 76, 390 S.E.2d 185, 185 (1990). However, in light of the still live nature of the bond issuance question which is wholly dependent on the referendum validity question, there is no need to determine whether to invoke either of these prudential exceptions to mootness.

proposed bonds for libraries and recreational facilities is valid to authorize the issuance of such bonds – does not appear to be moot.

IV. Ripeness and the Path to the Courthouse

The concept of ripeness, with its allied doctrine that requires exhaustion of statutorily-prescribed remedies, presents the most problematic issue of justiciability in this case. At a superficial level, the case appears ripe at this time,[6] in the sense that the parties disagree about the legal validity and effect of an action that has already occurred, the resolution of which disagreement will determine whether one party can perform a governmental function and whether the other party will be obliged to support that function through the payment of taxes.

The interpretive questions arise in examining whether the proper steps were taken to bring this matter to this Court, so that this Court can now exercise jurisdiction over it. In considering that problem, one must first determine whether a declaratory judgment action (such as the one here) can supplant a statutorily-prescribed path to the courthouse.

> [T]hough Rule 57 of the South Carolina Rules of Civil Procedure governs declaratory judgment actions, and expressly provides: "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," a court should not exercise such power lightly. . . . [I]t is well settled a court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided. "Gratuitous interference" in the administrative process should be avoided. . . . This Court, therefore, should not serve as a substitute for "a tribunal of original jurisdiction in issues that are ripe for litigation by the usual processes." . . . "Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances," as "[r]elief is not generally available to one who has not exhausted administrative remedies.".

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6 With regard to the holding of the referendum, the case was ripe when filed. However, with regard to the now-remaining question – is the outcome of the referendum sufficient to authorize the issuance of the proposed bonds – the case was not ripe until the referendum resulted favorably. Until that time, the possibility of the issuance of bonds was speculative and contingent on an event not in either party's or the court's control.

Smith v. S.C. Ret. Sys., 336 S.C. 505, 527–28, 520 S.E.2d 339, 351 (Ct. App. 1999) [*internal citations omitted*].

Is there, then, a statutorily-prescribed path to this Court? And, if so, what is it and was it followed?

The protest, contest, and appeal procedures set out in South Carolina's election law at S.C. Code Ann. § 7-17-10 *et seq.* (2016 Supp.), and indeed all of Title 7, are stated by S.C. Code Ann. § 7-1-40 (1976) to "apply to and control all elections, including elections for the issuance of bonds and other elections in which any question or issue is submitted to a vote of the people." That breadth of scope was reiterated by this Court in *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978): "Title 7 of the South Carolina Code (1976) is known as the 'South Carolina Election Law;' and is applicable to all elections in South Carolina" [citing S.C. Code Ann. § 7-1-40 (1976); internal footnotes omitted]. This streamlined, compressed procedure provides for speedy answers to pressing questions about elections so that positions can be filled and dollars can be spent according to the will of the voters.

Plaintiffs-Appellants have not brought this case under the procedures set out in Title 7 (after the election, a short-deadline administrative protest through the county and/or state elections boards, followed by petition for *certiorari* to this Court); instead, they brought a declaratory action in circuit court before the election and continued it afterward. This Court, however, has held that the Title 7 procedures <u>do</u> "apply to issues as to the sufficiency of ballot questions." *Taylor v. Roche*, *supra*, 271 S.C. at 511, 248 S.E.2d 583. In *Taylor v. Roche*, the plaintiffs brought an action in circuit court to challenge a proposed bond issuance that would be lawful <u>**if**</u> the amendment of S.C. Const., art. X, was lawful. The plaintiffs contended that the amendment was unlawful because the ballot question by which it had been voted upon was

defective. Having failed to follow Title 7 to challenge the amendment within the appropriate time, the plaintiffs could not use alleged defects in the ballot question to halt the bond issuance.

The next question, then, is whether this Court's *Smith v. S.C. Ret. Sys.* caution to itself, to avoid a declaratory judgment alternative where statutorily-prescribed relief is available, is merely precatory or is precedential. That question, also, was answered in *Taylor v. Roche*:

> Under the common law there is no right to contest an election. The right to contest an election exists only under the constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed. The determination of election contests is judicial only when and to the extent authorized by statute; and the constitutional and statutory provisions in the various jurisdictions determine what tribunal shall entertain the proceeding, and only such tribunal shall do so.

Id., 271 S.C. at 509, 248 S.E.2d at 582. Accordingly, the Court there held "that the plaintiff's failure to pursue his statutorily provided remedies precludes this attack on the election process." *Id.*, 271 S.C. at 511, 248 S.E.2d at 583.

Based on the foregoing, it is clear that this case is not ripe for decision by this Court, as it has not arrived before the Court through the mandatory, statutorily-prescribed channels. Moreover, there is no way that this case can become ripe, as the short deadline for instituting the statutorily-prescribed procedures has long-since passed. "It is also clear that the protest concerning the election process must be made to the Board of Canvassers within the statutorily required time, or the suit will be barred." *Taylor v. Roche*, 271 S.C. at 510, 248 S.E.2d at 582, citing *Smith v. Hendrix*, 265 S.C. 417, 219 S.E.2d 312 (1975). Plaintiffs-Appellants here, like the plaintiff in Taylor v Roche, having failed to follow the statutorily-prescribed contest-and-appeal procedures, cannot now in this proceeding challenge the validity of the ballot, are now time-barred from attempting to utilize those procedures, and so cannot challenge the issuance of bonds pursuant to the referendum.

CONCLUSION

Although the various doctrines subsumed under the label of justiciability invoke sufficient prudential criteria to allow this Court to exercise jurisdiction if it wished to provide future guidance, Defendants-Respondents believe that the failure to bring this case to this Court in a posture where it can be resolved in accordance with the statutory procedures, and the lack of any judicially manageable standard whereby to draw the lines requested by Appellants both suggest that this case is not a justiciable case or controversy.

It has now been nearly two years since the voters of Dorchester County stated, by a wide margin, that they want the recreational and library facilities and are willing to pay for them. For all of those 24 months and for every additional day that passes, those voters and taxpayers are at risk that interest rates and construction costs will rise – leaving the people of Dorchester County with less in the way of facilities for the same amount or more in cost.

If the Court determines that this matter is not justiciable for reasons of ripeness/exhaustion, Defendants-Respondents strongly request that this Court state, as it did in *Taylor v. Roche*, that the opportunity to pursue the statutorily-prescribed remedies is now time-barred, so that no further litigation on this point will continue to delay the fulfillment of the voters' mandate.

October 4, 2018

Respectfully submitted,

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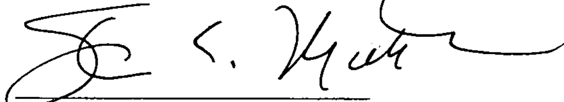
By: 

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PROOF OF SERVICE

I certify that on October 4, 2018 a copy of RESPONDENTS' SUPPLEMENTAL BRIEF ON JUSTICIABILITY has been served upon counsel for Appellants by placing the same in the United States mail to the following addresses:

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By: ______________________
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