

ORIGINAL

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, ... Respondents.

RECORD ON APPEAL VOL. II

February 21, 2014

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

South Carolina Public Interest) Civil Action No. 2012-CP-10-04969
Foundation and Waring S. Howe, Jr.,)
individually, and on behalf of all others)
similarly situated,)

Plaintiffs,)

vs.)

Robert W. Harrell, Jr., in his official)
capacity as Speaker of the South)
Carolina House of Representatives, Ken)
Ard, in his official capacity as President)
of the South Carolina Senate,)
Representative Harry B. "Chip")
Limehouse III, Senator Glenn)
McConnell, and the State of South)
Carolina,)

Defendants.)

**Memorandum in Support of Amended
Motion for Judgment on the Pleadings**

FILED
OCT 22 AM 9:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Defendant Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, by and through the undersigned counsel, files this Memorandum in Support of his Motion for Judgment on the Pleadings. As set forth below, this Court should issue an order dismissing this action with prejudice because:

1. Collateral estoppel bar Plaintiff SCPIF's claims
2. Plaintiff Howe lacks the standing necessary to maintain this action; and/or
3. Plaintiffs' claims are barred by laches and/or waiver.

Argument

- I. This Court should grant judgment on the pleadings because Plaintiffs lack the standing needed to maintain their claims.**

Both Plaintiffs lack the standing necessary to challenge the constitutionality of Act 130 of 2007 ("the Act" or "Act 130"). First, the South Carolina Supreme Court has previously held that the South Carolina Public Interest Foundation ("SCPIF") lacks the standing to challenge Act 130. Second, Plaintiff Howe also cannot demonstrate standing to maintain this action. This Court should grant the motion for judgment on the pleadings and enter an order finding SCPIF and Plaintiff Howe lack standing in this action.

- a. SCPIF lacks standing to challenge the constitutionality of Act 130 in this action.**

Collateral estoppel bars the South Carolina Public Interest Foundation ("SCPIF") from maintaining any challenge to the constitutionality of Act 130. Our Supreme Court adjudicated in 2008 that SCPIF lacked the standing to challenge the Act. As a result, SCPIF is estopped from re-arguing it has standing to challenge the Act in this action. Therefore, this Court should grant the motion for judgment on the pleadings

In 2008, SCPIF initiated an action in the original jurisdiction of our Supreme Court challenging the constitutionality of Act 130. *See South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008) (overruled on other grounds, *American Petroleum Inst. V. SC Dept. of Rev.*, 382 S.C. 572, 677 S.E.2d 16

(2009)).¹ In that 2008 action, SCPIF challenged the constitutionality of Act 130 of 2007. *Harrell*, 378 S.C. at 445, 663 S.E.2d at 54. Speaker Harrell defended the constitutional challenge to Act 130 on the ground that SCPIF lacked the standing to challenge Act 130. *Id.* The court fully weighed that defense, analyzed the SCPIF's contrary position, and ultimately ruled on that exact issue. *Id.* Specifically, the court held that:

We decline to address Petitioners' contention that 2007 Act Nos. 130 . . . violat[es] the South Carolina Constitution *Petitioners lack standing to challenge those acts.* *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Harrell, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1 (emphasis added).² Therefore, the issue of SCPIF's standing to challenge Act 130 was actually litigated to and decided by the Supreme Court in 2008.

Because the South Carolina Supreme Court previously held that SCPIF lacked the standing necessary to maintain a challenge to the constitutionality of Act 130, then the well-settled rules of collateral estoppel preclude SCPIF from asserting in this action that it has the standing necessary to maintain a challenge to the constitutionality of Act

¹ The Supreme Court's holding in *American Petroleum* did not affect the 2008 holding that SCPIF lacked standing to challenge the constitutionality of the Act.

² SCPIF was a petitioner in that action along with Edward D. Sloan, Jr. As petitioners, SCPIF challenged the constitutionality of Act 130 of 2007 along with other acts from that legislative year. Speaker Harrell also challenged the standing of Petitioner Sloan. The Supreme Court found Petitioner Sloan also lacked standing to challenge Act 130. Petitioner Sloan is not a party to the present action.

130. Therefore, SCPIF lacks standing to maintain this action. This Court should deny the motion for summary judgment and enter an order finding SCPIF lacks standing in this action.

Collateral estoppel prevents a party from relitigating an issue that was decided in a previous action. *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009); *S.C. Prop. & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Collateral estoppel applies regardless of whether the claims in the first action and subsequent action are the same. *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (cert. denied January 6, 2011). “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Id.*

All three elements are satisfied and preclude SCPIF from maintaining a challenge to Act 130 in this action. First, the issue of whether SCPIF had standing to challenge the constitutionality of Act 130 was actually litigated in the 2008 *SCPIF v. Harrell* action. SCPIF brought the action challenging the constitutionality of Act 130. Speaker Harrell specifically defended on the grounds that SCPIF lacked standing. Thus, the standing issue was litigated in 2008. Accordingly, the first element of collateral estoppel is satisfied.

Second, the Supreme Court directly and finally determined this standing issue in the prior action. After consideration of the merits of SCPIF’s numerous other constitutional challenges, this Court specifically held that SCPIF lacked the standing to challenge Act 130, noting that “Petitioners lack standing to challenge those acts.” *Id.*

Therefore, the Supreme Court definitively and unequivocally held in 2008 that SCPIF lacked standing to challenge Act 130 on constitutional grounds. Accordingly, the second element of collateral estoppel is satisfied.

Third, the Supreme Court's standing ruling was necessary to support the prior judgment and dispose of all the issues raised in the 2008 action. SCPIF raised challenges to several acts of 2007, including Act 130. The court ruled on all issues on various grounds. The ruling on Act 130 was necessary to support the Supreme Court's ruling and dispose of all the issues raised by SCPIF. Accordingly, the third element of collateral estoppel is satisfied.

Lastly, SCPIF cannot allege that collateral estoppel does not apply to the standing issue because the constitutional challenges to Act 130 are rooted in different claims than was the case in the 2008 action. Such a claim lacks merit. Collateral estoppel bars issues and applies despite the claims or grounds SCPIF utilizes to challenge Act 130. *See Carolina Renewal*, 385 S.C. at 556, 684 S.E.2d at 783 (holding "[c]ollateral estoppel applies to specific *issues*, regardless of whether the claims in the first and subsequent suits are the same") (citations omitted, emphasis added). The issue in the 2008 action is the same as in this action—the constitutionality of Act 130. The basis asserted to challenge the constitutionality of Act 130 is immaterial. Thus, SCPIF is collaterally estopped from asserting it has standing in this action.

Based on the above, SCPIF is collaterally estopped from asserting it possesses the standing necessary to maintain this action. The issue of whether SCPIF has standing to challenge the constitutionality of Act 130 has been finally decided by the

Supreme Court. The Supreme Court clearly held SCPIF did not have standing. Therefore, collateral estoppel prevents SCPIF from relitigating that issue now. As a result, SCPIF is barred from maintaining it has standing to challenge Act 130 in this action. Because SCPIF lacks standing to maintain a constitutional challenge to Act 130, this Court should deny the motion for summary judgment and enter an order finding SCPIF lacks standing in this action.

b. Plaintiff Howe also lacks standing to challenge Act 130.

Plaintiff Howe failed to plead a proper basis for standing. Thus, Plaintiff Howe lacks the standing necessary to maintain this action. This Court should grant the motion for judgment on the pleadings and enter an order finding Plaintiff Howe lacks standing in this action.

Our Supreme Court holds that standing may be acquired in only three ways. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). First, a party may acquire standing “through the rubric of constitutional standing.” *Preston*, 398 S.C. at 192, 728 S.E.2d at 43 (internal quotations omitted). Second, a plaintiff may assert standing via a statute. *Id.* Lastly, a plaintiff may acquire standing “under the public importance exception.” *Id.* It is well-settled that a plaintiff must *plead in the complaint* and prove one of these grounds for standing in order to maintain his action. *Id.*; see also *Beaufort Cnty. v. Trask*, 349 S.C. 522, 529 n.1, 563 S.E.2d 660, 663 (Ct. App. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). These rules of standing exist because “standing cannot be granted to every individual who is disgruntled by a governmental decision or policy; otherwise, the government would be forced to defend a constant barrage of lawsuits questioning its every move.” *Newman*

v. Richland Cnty. Historic Preservation Com'n, 325 S.C. 79, 480 S.E.2d 72 (1997).

Plaintiff Howe cannot establish standing under any of the three tenants of standing.

1. Plaintiff Howe cannot establish statutory standing.

Plaintiff Howe failed to plead in the Complaint any statutory basis for standing. Act 130 contains no provision that would provide a basis for Plaintiff Howe to acquire the standing needed to maintain this action. Therefore, no statutory basis for standing exists. *See Preston*, 398 S.C. at 192, 728 S.E.2d at 43 (recognizing the general rule that a plaintiff must *plead in the complaint* and prove one of these grounds for standing in order to maintain his action); *see also Beaufort Cnty. v. Trask*, 349 S.C. 522, 529 n.1, 563 S.E.2d 660, 663 (Ct. App. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Moreover, Plaintiff Howe's decision to bring this action pursuant to the South Carolina Uniform Declaratory Judgments Act, section 15-53-10, *et seq.*, is insufficient to give him statutory standing in this action. In *Trask*, a plaintiff taxpayer brought an action challenging governmental activity by a city. 349 S.C. at 523, 563 S.E.2d at 661. Defendants argued, *inter alia*, that plaintiff lacked standing necessary to maintain the action. *Id.* at 525, 563 S.E.2d at 661. The trial court agreed and held plaintiff could not acquire standing. *Id.* at 525, 563 S.E.2d at 662. On appeal, the plaintiff taxpayer argued she had standing to pursue the action by virtue of bringing her action pursuant to the South Carolina Uniform Declaratory Judgments Act. *Id.* at 529, 563 S.E.2d at 664. The Court of Appeals disagreed and held that "the presence of a justiciable controversy, however, does not by itself give a litigant standing to sue." *Id.*

Therefore, Plaintiff Howe cannot acquire standing via the South Carolina Uniform Declaratory Judgments Act.

2. Plaintiff Howe has neither pleaded, nor can he prove, standing under the rubric of constitutional standing.

In the Complaint, Plaintiff Howe failed to plead any concrete or particularized injury in fact. He instead pleads his status as a taxpayer gives him the standing to pursue this challenge to Act 130. {Compl. ¶ 2}. Thus, Plaintiff Howe relies solely on his status as a taxpayer to acquire standing. Our Supreme Court holds such an allegation is insufficient to vest a plaintiff with constitutional standing. Therefore, Plaintiff Howe cannot establish the rubric of constitutional standing.

To establish constitutional standing, the plaintiff must demonstrate two elements. First, the plaintiff must prove he suffered “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Second, a plaintiff must also show a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339. Plaintiff Howe’s status as a taxpayer is insufficient to establish constitutional standing.

In *Preston*, the Supreme Court addressed whether status as a taxpayer could satisfy the elements of constitutional standing. 398 S.C. at 192, 728 S.E.2d at 43. In that matter, the plaintiff argued his status as a taxpayer was sufficient to confer standing

to maintain the action. 398 S.C. at 192, 728 S.E.2d at 43. The Supreme Court rejected this contention. *Id.* The Court held:

In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court in rejecting [plaintiff's] claim of taxpayer standing under constitutional standing principles.

Id. at 193, 728 S.E.2d at 44. Therefore, the Supreme Court unequivocally held that a plaintiff's status as a taxpayer cannot establish constitutional standing.

Preston reaffirmed the Supreme Court's previous holding in *ATC* on this issue.

In that matter, the court rejected a plaintiff's contention that status as a taxpayer establishes constitutional standing. The court held:

[Plaintiff] further relies on its status as a taxpayer to acquire standing. The injury to [plaintiff], however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'

ATC, 380 S.C. at 198, 669 S.E.2d at 340-41 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). These decisions emanate from the recognition that:

[T]axpayers are not authorized to maintain a suit . . . simply because they are taxpayers It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights. Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance.

Trask, 349 S.C. at 529 n.20, 563 S.E.2d at 664. This clear precedent from the Supreme Court establishes that Plaintiff Howe cannot establish the rubric of constitutional standing.

3. This matter does not warrant application of standing under the public importance exception.

Plaintiff Howe cannot acquire standing under the public importance exception for two reasons. He failed to plead that this matter contains an overriding public interest or an extricable connection to the need for future guidance as required by our Supreme Court. This Court should, therefore, find that Plaintiff Howe cannot establish standing on this basis.

"The general rule is that a taxpayer may not maintain a suit based on the action of state officers when he has no special interest, and his only standing is the exceedingly small interest of a general taxpayer." *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. *Id.* Rather, the party must demonstrate some *overriding* public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Our Supreme Court mandates that the public importance exception to these standing rules should apply "only where a resolution is needed for future guidance." *Preston*, 398 S.C. at 193, 728 S.E.2d at 44. "Thus, for a court to relax general standing rules, the matter of importance must, in the context of the case, be extricably connected to the public need for court resolution for future guidance." *Id.*; *ATC South*, 380 S.C. at 199, 669 S.E.2d

at 341 (internal quotations omitted). This rubric of standing does not apply in this action.

Plaintiff Howe failed to plead this basis for standing. He pleads his status as a taxpayer gives him the standing to pursue this challenge to Act 130. {Compl. ¶ 2}. The Complaint does *not* allege this is a matter of overriding public importance or that future guidance is needed from our courts. Therefore, this failure to plead the public importance exception precludes Plaintiff Howe from establishing standing on this basis. *See Preston*, 398 S.C. at 192, 728 S.E.2d at 43; *Trask*, 349 S.C. at 529 n.1, 563 S.E.2d at 663 (holding that a plaintiff must *plead in the complaint* one of these grounds for standing in order to maintain his action).

Moreover, Plaintiffs' actions establish that this matter contains no overriding public importance. Plaintiffs were aware of the passage of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, very shortly after Act 130 became effective. SCPIF first challenged the constitutionality of Act 130 in 2008. Despite this knowledge, Plaintiffs chose to *NOT* launch this second action contesting the constitutionality of Act 130 for over four years after the first challenge. This four-plus year delay illustrates how Plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance or some immediate need for future guidance. Therefore, standing cannot be acquired on this basis, and judgment on the pleadings is proper.

II. Summary judgment should be denied because the doctrine of laches bars Plaintiffs' action.

In addition to their lack of standing, Plaintiffs have slumbered on their rights and have forfeited any opportunity to bring this second challenge to Act 130. Allowing this matter to continue or granting summary judgment to Plaintiffs after Plaintiff failed to bring this action for over four years would disadvantage Speaker Harrell and other defendants and cause them to suffer injury and prejudice. As a result, this Court should find doctrine of laches bars this action and grant Speaker Harrell's motion for judgment on the pleadings.

Laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." *Hemingway v. Mention*, 228 S.C. 211, 89 S.E.2d 369 (1955). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay. "[T]o establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 432, 673 S.E.2d 448, 456

(2009) (quoting *Hallums*, 296 S.C. at 198, 371 S.E.2d at, 527). In determining whether laches bars a claim, the court has broad discretion and should consider the circumstances of the case, "including whether the delay has worked injury, prejudice, or disadvantage to the other party." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 422, 434 S.E.2d 279, 281 (1993).

The above precedent leads to the inescapable conclusion that laches bars the Plaintiffs action. SCPIF first unsuccessfully challenged Act 130 in the 2008 action before the Supreme Court. Plaintiff Howe, for whatever reason, unreasonably decided to not bring this action until over five years after Act 130 became effective and over four-plus years after SCPIF's first challenge to the act. Thus, for that an unreasonably long amount of time, Plaintiffs did not believe an immediate challenge to Act 130 was required or needed to protect the public interest or for future guidance. Plaintiffs now ignore this fact and ask this Court to rule in this action despite slumbering on their rights for over four-plus years. Allowing this matter to proceed would subject Speaker Harrell and the other defendants to the disadvantage of having to litigate the constitutionality of Act 130 a second time. This would prejudice Speaker Harrell by having to defend a constant barrage of lawsuits questioning Act 130. This Court should find that the doctrine of laches bars this action and reject that Plaintiffs' request to rule on Act 130. Therefore, summary judgment should be denied.

Conclusion

Based on the foregoing, this Court should find Plaintiffs' action barred and grant Speaker Harrell's motion for judgment on the pleadings.

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October 22, 2012

STATE OF SOUTH CAROLINA)

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Civil Action No. 2012-CP-10-04969

**Memorandum in Opposition
to Plaintiffs' Motion
for Summary Judgment**

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT
BY 

Defendant Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives ("Speaker Harrell"), submits this memorandum in opposition to Plaintiffs' Motion for Summary Judgment. As more fully set forth below, this Court should deny the motion because (1) Plaintiffs lack standing to maintain this action, (2) the doctrine of laches and/or waiver bar Plaintiffs' claims, (3) summary judgment is premature because discovery remains ongoing, and (4) Plaintiffs cannot be afforded the relief sought in the motion because the proper parties have yet to be substituted as defendants.

Argument

I. Summary judgment should be denied because Plaintiffs lack the standing needed to maintain their claims.

Both Plaintiffs lack the standing necessary to challenge the constitutionality of Act 130 of 2007 ("the Act" or "Act 130"). First, the South Carolina Supreme Court has previously held that the South Carolina Public Interest Foundation ("SCPIF") lacks the standing to challenge Act 130. Second, Plaintiff Howe also cannot demonstrate standing to maintain this action. This Court should deny the motion for summary judgment and enter an order finding SCPIF and Plaintiff Howe lack standing in this action.

a. SCPIF lacks standing to challenge the constitutionality of Act 130 in this action.

Collateral estoppel bars the South Carolina Public Interest Foundation ("SCPIF") from maintaining any challenge to the constitutionality of Act 130. Our Supreme Court ruled in 2008 that SCPIF lacked the standing to challenge the Act. As a result, SCPIF is estopped from re-arguing it has standing to challenge the Act in this action. Therefore, this Court should deny summary judgment.

In 2008, SCPIF initiated an action in the original jurisdiction of our Supreme Court challenging the constitutionality of Act 130. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008) (overruled on other grounds, *American Petroleum Inst. V. SC Dept. of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009)).¹ In that 2008 action, SCPIF challenged the constitutionality of Act 130 of

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Because the South Carolina Supreme Court previously held that SCPIF lacked the standing necessary to maintain a challenge to the constitutionality of Act 130, then the well-settled rules of collateral estoppel preclude SCPIF from asserting in this action that it has the standing necessary to maintain a challenge to the constitutionality of Act 130. Therefore, SCPIF lacks standing to maintain this action. This Court should deny

² SCPIF was a petitioner in that action along with Edward D. Sloan, Jr. As petitioners, SCPIF challenged the constitutionality of Act 130 of 2007 along with other acts from that legislative year. Speaker Harrell also challenged the standing of Petitioner Sloan. The Supreme Court found Petitioner Sloan also lacked standing to challenge Act 130. Petitioner Sloan is not a party to the present action.

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All three elements are satisfied and preclude SCPIF from maintaining a challenge to Act 130 in this action. First, the issue of whether SCPIF had standing to challenge the constitutionality of Act 130 was actually litigated in the 2008 *SCPIF v. Harrell* action. SCPIF brought the action challenging the constitutionality of Act 130. Speaker Harrell specifically defended on the grounds that SCPIF lacked standing. Thus, the standing issue was litigated in 2008. Accordingly, the first element of collateral estoppel is satisfied.

Second, the Supreme Court directly and finally determined this standing issue in the prior action. After consideration of the merits of SCPIF’s numerous other constitutional challenges, this Court specifically held that SCPIF lacked the standing to challenge Act 130, noting that “Petitioners lack standing to challenge those acts.” *Id.* Therefore, the Supreme Court definitively and unequivocally held in 2008 that SCPIF

lacked standing to challenge Act 130 on constitutional grounds. Accordingly, the second element of collateral estoppel is satisfied.

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Lastly, SCPIF cannot allege that collateral estoppel does not apply to the standing issue because the constitutional challenges to Act 130 are rooted in different claims than was the case in the 2008 action. Such a claim lacks merit. Collateral estoppel bars issues and applies despite the claims or grounds SCPIF utilizes to challenge Act 130. See *Carolina Renewal*, 385 S.C. at 556, 684 S.E.2d at 783 (holding "[c]ollateral estoppel applies to specific *issues*, regardless of whether the claims in the first and subsequent suits are the same") (citations omitted, emphasis added). The issue in the 2008 action is the same as in this action—the constitutionality of Act 130. The basis asserted to challenge the constitutionality of Act 130 is immaterial. Thus, SCPIF is collaterally estopped from asserting it has standing in this action.

Based on the above, SCPIF is collaterally estopped from asserting it possesses the standing necessary to maintain this action. The issue of whether SCPIF has standing to challenge the constitutionality of Act 130 has been finally decided by the Supreme Court. The Supreme Court clearly held SCPIF did not have standing.

Therefore, collateral estoppel prevents SCPIF from relitigating that issue now. As a result, SCPIF is barred from maintaining it has standing to challenge Act 130 in this action. Because SCPIF lacks standing to maintain a constitutional challenge to Act 130, this Court should deny the motion for summary judgment and enter an order finding SCPIF lacks standing in this action.

b. Plaintiff Howe also lacks standing to challenge Act 130.

Plaintiff Howe failed to plead a proper basis for standing. Thus, Plaintiff Howe lacks the standing necessary to maintain this action. This Court should deny summary judgment and enter an order finding Plaintiff Howe lacks standing in this action.

Our Supreme Court holds that standing may be acquired in only three ways. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). First, a party may acquire standing “through the rubric of constitutional standing.” *Preston*, 398 S.C. at 192, 728 S.E.2d at 43 (internal quotations omitted). Second, a plaintiff may assert standing via a statute. *Id.* Lastly, a plaintiff may acquire standing “under the public importance exception.” *Id.* It is well-settled that a plaintiff must *plead in the complaint* and prove one of these grounds for standing in order to maintain his action. *Id.*; see also *Beaufort Cnty. v. Trask*, 349 S.C. 522, 529 n.1, 563 S.E.2d 660, 663 (Ct. App. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). These rules of standing exist because “standing cannot be granted to every individual who is disgruntled by a governmental decision or policy; otherwise, the government would be forced to defend a constant barrage of lawsuits questioning its every move.” *Newman v. Richland Cnty. Historic Preservation Com’n*, 325 S.C. 79, 480 S.E.2d 72 (1997). Plaintiff Howe cannot establish standing under any of the three tenants of standing.

1. Plaintiff Howe cannot establish statutory standing.

Plaintiff Howe failed to plead in the Complaint any statutory basis for standing. Act 130 contains no provision that would provide a basis for Plaintiff Howe to acquire the standing needed to maintain this action. Therefore, no statutory basis for standing exists.

Moreover, Plaintiff Howe's decision to bring this action pursuant to the South Carolina Uniform Declaratory Judgments Act, section 15-53-10, *et seq.*, is insufficient to give him statutory standing in this action. In *Trask*, a plaintiff taxpayer brought an action challenging governmental activity by a city. 349 S.C. at 523, 563 S.E.2d at 661. Defendants argued, *inter alia*, that plaintiff lacked standing necessary to maintain the action. *Id.* at 525, 563 S.E.2d at 661. The trial court agreed and held plaintiff could not acquire standing. *Id.* at 525, 563 S.E.2d at 662. On appeal, the plaintiff taxpayer argued she had standing to pursue the action by virtue of bringing her action pursuant to the South Carolina Uniform Declaratory Judgments Act. *Id.* at 529, 563 S.E.2d at 664. The Court of Appeals disagreed and held that "the presence of a justiciable controversy, however, does not by itself give a litigant standing to sue." *Id.* Therefore, Plaintiff Howe cannot acquire standing via the South Carolina Uniform Declaratory Judgments Act.

2. Plaintiff Howe has neither pleaded, nor can he prove, standing under the rubric of constitutional standing.

In the Complaint, Plaintiff Howe failed to plead any concrete or particularized injury in fact. He instead pleads his status as a taxpayer gives him the standing to pursue this challenge to Act 130. {Compl. ¶ 2}. Thus, Plaintiff Howe relies solely on

his status as a taxpayer to acquire standing. Our Supreme Court holds such an allegation is insufficient to vest a plaintiff with constitutional standing. Therefore, Plaintiff Howe cannot establish the rubric of constitutional standing.

To establish constitutional standing, the plaintiff must demonstrate two elements. First, the plaintiff must prove he suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Second, a plaintiff must also show a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339. Plaintiff Howe's status as a taxpayer is insufficient to establish constitutional standing.

In *Preston*, the Supreme Court addressed whether status as a taxpayer could satisfy the elements of constitutional standing. 398 S.C. at 192, 728 S.E.2d at 43. In that matter, the plaintiff argued his status as a taxpayer was sufficient to confer standing to maintain the action. 398 S.C. at 192, 728 S.E.2d at 43. The Supreme Court rejected this contention. *Id.* The Court held:

In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court in rejecting [plaintiff's] claim of taxpayer standing under constitutional standing principles.

Id. at 193, 728 S.E.2d at 44. Therefore, the Supreme Court unequivocally held that a plaintiff's status as a taxpayer cannot establish constitutional standing.

Preston reaffirmed the Supreme Court's previous holding in *ATC* on this issue.

In that matter, the court rejected a plaintiff's contention that status as a taxpayer establishes constitutional standing. The court held:

[Plaintiff] further relies on its status as a taxpayer to acquire standing. The injury to [plaintiff], however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'

ATC, 380 S.C. at 198, 669 S.E.2d at 340-41 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). These decisions emanate from the recognition that:

[T]axpayers are not authorized to maintain a suit . . . simply because they are taxpayers It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights. Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance.

Trask, 349 S.C. at 529 n.20, 563 S.E.2d at 664.³ This clear precedent from the Supreme Court establishes that Plaintiff Howe cannot establish the rubric of constitutional standing.

3. This matter does not warrant application of standing under the public importance exception.

Plaintiff Howe cannot acquire standing under the public importance exception for two reasons. He failed to plead that this matter contains an overriding public

³ Notably, at his deposition, Plaintiff Howe asserted standing based on his subjective heightened interest (as compared other taxpayer) in constitutional issues to support his claim for standing. *Trask* rejects this contention. Since Plaintiff Howe was just deposed on October 16, 2012, and other discovery remains ongoing, Speaker Harrell cannot attach deposition testimony or other discovery responses in further support. See Rule 56(f) Affidavit of Michael J. Anzelmo, Esquire.

interest or an extricable connection to the need for future guidance as required by our Supreme Court. This Court should, therefore, find that Plaintiff Howe cannot establish standing on this basis.

"The general rule is that a taxpayer may not maintain a suit based on the action of state officers when he has no special interest, and his only standing is the exceedingly small interest of a general taxpayer." *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. *Id.* Rather, the party must demonstrate some *overriding* public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Our Supreme Court mandates that the public importance exception to these standing rules should apply "only where a resolution is needed for future guidance." *Preston*, 398 S.C. at 193, 728 S.E.2d at 44. "Thus, for a court to relax general standing rules, the matter of importance must, in the context of the case, be extricably connected to the public need for court resolution for future guidance." *Id.*; *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341 (internal quotations omitted). This rubric of standing does not apply in this action.

Plaintiff Howe failed to plead this basis for standing. He pleads his status as a taxpayer gives him the standing to pursue this challenge to Act 130. {Compl. ¶ 2}. The Complaint does *not* allege this is a matter of overriding public importance or that future guidance is needed from our courts. Therefore, this failure to plead the public importance exception precludes Plaintiff Howe from establishing standing on this basis.

See Preston, 398 S.C. at 192, 728 S.E.2d at 43; *Trask*, 349 S.C. at 529 n.1, 563 S.E.2d at 663 (holding that a plaintiff must *plead in the complaint* one of these grounds for standing in order to maintain his action).

Moreover, Plaintiffs' actions establish that this matter contains no overriding public importance. Plaintiffs were admittedly aware of the passage of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, very shortly after Act 130 became effective. SCPIF first challenged the constitutionality of Act 130 in 2008. Plaintiff Howe acknowledged in his deposition that he was aware of the passage of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority. *See* Rule 56(f) Affidavit of Michael J. Anzelmo, Esquire. Despite this knowledge, Plaintiffs chose to *NOT* file this action for over four years to launch this second action contesting the constitutionality of Act 130. This four-plus year delay illustrates how Plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance or some immediate need for future guidance. Therefore, standing cannot be acquired on this basis, and summary judgment should be denied.

II. Summary judgment should be denied because the doctrine of laches bars Plaintiffs' action.

In addition to their lack of standing, Plaintiffs have slumbered on their rights and have forfeited any opportunity to bring this second challenge to Act 130. Allowing this matter to continue or granting summary judgment to Plaintiffs after Plaintiff failed to bring this action for over four years would disadvantage Speaker Harrell and other

defendants and cause them to suffer injury and prejudice. As a result, this Court should find doctrine of laches bars this action and deny summary judgment.

Laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." *Hemingway v. Mention*, 228 S.C. 211, 89 S.E.2d 369 (1955). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay. "[T]o establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009) (quoting *Hallums*, 296 S.C. at 198, 371 S.E.2d at 527). In determining whether laches bars a claim, the court has broad discretion and should consider the circumstances of the case, "including whether the delay has worked injury, prejudice, or disadvantage to the other party." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 422, 434 S.E.2d 279, 281 (1993).

The above precedent leads to the inescapable conclusion that laches bars the Plaintiffs action. In his deposition, Plaintiff Howe admitted he was aware of the passage

of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, very shortly after Act 130 became effective. *See* Rule 56(f) Affidavit of Michael J. Anzelmo, Esquire. Further, Plaintiff Howe acknowledged he was aware of SCPIF's previous challenge to Act 130 and the fact that the action was ultimately unsuccessful. *Id.* Despite this knowledge, Plaintiffs choose to *NOT* file this action until 2012 despite Act 130 having been enacted in 2007.

The Supreme Court rejected SCPIF's first challenge to Act 130 in 2008. Plaintiffs then waited over four more years to launch this second action contesting the constitutionality of Act 130. Thus, for that four-plus year period, Plaintiffs, for whatever reason, did not believe an immediate challenge to Act 130 was required or needed to protect the public interest or for future guidance. Plaintiffs now ignore this fact and ask this Court to rule in this action despite slumbering on their rights for over four-plus years. Allowing this matter to proceed would subject Speaker Harrell and the other defendants to the disadvantage of having to litigate the constitutionality of Act 130 a second time. This would prejudice Speaker Harrell by having to defend a constant barrage of lawsuits questioning Act 130. This Court should find that the doctrine of laches bars this action and reject that Plaintiffs' request to rule on Act 130. Therefore, summary judgment should be denied.

III. Summary judgment should be denied because Speaker Harrell and the other defendants have not had a full and fair opportunity to conduct discovery.

In addition to laches barring this action and the Plaintiffs' lack of the standing, this Court should still deny summary judgment. Summary judgment is premature

because Speaker Harrell and the other defendants have not had a full and fair opportunity to conduct discovery. It is axiomatic that the parties must be given a full and fair opportunity to conduct the discovery necessary to respond to Plaintiffs' Motion for Summary Judgment. Plaintiffs have not afforded Speaker Harrell and the other defendants the chance to do so in this matter. Without an opportunity to conduct written discovery and complete the necessary depositions, Speaker Harrell cannot properly oppose Plaintiffs' Motion for Summary Judgment. *See* Rule 56(f) Affidavit of Michael J. Anzelmo, Esquire. Therefore, Plaintiffs' Motion for Summary Judgment is premature. This Court should adhere to well-settled precedent and deny the motion.

It is well-established that summary judgment is a "drastic remedy" that should be cautiously invoked so no party will be improperly deprived of a trial of the disputed factual issues. *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that

may be drawn from the evidence in the light most favorable to the non-moving party.”

David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

Because it is a drastic remedy, it is axiomatic that a non-movant should have a full and fair opportunity to conduct discovery before the court grants a motion for summary judgment. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543; *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). This means that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery, and a trial court's decision to the contrary constitutes reversible error. See, e.g., *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 81, 708 S.E.2d 745, 747-48 (2011) (reversing the trial court's grant of summary judgment where appellant argued that it did not have an adequate opportunity to conduct discovery); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334 (affirming the Court of Appeals' remand where discovery was incomplete); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 5857 (2001) (affirming the Court of Appeals' reversal of the trial court's grant of summary judgment due to the lack of a “full and fair opportunity to complete discovery”); *Baird v. Charleston Cnty.*, 333 S.C. 519, 529-30, 511 S.E.2d 69, 74-75 (1999) (finding trial court's conversion of a motion to dismiss to a summary judgment motion to be improper where discovery was incomplete); see also *Jones ex. rel. Jones v. Enter. Leasing Co.-S.E.*, 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009); *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008); *BPS, Inc. v. Worthy*, 362 S.C. 319, 329-31, 608 S.E.2d 155, 161-62 (Ct. App. 2005) (same); *Schmidt v. Courtney*, 357 S.C. 310, 326-27, 592 S.E.2d 326, 335 (Ct. App. 2003) (finding that the

trial court erred in granting summary judgment where discovery was incomplete); *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001); *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999); *Doe v. Batson*, 338 S.C. 291, 298, 525 S.E.2d 909, 912 (Ct. App. 1999) (reversing the trial court's grant of summary judgment due to a lack of full and fair opportunity for discovery), *vacated in part sub nom. Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001); *Veronie v. 303 Associates, LLC*, 2012-UP-044 (S.C. Ct. App. filed Jan. 25, 2012) (finding that the trial court erred in granting summary judgment where discovery was incomplete). These cases demonstrate that South Carolina courts should routinely reject motions for summary judgment as improper when the non-movant has had no opportunity to participate in discovery.

In the analogous matter of *Baughman*, the court reversed a grant of partial summary judgment as premature prior to the completion of discovery. 306 S.C. at 112, 410 S.E.2d at 543. The trial court had granted defendant's motion for partial summary judgment because plaintiff's expert failed to establish the requisite standard of care. *Id.* at 111, 410 S.E.2d at 543. However, plaintiff argued that further discovery was necessary prior to granting partial summary judgment to defendants on the issue of liability. *Id.* at 112, 410 S.E.2d at 543. The Supreme Court agreed, holding that the further discovery was needed to properly develop the record on this issue prior to a grant of partial summary judgment. Hence, the Supreme Court reversed the grant of partial summary judgment based on the fact that plaintiff had not been afforded the full and fair opportunity to conduct discovery on the issue. *Id.*

Based on the above, this Court should deny Plaintiffs' Motion for Summary Judgment as the parties have not had a full and fair opportunity to conduct discovery. Plaintiff initiated this action on February 27, 2012, by filing the Summons and Complaint in the Court of Common Pleas for Richland County. Immediately thereafter, Defendants filed a Motion to Transfer Venue from Richland County to Charleston County. The Honorable L. Casey Manning granted the Motion to Transfer Venue on July 27, 2012. The official transfer to Charleston County was not effectuated until August 7, 2012. On August 14, 2012, a mere one week after the matter was transferred to Charleston County, Plaintiffs filed the Motion for Summary Judgment with this Court.

Shortly after transfer to Charleston County, Representative Limehouse served written discovery on Plaintiffs on September 13, 2012. To date, Plaintiffs have not responded to the written discovery of Representative Limehouse. Plaintiffs' responses are untimely under Rules 33 and 34 of the South Carolina Rules of Civil Procedure.

Also, Speaker Harrell initiated discovery in this matter shortly after transfer to this Court. Speaker Harrell noticed the deposition of Plaintiff Waring S. Howe, Jr., and the parties deposed Plaintiff Howe on Tuesday, October 16, 2012.⁴ Counsel for Speaker Harrell submits that the deposition of Plaintiff Howe provided testimony sufficient to refute Plaintiffs' claims for summary judgment.⁵ Unfortunately, the

⁴ Additionally, at that deposition, counsel for Speaker Harrell learned, *for the first time*, that Plaintiffs intend to replace various defendants and substitute them with new parties. However, Plaintiffs have yet to move for substitution of these defendants. These new parties have neither been served with the Complaint nor been given time proscribed by the South Carolina Rules of Civil Procedure to answer. As result, Plaintiffs cannot be afforded the complete relief sought in the Motion for Summary Judgment because not all proper defendants are parties to this action.

⁵ Based on information learned at this deposition, Representative Limehouse served Plaintiff Howe with

transcript of that deposition will not be available to refute Plaintiffs' Motion for Summary Judgment or for use during the October 22, 2012 hearing on the Motion for Summary Judgment. *See* Rule 56(f) Affidavit of Michael J. Anzelmo, Esquire.

Other depositions are still outstanding and have yet to be conducted. Speaker Harrell properly noticed the deposition of Edward D. "Ned" Sloan, Jr. for October 31, 2012, at 10:00 a.m. in Greenville, South Carolina. Mr. Sloan founded and chairs the South Carolina Public Interest Foundation, a named plaintiff in this action. Thus, discovery remains ongoing and far from complete. At this time, only one party has been deposed and another deposition remains outstanding, and plaintiffs have failed to respond to the any written discovery served by Representative Limehouse. Discovery is still needed on Plaintiffs' dual office holding and separation of powers claims.

In sum, Speaker Harrell cannot properly oppose Plaintiffs' Motion for Summary Judgment without an opportunity to conduct written discovery and complete the necessary depositions. *See* Rule 56(f) Affidavit of Michael J. Anzelmo, Esquire. Further, Plaintiffs should not be permitted to contend this matter contains no genuine issues of material fact while refusing to respond to the written discovery served by Representative Limehouse. Simply stated, Speaker Harrell and the other defendants should be afforded the full and fair opportunity to conduct discovery prior to addressing Plaintiffs' Motion for Summary Judgment.

This Court should follow the clear precedent from our Supreme Court and Court of Appeals that holds summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Granting the motion at this

supplemental written discovery on October 18, 2012.

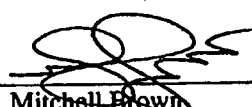
time would constitute reversible error. Accordingly, this Court should deny summary judgment.

IV. Summary Judgment is improper because not all persons necessary for relief have been made parties to this action.

At the deposition of Plaintiff Howe, counsel for Speaker Harrell learned, for the first time, that Plaintiffs have started the process to amend the pleadings to replace Defendants Ard and McConnell and substitute new parties. These new defendants would not be bound by any grant of summary judgment at this time. *See, e.g., Arnold v. Arnold*, 285 S.C. 296, 299, 328 S.E.2d 924, 925 (Ct. App. 1985) (applying the general rule that only parties are bound by a judgment in a matter); *see also Thompson v. Hudgens*, 161 S.C. 450, 159 S.E. 807, 812 (1931) ("A general statement of one of the elementary principles of that law is that only parties and privies are bound by a judgment"). Therefore, summary judgment is premature.

Moreover, Plaintiffs have yet to move to amend their pleadings or for substitution of these new defendants. Once added, either via motion or operation of law, the new defendants would have fifteen days to file a responsive pleading. *See* Rule 15(a), SCRCP ("A party shall plead in response to an amended pleading . . . within fifteen days after service of the named amended pleading . . ."). Thus, summary judgment cannot be granted until after these parties answer or otherwise plead. As a result, Plaintiffs cannot be afforded the complete relief sought in the Motion for Summary Judgment because not all proper defendants are parties to this action.

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Columbia, South Carolina

October 22, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Public Interest Foundation)
and Waring S. Howe, Jr., individually, and)
on behalf of all others similarly situated,)
Plaintiffs,)

v.)

Robert W. Harrell, Jr., in his official)
capacity as Speaker of the S.C. House of)
Representatives, Ken Ard in his official)
capacity as President of the S.C. Senate,)
Representative Harry B. "Chip" Lime-)
house III, Senator Glenn McConnell, and)
The State of South Carolina,)
Defendants.)

IN THE CIRCUIT COURT

CASE NO: 2012-CP-10-04969

**PLAINTIFFS' REPLY
MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS'
MOTION FOR
SUMMARY JUDGMENT**

2013 FEB 22 PM 1:35
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

NOW COME the Plaintiffs South Carolina Public Interest Foundation ("SCPIF" or "the Foundation") and Waring S. Howe, Jr., by their undersigned attorney, and submit this Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment.

STATEMENT OF THE CASE

On October 31, 2011, Plaintiffs petitioned the South Carolina Supreme Court to take this case in its Original Jurisdiction. All Defendants opposed the granting of Original Jurisdiction, but no Defendant argued that any "genuine issue as to any material fact" counseled against the granting of Original Jurisdiction. Instead, all Defendants argued that the Circuit Court was quite capable of deciding the issues presented. On February 8, 2012, the Supreme Court denied the Petition for Original Jurisdiction, without comment or explanation.

Plaintiffs filed this action in Richland County on February 27, 2012. The Complaint in the Circuit Court was essentially the same as in the Supreme Court. In their Answers, Defendant raised legal defenses to the allegations in the Complaint, but again failed to allege any “genuine issue as to any material fact.”

Plaintiffs filed a Motion for Summary Judgment in Richland County July 18, 2012, arguing that there was “no genuine issue as to any material fact, and [Plaintiffs were] entitled to a judgment as a matter of law.” SCRCP 56. Plaintiffs supported their Motion with a Memorandum of Law, affidavits, and exhibits.

Defendants moved for a change of venue to Charleston County. On July 26, 2012, the Court granted the motion for Change of Venue. The Charleston County Clerk of Court asked Plaintiffs to refile their Motion for Summary Judgment in Charleston County. Plaintiffs refiled the Motion in Charleston County on August 14, 2012.

Defendants Harrell and Limehouse argue that the Plaintiffs lack standing and that *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008) collaterally estops the Plaintiff Foundation from bringing this action. Defendants further argue that Plaintiff Howe lacks standing for failure to plead with specificity in the Complaint. Finally, Defendants argue that *laches* bar the Plaintiffs from bringing this action. In addition, Limehouse argues that the legislature properly overrode the veto, that members of the General Assembly serving on the Charleston County Aviation Authority does not violate the Separation of Powers or Dual Office Holding provisions of the Constitution, and that Act 130 was not Special Legislation.

All these arguments fall short.

STATEMENT OF FACTS

The General Assembly enacted Act 130 of 2007, which added the chairman and vice chairman of the Charleston County Legislative Delegation, or their designees to the Charleston County Aviation Authority. Act 130 applies only to Charleston County and the Charleston County Aviation Authority. The Governor vetoed Act 130 because Article III, § 34 and Article VIII § 7 of the South Carolina Constitution prohibit the General Assembly from enacting special legislation or legislation that applies to only one county. In *South Carolina Public Interest Foundation v. Harrell*, Petitioners alleged that Act 130 violated S.C. Constitution Article III § 34 and Article VIII, § 7, *Id.* 378 S.C. 441, 663 S.E.2d 52 (2008). In his brief, the Attorney General publicly agreed with the Petitioners in *Harrell* that Act 130 was unconstitutional.

The General Assembly purported to override the Governor's veto. The vote to override of Act 130 of 2007 did not carry two-thirds of a quorum of each house; therefore, the General Assembly did not properly and legally override the veto. South Carolina Constitution Article IV, § 21; *Board of Trustees of School District of Fairfield County v. State*, 395 S.C. 276, 718 S.E.2d 210 (2011). *Fairfield County* controls this issue.

The Supreme Court ruled in *Torgerson v. Craver* that another act *related to this same District* was single county legislation, in violation of the Constitution. The Supreme Court quoted Art. VIII, § 7 and reasoned:

In our opinion, *the act violates both the letter and the spirit of the constitutional directive quoted above*. One of the purposes of Article VIII and of Home Rule is to relieve the General Assembly of the burdens of local governments. The Charleston County Airport District is a Charleston County political subdivision.

267 S.C. 558, 562, 230 S.E.2d 228, 229 (1976).

In several subsequent decisions, the Supreme Court ruled in accord with *Torgerson*. Several times, the General Assembly sought to meddle in the affairs of a commission, authority, or entity contained wholly within the boundaries of one county. *Cooper River Park and Playground Commission v. City of North Charleston*, 273 S.C. 639, 259 S.E.2d 107 (1979); *Richardson v. McCutchen*, 278 S.C. 117, 292 S.E.2d 787 (1982); *Hamm v. Cromer*, 305 S.C. 305, 408 S.E.2d 227 (1991); *Davis v. Richland County Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). Each time, the Court found the actions of the General Assembly unconstitutional. The same rule applies to this case.

The Supreme Court recently ruled that a Plaintiff sufficiently stated a valid claim that an act applicable only to the School District of Charleston County violated the South Carolina Constitution Article III, § 34 *because it was special legislation*. *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). The School District of Charleston County, like the Charleston County Aviation District, has the same boundaries as Charleston County.

Finally, Act 130 violates the Separation of Powers (Art. I, § 8), and the Dual Office Holding provisions of the South Carolina Constitution (Art. III, § 24, Art. VI, § 3, and Art. XVII, § 1A). *See also, Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947); *Segars-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010).

ARGUMENT

All parties agree that the overriding issues in this action are legal. The South Carolina Supreme Court has addressed these issues recently and authoritatively.

I. DEFENDANTS' CONSTITUTIONAL VIOLATIONS ARE NOT "IMMUNE FROM REVIEW."

The Defendants argue that the Supreme Court's decision, *South Carolina Public Interest Foundation v. Harrell*, collaterally estops SCPIF from *even asserting* standing based on the important public issues that this case raises (Harrell Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed October 22, 2012, hereafter "Harrell Memorandum," p. 2; Limehouse Memorandum in Opposition to Plaintiffs Motion for Summary Judgment, hereafter "Limehouse Memorandum," pp. 3-5). Defendants argue that because the Supreme Court declined to grant public importance standing to SCPIF in *South Carolina Public Interest Foundation v. Harrell*, now no one will ever possess standing to challenge Act 130 in any circumstance on any basis whatever (Harrell Memorandum, pp.7-13; Limehouse Memorandum, pp.3-5). They imply that Defendants have some prescriptive right to violate the Constitution without answering for it. This argument overstates collateral estoppel, and fails to recognize the exceptions to collateral estoppel that apply to this exceptional case.

Chief Justice Toal, in her dissent in *Newman v. Richland County Historic Preservation Commission*, warned against closing the courthouse doors to citizens.

If citizens were barred from bringing all lawsuits that concern governmental action, then there would be no opportunity to remedy governmental abuse. . . . A moderate balance is achieved by *granting citizens standing when they bring actions alleging ultra vires acts by a governmental agency*, while denying citizens standing to challenge discretionary actions.

* * *

If this were not the rule . . . , then governmental abuse by the executive and legislative branches of government would be nearly completely *immune from review*.

* * *

In determining when it is permissible to conduct such review, it is important to distinguish between matters of policy and matters of law. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, *our role is confined to determining whether a particular action is legal*.

Id. at 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, J., dissenting) (emphasis added).

Plaintiffs respectfully suggest that the Supreme Court has since adopted the rule set out in Justice Toal's dissent in *Newman v. Richland County Historic Preservation Commission*. The multiple Constitutional violations alleged in this action meet the standard that Justice Toal set out; they are "matters of law;" they are clearly "*ultra vires*;" and they should not be "immune from review." *Id.*

II. THIS COURT SHOULD GRANT BOTH PLAINTIFFS PUBLIC IMPORTANCE STANDING TO PROVIDE JUDICIAL GUIDANCE.

Defendants argue, without reason, that Public Importance standing is not appropriate in this case, because the Plaintiffs have not demonstrated a need for judicial "guidance." Defendants contend that the need for guidance is a prerequisite for requesting or granting public importance standing. Plaintiffs will establish that guidance is *desperately needed*.

A. The Supreme Court Has Granted Public Importance Standing to Numerous Plaintiffs.

On many occasions, South Carolina courts have granted public importance standing to Mr. Sloan, the South Carolina Public Interest Foundation, and other persons and organizations challenging illegal or unconstitutional acts of state government in circumstances similar to these.

On several occasions, when illegal or unconstitutional acts arose *in Charleston County*, the South Carolina Supreme Court granted public importance standing to the South Carolina Public Interest Foundation or to Mr. Sloan to address these illegal or unconstitutional acts. *Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 711 S.E.2d 895 (2011) (Defendant's primary operations were in Charleston County); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), (DOT improperly used the "emergency exception" for procurement of repairs to Ladson Road in Charleston County); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007) (one of the DOT Commissioners serving in violation of the statute was from Charleston); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (DOT procured construction of the Arthur Ravenel Bridge unlawfully). Based on these authorities, this Court should grant the South Carolina Public Interest Foundation public importance standing to address illegal and unconstitutional acts, even though the acts are related to Charleston County.

On several occasions, the South Carolina Supreme Court has extended public importance standing to the South Carolina Public Interest Foundation in cases from around the State when there was a co-plaintiff who was a citizen, resident, taxpayer, and

registered elector from the County where the claim arose. *McSherry v. Spartanburg County*, 371 S.C. 586, 641 S.E.2d 431 (2007) (Spartanburg County); *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n.*, 369 S.C. 139, 632 S.E.2d 277 (2006) (Hilton Head Island); *Colleton County Taxpayers Ass'n. v. School Dist. of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006) (Colleton County). Accordingly, this Court should grant public importance standing in this case to the South Carolina Public Interest Foundation and to Mr. Howe, a Charleston County citizen, resident, taxpayer, and registered elector, in order to address the issues of great public importance that this case raises, just as the Supreme Court has on many occasions.

B. Defendants Have Violated the Constitution and the Rulings of the Supreme Court and Have Demonstrated Their Need of "Guidance."

Defendants have ~~not~~ violated the South Carolina Constitution or Supreme Court rulings and have ignored the controlling precedents. They have chosen to re-litigate these issues and have raised additional procedural issues.

1. The General Assembly failed to override the veto of Act 130 of 2007.

The vote to override the veto of Act 130 was 12 to 0 in the House and 43 to 1 in the Senate. The vote in the House should have been ruled a failure for lack of two-thirds of a quorum. South Carolina Constitution Article IV, § 21; *Board of Trustees of School District of Fairfield County v. State*, 395 S.C. 276, 718 S.E.2d 210 (2011). Defendant Limehouse contends that the ruling in *Fairfield County* was a new ruling and should not be applied "retrospectively" (Limehouse Memorandum, pages 5-6). The Supreme Court foreclosed this argument in its holding in *Fairfield County*.

This Court's precedent and a plain reading of this unambiguous constitutional provision combine to compel a construction that the two-thirds requirement means two-thirds of a quorum "shall agree." Indeed, that has been the General Assembly's *longstanding understanding* and application of its veto override authority, until relatively recently.

Id., 395 S.C. 276, 718 S.E.2d 210 (2011) (emphasis added). The Supreme Court cited authoritative precedent going back more than 100 years and referred to hundreds of veto overrides that had routinely required two-thirds of a quorum of each house, "until relatively recently." Accordingly, the holding in *Fairfield County* and the South Carolina precedents going back more than 100 years apply to the purported override in the case at bar. The South Carolina Supreme Court's proper application of the South Carolina Constitution should not surprise the General Assembly.

2. Act 130 of 2007 violates the Constitutional prohibition of local or special laws.

The South Carolina Constitution, Article III, § 34 states: "The General Assembly . . . shall not enact local or special laws. . . . Where a general law can be made applicable, no special law shall be enacted" Act 130 is a special law enacted one a general law applies. S.C. Code § 55-1-80 establishes a standard and method for the appointment of additional members to all county aviation commissions, but Act 130 of 2007 establishes procedures that apply only to the Charleston County Aviation Authority. In *South Carolina Public Interest Foundation v. Harrell*, the Attorney General publicly agreed in his brief that Act 130 violated Article III, § 34. *Id.* at 378 S.C. 441, 663 S.E.2d 52 (2008).

3. Act 130 of 2007 violates the Constitutional prohibition of single county legislation.

South Carolina Constitution, Article VIII, § 7 states: "No laws for a specific county

shall be enacted and no county shall be exempted from the general laws.” Act 130 applies only to Charleston County. The Charleston County Aviation Authority governs the Charleston County Aviation District, a political subdivision created by Act 1235 of 1970. The District’s geographic boundaries are the same as Charleston County. In *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), the Attorney General again publicly agreed that Act 130 violated Article VIII, § 7.

The Supreme Court has already ruled that legislation related to the Charleston County Aviation District violates the prohibition of single county legislation. *Torgerson v. Craver*, 267 S.C. 558, 562, 230 S.E.2d 228, 229 (1976). The Supreme Court issued the most recent controlling precedent, *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011), after the *Harrell* decision in 2008.

4. Act 130 violates the Constitutional provision requiring the separation of powers.

Article I, § 8 of the South Carolina Constitution requires the Separation of Powers in State government. Act 130 allows members of the General Assembly to serve and fulfill executive functions on the Charleston County Aviation Authority, in violation of the Separation of Powers provision of the South Carolina Constitution. *See also, Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947); *Segars-Andrews, v. Judicial Merit Selection Commission*, 387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010). The *Harrell* decision did not address this issue, and the Supreme Court issued *Segars-Andrews* after the 2008 decision.

5. Act 130 violates the Constitutional dual office holding provisions.

The South Carolina Constitution prohibits dual office holding. South Carolina Constitution, Art. I, § 8, Art. III, § 24, Art. VI, § 3, and Art. XVII, § 1A. The simultaneous holding of offices both in the General Assembly and on the Charleston County Aviation Authority violates the dual office holding provisions of the South Carolina Constitution. *Ashmore*, 211 S.C. 77, 90, 44 S.E.2d 88, 94 (1947); *Segars-Andrews, v. Judicial Merit Selection Commission*, 387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010). Similarly, the *Harrell* decision did not address this issue, and this Court issued *Segars-Andrews* after the 2008 action.

Thus, all five of the Defendants' five violations of the Constitution demonstrate Defendants' need for judicial guidance.

C. The Speaker of the House Requested Guidance.

On January 10, 2012, the Defendant Mr. Harrell, the South Carolina Speaker of the House, was discussing *Board of Trustees of School District of Fairfield County v. State* and the number of votes necessary to override vetoes, *Id.* at 395 S.C. 276, 718 S.E.2d 210 (S.C. 2011). Journal of the House of Representatives of the State of South Carolina, Regular Session Beginning Tuesday, January 10, 2012 (Statewide Session) (Exhibit A, attached). He lamented that *he did not know* what the Court's decision in *Fairfield County* means. *Id.* He reported that he had asked *many lawyers* what *Fairfield County* means, and they *did not know either*. *Id.* Finally, Speaker Harrell reported that *he had asked the Supreme Court for clarification*, but the Supreme Court refused. *Id.* Accordingly, the Speaker himself has publicly voiced a need for judicial "guidance." The Speaker has established the public importance of this issue and this case. This action

affords this Court an opportunity to provide the guidance that the Speaker requested on that point and several others.

D. *Freemantle v. Preston* Does Not Preclude Public Importance Standing.

Defendants rely upon *Freemantle v. Preston* to argue that the Plaintiffs lack standing (Harrell Memorandum, pp. 6, 8-11) *Id.* at 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012). In *Freemantle*, a citizen sought to invalidate a severance agreement between a county and its former county administrator, contending the severance agreement violated the common law and the approval violated the South Carolina's Freedom of Information Act (FOIA). *Id.* at 398 S.C. 186, 193, 728 S.E.2d 40, 43 (2012). The Circuit Court refused to grant standing to the Plaintiff, and the Supreme Court affirmed in part and reversed in part. In *Freemantle*, the Supreme Court ruled that the Circuit Court had properly refused to grant public importance standing. Thus, Defendants rely on *Freemantle*.

The claims in this case by the Foundation and Mr. Howe are distinguishable from *Freemantle*. First, in *Freemantle*, the citizen sought *monetary damages for himself* in his common law causes of action, while claiming to represent the county taxpayers. The Supreme Court ruled, "That Appellant *sought monetary damages* for himself in his common law causes of action, while claiming to represent the taxpayers of Anderson County, *directly conflicts* with the purpose and spirit of the public importance exception." *Id.* 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012). In the present action, the Foundation and Mr. Howe do not seek money damages for themselves. They seek

declaratory and injunctive relief. Accordingly, their action fulfills “the purpose and spirit of the public importance exception.”

Second, the citizen in *Freemantle* sued current and former members of the County Council in their *individual* capacities, as well as their official capacities. “Appellant named as Defendants the Anderson County Council (“Council”) and several former and current Council members in their official and individual capacities.” *Id.* 398 S.C. 186, 190, 728 S.E.2d 40, 42 (2012). An action against Defendants in their individual capacities would not support injunctive relief, the traditional remedy for cases for which courts have granted plaintiffs public importance standing. In contrast, in this case, Plaintiffs name Defendants in their official capacities.

Third, the plaintiff in *Freemantle* brought his action under the common law alleging a variety of claims, but he did *not* allege a Constitutional violation or an *ultra vires* act on the part of the defendants. An allegation of an unconstitutional or *ultra vires* act is ordinarily necessary for public importance standing. *See Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, CJ, *dissenting*). In the case at bar, SCPIF and Mr. Howe do not rely on the common law; they allege five separate Constitutional violations.

Fourth, the Court in *Freemantle* ruled that the personnel decisions of the county, even in the face of a seemingly excessive severance package, did not require additional guidance. *Freemantle* involved an individual citizen’s disapproval of the details of one former employee’s private personnel matters. “[T]he personnel choices of Anderson County, even in the face of a seemingly excessive severance package, do not necessitate further guidance.” *Id.* 398 S.C. 186, 190, 728 S.E.2d 40, 42 (2012). Defendants’ five

different Constitutional violations are more critical to the citizens of South Carolina than one county's termination of an employment contract. The citizens of this State have a strong public interest in ensuring that State government complies with the Constitution.

This Court has the authority and responsibility to interpret the South Carolina Constitution. *Anderson v. South Carolina Election Commission*, 397 S.C. 551, 725 S.E.2d 704 (2012). In *Anderson*, the Republican Party argued that the Supreme Court lacked jurisdiction to address the legal requirement that a candidate for the General Assembly file a Statement of Economic Interest. The Supreme Court disagreed.

The Republican Party claims this Court lacks subject matter jurisdiction over the legislative races because the General Assembly has exclusive authority over disputes involving legislative elections. South Carolina Const. Art. III, § 11 provides, "Each house shall judge of the election returns and qualifications of its own members." Accordingly, this Court has declined to opine on issues where the Constitution delegates authority to the General Assembly. *South Carolina Public Interest Found. v. Judicial Merit Selection Comm'n*, 369 S.C. 139, 632 S.E.2d 277 (2006). Here we are not asked to judge a disputed legislative election but rather to interpret a statute. *The construction of a statute is a judicial function and responsibility.* *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 614 S.E.2d 629 (2005). Accordingly, we reject the argument that this Court lacks subject matter jurisdiction in this case.

Id., 397 S.C. 551, 555, 725 S.E.2d 704, 706 (emphasis added).

As "the construction of a statute is a judicial function and responsibility," *Anderson v. S.C. Election Commission*, even more so is the construction of five sections of the South Carolina Constitution. *Id.* 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012). This Court has jurisdiction to interpret the five sections of the Constitution that the Defendants violated and to apply them to the Defendants.

III. **HARRELL DOES NOT PRECLUDE THIS COURT FROM GRANTING PUBLIC IMPORTANCE STANDING TO THE PLAINTIFFS.**

Harrell and Limehouse argue that *South Carolina Public Interest Foundation v. Harrell* collaterally estops the Plaintiff Foundation from bringing this action. *Id.* 378 S.C. 441, 663 S.E.2d 52 (2008) (Harrell Memorandum, pp 2-5; Limehouse Memorandum, pp. 3-5). Properly understood, the prior decision does not collaterally estop either the Foundation or Howe from bringing this action.

In *Harrell*, the Supreme Court initially granted the Petition for Original Jurisdiction on all claims (three bobtail acts and five single county or special acts), but in its written opinion, the Court declined to rule as to five single county or special acts (one of which was the Act 130, the Act at issue in this action). In a footnote, the Court announced its decision on standing as to the five single county or special acts:

We *decline to address* Petitioners' contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34. Petitioners lack standing to challenge those acts. *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Id., 378 S.C. 441, n.1, 663 S.E.2d 52 (2008). The present action is distinguishable, and requires a different resolution.

A. The Grant or Denial of Public Importance Standing Is Discretionary.

The grant of public importance standing is discretionary with the court. The Court in *Harrell* could have, and indeed initially *did* grant standing to both Petitioners (South Carolina Public Interest Foundation and Mr. Sloan) to address *all eight* challenged Acts (three Acts based on unconstitutional bobtailing, and five Acts based on

single county or special legislation). After briefing and oral argument on all eight Acts, during which the Attorney General agreed with the Petitioners, the Supreme Court “*declin[ed] to address* petitioners contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34.” This was a *discretionary* ruling on the part of the Supreme Court. It does not preclude a different court, in a different action, brought by different Plaintiffs, from raising different legal theories, and using its discretion to grant public importance standing, particularly when the legal context has changed.

B. Harrell Did Not Address Petitioners’ Claims on Their Merits.

The *Harrell* Court did not address Petitioners’ single county and special legislation claims on their merits. Collateral estoppel requires that factual question must have been *actually determined on the merits*. Without issuing a ruling on the merits of those claims, *Harrell* does not bar this action.

Under the doctrine of collateral estoppel, . . . the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues “*actually and necessarily litigated and determined in the first suit.*”

Beall, 281 S.C. at 369 n. 1, 315 S.E.2d at 189 n. 1. This Court further held: In order, however, to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was *actually litigated and directly determined* in the prior action and that the matter or fact directly in issue was *necessary to support the first judgment*.

Pye v. Aycock, 325 S.C. 426, 435-436, 480 S.E.2d 455, 459-460 (Ct. App. 1997) (emphasis added). Accordingly, *Harrell* does not collaterally estop this action.

C. Several Factors Distinguish This Action from *Harrell*.

In *Harrell*, Mr. Sloan, a Greenville County resident, and SCPIF, in Greenville County, challenged several single county or special acts related to counties other than Greenville. In this action, Plaintiff Waring Howe is a citizen, resident, taxpayer, and registered elector of Charleston County. He is also a former member and Chairman of the Charleston County Aviation Authority. He has paid many user fees to the Charleston County Aviation Authority. This action relates solely to Charleston County. Mr. Howe's involvement with Charleston County and the Aviation Authority distinguishes this case from *Harrell*.

Second, in *Harrell*, Petitioners challenged *eight separate Acts* of the General Assembly; the Supreme Court ruled on three of them, all related to bobtails. This action focuses on only Act 130, and the actions of only *one group*: the Charleston County Aviation Authority. This action does not challenge a multitude of Acts.

Third, this action alleges five distinct Constitutional arguments, three of which were *not* raised in *Harrell*: improper veto override, dual office holding and separation of powers. For these reasons, *Harrell* is distinguishable from the present action.

D. Intervening Changes in the Legal Context Create an Exception to the Application of the Doctrine of Collateral Estoppel.

Intervening changes in the legal context create an exception to the doctrine of collateral estoppel. Since the ruling in *Harrell* in 2008, the Supreme Court has issued two significant decisions that amount to intervening changes in the legal context. These new decisions justify an exception to collateral estoppel and allow this Court to address the merits of this matter.

The Restatement (2nd) of Judgments, § 28 recognizes this exception to the doctrine of collateral estoppel, among others.

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, *relitigation* of the issue in a subsequent action between the parties *is not precluded* in the following circumstances:

* * *

(2) *The issue is one of law and* (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of *an intervening change in the applicable legal context* or otherwise to avoid inequitable administration of the laws; or

* * *

(5) There is a clear and convincing *need for a new determination* of the issue (a) because of the *potential adverse impact* of the determination *on the public interest*

Id. (emphasis added).

The South Carolina Supreme Court recognized these exceptions to the doctrine of collateral estoppel by quoting this section in *Pye v. Aycock*, 325 S.C. at 437-38, 480 S.E.2d at 460-61. *See also, Nelson v. QHG of South Carolina, Inc.*: “There are numerous exceptions to the application of res judicata and collateral estoppel. In *Pye*, the court adopted the Restatement (Second) of Judgments section 28.” *Id.* at 354 S.C. 290, 306, 580 S.E.2d 171, 179 (2003), *aff’d. in part, rev. in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005).

This case meets both of the exceptions quoted above: the two decisions create an “intervening change in the applicable legal context” and allowing the five constitutional violations to continue would cause an “adverse impact . . . on the public interest.” The first decision was *Board of Trustees of School District of Fairfield County v. State*, 395 S.C.

276, 718 S.E.2d 210 (2011). In *Fairfield County*, the Supreme Court ruled that a vote to override a veto requires a two-thirds vote of a quorum of each house of the General Assembly. *Fairfield County* was a decision that brought the General Assembly practice back to the place it had been some years before, constitutionally requiring the two-thirds vote of a quorum of both houses.

The second decision was *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). The Plaintiffs in *Charleston County School District* alleged that an act that dealt only with the Charleston County School District was a special law. The Circuit Court had dismissed the claim, but the Supreme Court reversed and ruled that the Plaintiffs had stated a valid claim. *Id.*

These cases created an “intervening change in the applicable legal context,” first by articulating the rule that to override a veto, the General Assembly needs a two-thirds vote of a quorum of each House, and second by ruling that a plaintiff had stated a valid cause of action for unconstitutional special legislation when an Act addressed only the School District of Charleston County, whose boundaries were coterminous with those of the County. An intervening change in the applicable legal context is an exception to a strict application of collateral estoppel.

Allowing governmental entities, including the General Assembly, to ignore or violate their Constitutional limits causes an “adverse impact . . . on the public interest.” Indeed, one could hardly imagine a more “adverse impact . . . on the public interest” than insistent and flagrant lawbreaking by the public officials charged with upholding the Constitution.

E. Constitutional Claims of Public Importance Warrant an Exception to Application of Collateral Estoppel.

Montana v. United States holds that generally, when two cases are “closely aligned in time and subject matter,” collateral estoppel *should* ordinarily apply. *Id.* 440 U.S. 147, 162-163, 99 S.Ct. 970, 978, 59 L.Ed.2d 210 (1979). However, the United States Supreme Court acknowledged an exception to the doctrine of collateral estoppel in its application to *constitutional* claims and issues of *public importance*.

Thus, when issues of law arise in successive actions involving unrelated subject matter, preclusion may be inappropriate. *This exception is of particular importance in constitutional adjudication. Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical.*

Id. (citations omitted) (emphasis added). SCPIF respectfully suggests that the case at bar, its Constitutional issues, and its public importance raise similar policy considerations. This Court should not engage in “unreflective invocation of collateral estoppel” in such constitutional cases of public importance as the case at bar, but rather this Court should follow the reasoning of the United States Supreme Court and acknowledge this exception for Constitutional claims and issues of great public importance. *Id.*

IV. THE PLAINTIFFS PROPERLY PLED AND REQUESTED BOTH PUBLIC IMPORTANCE STANDING AND TAXPAYER STANDING.

Harrell further argues that Plaintiff Howe lacks standing for failure to plead public importance standing and taxpayer standing with specificity in the Complaint, (Harrell Memorandum, pp. 6-7). This argument is unfounded.

The Plaintiffs' Complaint cites a long list of cases recognizing public importance standing and alleges that this Court has jurisdiction as established in those cases (Complaint, par. 6). Part of the jurisdiction of the Court is the granting of public importance standing to the Plaintiffs. Accordingly, the Plaintiffs South Carolina Public Interest Foundation and Mr. Howe specifically pled public importance standing in this case. Second, Mr. Howe specifically pled that he was "a citizen, resident, taxpayer, and registered elector of Charleston County," thereby pleading and alleging he had standing under each of those designations (Complaint, par. 2).

Third, Mr. Howe alleged many more personal and taxpayer connections to the Charleston County Aviation Authority. He alleged that he "has used the Charleston County Airport and paid fees and taxes to the Charleston County Airport District. He served as a member of the Charleston County Aviation Authority 1989-2001, and as Chairman 1996-1999" (Complaint, par. 2). Mr. Howe alleges all of the foregoing in the Complaint, and these facts provide a sound, legal basis for Mr. Howe's standing to bring this action. Thus, Harrell's argument that the Plaintiffs failed to plead a basis for standing falls short.

A. Plaintiff Howe Possesses Standing as a Former Member of the Charleston County Aviation Authority.

Defendants argue at some length that Plaintiffs do not possess standing to address the unconstitutional actions of the General Assembly and the Defendants related to the Charleston County Aviation Authority. However, South Carolina courts have long recognized the right of a former member of a government body to bring an action to contest an illegal government action related to that body.

In *Davis v. Richland County Council*, the General Assembly had enacted Act 207 of 2005, which transferred the power to appoint members of the Richland County Recreation Commission from the legislative delegation to the Richland County Council. *Id.* 372 S.C. 497, 642 S.E.2d 740 (2007). After Act 207 took effect, the members of the Recreation Commission were no longer serving. They filed suit alleging that Act 207 was unconstitutional because it was a single county Act and special legislation. The Circuit Court ruled that the plaintiffs lacked standing, in part because they were no longer on the Recreation Commission when they filed suit. The Supreme Court reversed, finding that the *former* Commissioners had standing to challenge the constitutionality of the Act. The Supreme Court further found that Act 207 was unconstitutional special legislation.

The Supreme Court issued a similar ruling in *Evins v. Richland County Historic District*, 341 S.C. 15, 532 S.E.2d 876 (2000). The commissioners of the Richland County Historic District had transferred away certain historic properties. In an earlier action, Newman, one of the then-current commissioners, had brought a declaratory judgment action to declare the property transfers void. The Supreme Court ruled that a current member of the Commission did not possess standing to bring such an action. *Newman v. Richland County Historic Preservation Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997) (but see Toal, J, dissenting).

Four months after the decision denying standing to Newman, a *former* commissioner, Ms. Evins, brought a similar action to avoid the property conveyances. Defendants again moved to dismiss for lack of standing. The Circuit Court ruled that Ms. Evins possessed standing, and the Supreme Court affirmed. The Court ruled that the case

raised issues of great public importance and “the actions of RCHPC were *ultra vires* as discussed above. Thus, the trial court correctly held Evins has standing.” *Id.*, 341 S.C. 15, 21, 532 S.E.2d 876, 879. Thus, the Supreme Court has ruled that a former member of a governmental body possesses standing to raise issues related to illegal or *ultra vires* acts of the body on which he or she had served, even though a current member of the government body does not possess such standing. *Davis v. Richland County Council*; *Newman v. Richland County Historic Preservation Comm’n*. Accordingly, Mr. Howe, a former member of the Charleston County Aviation Authority, possesses a particular standing beyond his taxpayer and public importance standing.

B. Plaintiff Howe Possesses Taxpayer Standing.

Defendants argue at some length that Plaintiffs do not possess taxpayer standing. Mr. Howe’s affidavit supports his allegations in the Complaint and demonstrates that he has paid tax money to the County of Charleston, and that the County of Charleston has used taxpayer money to support many expenditures of the Charleston County Aviation Authority. Furthermore, Mr. Howe’s affidavit establishes that on many occasions he has paid user fees, which are spent to support the Charleston County Aviation Authority and provide money for its operations. Thus, he is both a taxpayer and a payer of user fees and has contributed to the funding of the Authority.

The Defendants Harrell and Limehouse oppose the Plaintiff Howe’s assertion of taxpayer standing (Harrell memorandum pages 7-10; Limehouse memorandum, pp.4-5). The Defendant Limehouse argues that the Charleston County Aviation Authority is not

funded by taxes (Limehouse memorandum, pp.4-5). Limehouse's assertion is contrary to a finding of the South Carolina Supreme Court.

Taxes for operation and/or to repay bonds are raised by a levy on the district, which for all practical purposes in the county.

The 1975 act pledges for the payment of the \$12,600,000.00 to be borrowed, "the full faith, credit and taxing power of Charleston County Airport District." It further directs that there be *levied annually* "by the Auditor of Charleston County and collected by the Treasurer of Charleston County, in the same manner as county taxes are levied and collected, *a tax without limit on all taxable property in the district* sufficient to pay the principal and interest on such bonds."

Torgerson v. Craver, 267 S.C. 558, 562-63, 230 S.E.2d 228, 229-30 (1976) (emphasis added). In *Torgerson*, the appellant brought the action as a taxpayer.

Appellant brings this suit pursuant to the Declaratory Judgment Act, § 10—2001 et seq., 1962 South Carolina Code of Laws, *on behalf of herself and all taxpayers and property owners* in the Charleston County Airport District

Id. 267 S.C. 558, 560, 230 S.E.2d 228, (1976) (emphasis added). Just as the plaintiff taxpayer in *Torgerson* was granted standing as a taxpayer "on behalf of herself and all taxpayers," so also, Mr. Howe should be granted standing as "a citizen, resident, taxpayer, and registered elector of Charleston County" who "brings this action individually on his behalf and on behalf of all others similarly situated" (Complaint, par. 2).

South Carolina courts have long recognized the right of a taxpayer to bring an action to contest an illegal government activities and expenditures of taxpayer funds. Taxpayers are a distinct subset of residents. In *Myers v. Patterson*, 350 S.C. 248, 433 S.E.2d 841 (1993), taxpayers sued the Treasurer, Commissioners and Executive Director of the South Carolina Highways and Public Transportation Commission. The Court

acknowledged that a plaintiff ordinarily must allege damage to himself different from that sustained by the public generally, but also noted the exception to the rule: an unlawful diversion of public funds.

In such cases, *a taxpayer* who may be compelled to pay the assessment, or *who has contributed to the sum jeopardized*, is considered to have sufficient interest to enjoin the illegal act. [*Shillito v. City of Spartanburg*, 214 S.C. 11, 22, 51 S.E.2d 95, 97 (1948)]. See also *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that *a taxpayer may maintain an action in equity*, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law).

350 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added). Therefore, a taxpayer possesses standing if he has contributed to the sum at issue. In the case at bar, the jeopardized sum includes general tax funds to which Mr. Howe has contributed. Accordingly, Mr. Howe possesses standing as a taxpayer to contest expenditures of tax funds under illegal statutes.

South Carolina Courts have consistently granted taxpayers standing to contest illegal government expenditures. *Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299 303-304 (S.C. App. 2000); *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939); *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); and *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993). In South Carolina, taxpayers particularly possess standing to bring such actions and request such judicial relief.

V. THE DOCTRINE OF *LACHES* DOES NOT PREVENT THIS COURT FROM GRANTING PUBLIC IMPORTANCE STANDING TO THE PLAINTIFFS.

Mr. Harrell argues that *laches* bars the Plaintiffs from bringing this action (Memorandum in Opposition, pp. 11-13). Defendants do not assert (and Plaintiffs are not aware of) any statute of limitations that limits the right of citizens to bring to the court allegations of constitutional violations. Public policy would seem to oppose such a statute of limitations.

This action seeks declaratory judgment that Act 130 is unconstitutional. Declaratory judgment actions are neither strictly legal nor equitable; but they take the characteristics of the underlying cause of action. *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). In this case, all the causes of action call for the interpretation and application of five provisions of the South Carolina Constitution. A request for interpretation and application of the law, including the Constitution, is an action at law, not equity. Accordingly, all of Plaintiffs' causes of action are legal. *Laches* is an equitable doctrine applicable to actions in equity. Therefore, the doctrine of *laches* does not apply to bar these actions.

Second, even if Plaintiffs' causes of action were equitable, and *laches* were applicable, *laches* requires the one asserting it to prove that its elements apply to the causes of action.

Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish *laches* as a defense, a party must show that the complaining party *unreasonably delayed* its assertion of a right, *resulting*

in prejudice to the party asserting the defense of laches. See *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007).

Historic Charleston Holdings v. Mallon, 381 S.C. 417, 617 S.E.2d. 388 (2009) (emphasis added). Defendants have demonstrated neither unreasonable delay nor prejudice to them due to the alleged delay in bring this action.

First, Defendants have not demonstrated unreasonable delay. The South Carolina Public Interest Foundation brought an action challenging Act 130 a month or two after the Governor vetoed it in 2007. Ultimately, the Supreme Court declined to extend public importance standing to the Foundation's challenge to Act 130 or the other four single county or special legislation acts that the Foundation challenged in *Harrell*.

In 2011, the Supreme Court issued two decisions that significantly encouraged Plaintiffs' decision to bring another challenge to Act 130. On October 20, 2011, the Supreme Court denied rehearing in *Board of Trustees of School District of Fairfield County v. State*, 395 S.C. 276, 718 S.E.2d 210 (2011). *Fairfield County* was a significant case that influenced the decision to bring this action. In *Fairfield County*, the Supreme Court ruled that a vote to override a veto requires a two-thirds vote of a quorum of each house of the General Assembly. The General Assembly's vote to override the veto of Act 130 was less than what the Court required in *Fairfield County*. Plaintiffs realized that the rule from *Fairfield County* should apply to Act 130. SCPIF and Mr. Howe filed this action in the Supreme Court just 11 days after the Supreme Court denied rehearing in *Fairfield County*. The invalid veto override is the Plaintiffs' First Claim in their Complaint. Plaintiffs respectfully suggest that 11 days is not an *unreasonable* delay.

Furthermore, on July 25, 2011, the Supreme Court issued its opinion in *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011). The General Assembly had enacted a law that applied only to the Charleston County School District. Before this decision, the Supreme Court had repeatedly ruled that the General Assembly could pass such acts. The Plaintiffs in *Charleston County School District* alleged that an act that dealt only with Charleston County School District was an unconstitutional special law. The Circuit Court had dismissed the claim, but the Supreme Court reversed and ruled that the Plaintiffs had stated a valid claim. *Id.* *Charleston County School District* was another case that influenced the Plaintiffs' decision to bring the current action. Plaintiffs suggest that the period of three months between July 25, 2011 and October 31, 2011 when Plaintiffs filed this action in the Supreme Court was not an unreasonable delay.

Second, Defendants have failed to demonstrate prejudice due to the delay. Defendants have no inherent right to violate the Constitution. Each of them took an oath to support and defend the Constitution, but they have violated it five different ways. A slight delay in calling public officials to account does not prejudice them by cutting short some prescriptive right to continue to violate the Constitution. Defendants have articulated no legal or cognizable prejudice. The only disadvantage that the Defendants articulate is that they are required to defend this lawsuit (Harrell Memorandum, p. 13). The burden to defend a case does not amount to legal prejudice.

Third, "the application of *laches* is a matter of discretion, not of right." *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004). Defendants do not have a *right* to a ruling of *laches*. The Court, in its discretion, may apply it or refrain from

applying it, after examining the facts. *Id.* Plaintiffs suggest that the totality of the facts of this case demonstrate that the application of *laches* is inappropriate.

Finally, when Defendants seek to assert any *laches* defense, they must establish that they come with clean hands.

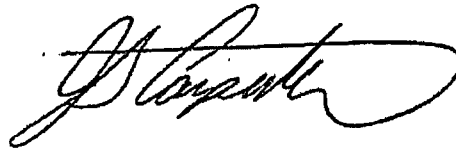
Laches is a defense in equity, and one who comes to the court seeking equity must come with clean hands. *See Precision Instrument Mfg. Co. v. Automotive Co.*, 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) (“He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.”)

Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004). Defendants have violated five provisions of the South Carolina Constitution. They now seek to avoid accountability for their unconstitutional actions. Their Constitutional violations, their persistence in defending this action and seeking to perpetuate the violations and avoid accountability demonstrate their unclean hands. This Court should not apply doctrine of *laches* to enable them to avoid answering for their actions.

CONCLUSION

Plaintiffs pray the Court to overrule the Defendants' arguments in their Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, and to grant Summary Judgment to the Plaintiffs.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read "J. Carpenter", with a large, sweeping flourish at the end.

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EXHIBIT A

PARLIAMENTARY INQUIRY

Rep. LUCAS made a Parliamentary Inquiry and requested that the Speaker, in light of the Supreme Court's recent decision in the case of the *Board of Trustees of the School District of Fairfield County v. The State of South Carolina*, inform the body of the Court's ruling concerning the process whereby the House may override or sustained a veto of the Governor.

SPEAKER HARRELL responded by thanking Rep. LUCAS for asking the question making the parliamentary inquiry. The Speaker stated the following:

"As many of you know, the Supreme Court issued an opinion this past August striking down the General Assembly's long established interpretation of the law relating to the vote necessary to override a veto. This was done in a case that involved Act 308 of 2010, *a piece of local legislation* passed by this body in February, 2010 and which this body overrode the Governor's veto in March 2010. While the particular legislation at issue in this case involves *local legislation*, the Court's decision has a much further reaching impact that affects the required vote on all questions before this body regarding overriding a Governor's veto.

Many of you know that I don't agree with the Court's decision in this case. I believe the decision overrules long established precedent of this body as well as the Court's prior decisions.

While I strongly disagree with the decision, I also recognize that our government was established by the founders of this great country and state to put in place a system of checks and balances.

In this system, the Judicial Branch is given the authority and responsibility to interpret the law, and, in this case, that law is our South Carolina Constitution. Thus, we must abide by the Court's decision, and that is why I have made my best effort to interpret the Court's decision so that it can be implemented into the voting procedures of this House.

I have devoted a great deal of time in the months since the Court's decision in an attempt to interpret exactly what the Court meant. *Unfortunately, even after lengthy consultation with our various in-house legal counsel as well as various private outside counsel, I have been unable to come to a definitive conclusion as to the Court's intent.*

Please know that *I attempted to resolve this confusion and requested that the Court provide much needed clarification* to their decision - *clarification I felt was necessary* in order to implement the Court's decision into our voting process. Unfortunately, *the Court denied this clarification* and that has left us in the *dilemma* we are in today.

I'm afraid *it is impossible to come to a definitive conclusion of the Court's intent.* Thus, what I have done is come to a conclusion and interpretation based on my best efforts to understand the Court's ruling and the advice of legal counsel. I assure you

that I did not come to this conclusion lightly, but I believe it is the most accurate reflection of the Court's decision based on the *limited guidance* we currently have available.

Thus, the necessary vote to override a Governor's veto in the House is an affirmative vote of at least 2/3 of those members present and voting with a minimum of at least 2/3 of a quorum of the body voting in the affirmative to override. Thus, assuming the House has 124 elected members, a quorum of the House would be 63. A 2/3 majority of this quorum would be 42.

Therefore, the necessary vote to override a veto of the Governor would be an affirmative vote of at least 2/3 of those members present and voting with a minimum of at least 42 members voting in the affirmative to override. Any vote to override that does not meet this standard will be sustained.

After lengthy consideration I firmly believe this is the most straight-forward of all of the possible interpretations of the Court's ruling. I will also reiterate that I do not agree with the Court's decision in this case. However, I believe this interpretation complies with the Court's intent, as best as we can discern the intent and language of the Court's decision. Our system of government requires that we abide by that decision.

Again, my ruling is that the necessary vote to override a veto in the House is an affirmative vote of at least 2/3 of those members present and voting with a minimum of at least 2/3 of a quorum of the body voting in the affirmative to override. Any vote to override that does not meet this standard will be sustained."

MOTION TO RECONSIDER TABLED

Journal of the House of Representatives of the State of South Carolina, Regular Session
Beginning Tuesday, January 10, 2012 (Statewide Session) (*emphasis added*).

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE CIRCUIT COURT
NINTH JUDICIAL CIRCUIT

South Carolina Public Interest)
Foundation and Waring S. Howe, Jr.,)
individually, and on behalf of all others)
similarly situated,)

Civil Action No.: 2012-CP-10-04969

Plaintiffs,)

vs.)

Robert W. Harrell, Jr., in his official)
capacity as Speaker of the S.C. House)
of Representatives, Glen McConnell in)
his official capacity as President of the)
S.C. Senate, Representative Harry B.)
"Chip" Limehouse III, Senator George)
"Chip" Campsen, and The State of)
South Carolina,)

Defendants.)

MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

Defendant Representative Harry B. "Chip" Limehouse III ("Limehouse") submits this Memorandum in Opposition to Plaintiffs South Carolina Public Interest Foundation and Waring S. Howe, Jr.'s ("Plaintiffs") Motion for Summary Judgment. For the reasons set forth below, Plaintiffs' Motion must be denied.

FACTUAL AND PROCEDURAL HISTORY

The issues in this case center around membership on the Charleston County Aviation Authority ("Authority"), which manages and operates the airports included in the Charleston County Airport District. By passing Act 130 of 2007, the South Carolina legislature added two members to the Authority, the Chairman and Vice Chairman of the Charleston County Legislative Delegation. On November 1, 2011, the Plaintiffs filed a Petition for Original

Jurisdiction in the South Carolina Supreme Court alleging that Act 130 and the manner in which it was passed violates several constitutional provisions.

Defendant Limehouse objected to Plaintiffs' petition on the grounds that factual issues must be discerned before the case could be resolved. On February 8, 2012, the Supreme Court denied the Petition for Original Jurisdiction. On February 27, 2012, Plaintiffs filed their Complaint in the Richland County Court of Common Pleas. On July 26, 2012, upon motion of Defendant Limehouse, the case was transferred to the Charleston County Court of Common Pleas. In the fall of 2012, Defendant Glen McConnell became the Lieutenant Governor and Senator George "Chip" Campsen took McConnell's place as vice chairman of the Charleston County Delegation, so the Plaintiffs substituted the parties in their complaint by consent order entered on October 30, 2012. In September 2012, the parties began discovery, which is still ongoing. Plaintiffs have moved for summary judgment on all of the issues in their Complaint.

STANDARD

Summary judgment is appropriate if the pleadings and other supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (Ct. App. 2001) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). In determining whether to grant summary judgment, a court must view the evidence and its reasonable inferences in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

Legislative acts are presumed to be constitutional, and the burden is on the plaintiff to establish the unconstitutionality of an act. *Ex Parte Lynch*, 16 S.C. 32 (1881); *Y.C. Ballenger Elec. Contractors, Inc. v. Reach-All Sales, Inc.*, 276 S.C. 394, 279 S.E.2d 127 (1981). South Carolina law is clear that “all reasonable doubt must be resolved in favor of the constitutionality of [an] Act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction.” *Crow v. McAlpine*, 277 S.C. 240, 242, 285 S.E.2d 355 (1981).

ARGUMENT

A. Both Plaintiffs Lack Standing

As a preliminary matter, a fundamental prerequisite to bringing an action in any court is that the plaintiffs have standing. *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985). An individual may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained prejudice therefrom. *Id.* “It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it.” *Furman Univ. v. Livingston*, 244 S.C. 200, 204, 136 S.E.2d 254, 256 (1964).

The issue of whether SCPIF has standing to challenge this particular Act already has been decided by the South Carolina Supreme Court. SCPIF, through its counsel, argued this specific Act was unconstitutional. However, the Supreme Court disagreed. In 2008, the Court “decline[d] to address Petitioners’ contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34. Petitioners lack standing to challenge those acts.” *S.C. Pub. Interest Found. v. Harrell*, 378 S.C. 441, n. 1, 663 S.E.2d 52 (2008) (emphasis added).

SCPIF cannot now attempt to re-litigate an issue which has already been decided. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transactions or occurrence that was the subject of a prior action between those parties." *S.C. Pub. Interest Found. v. Greenville Cnty.*, ___ S.C. ___ (2013) (citing *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011)) (holding that SCPIF's constitutional challenge regarding the county council reserves account was barred by res judicata). The Supreme Court has already ruled on this issue and held that SCPIF does not have standing to challenge Act 130, and res judicata prevents them from raising the issue again. SCPIF is trying to acquire standing to now challenge the same act by associating itself with the other plaintiff, Waring Howe. A party either has standing or it does not, and standing cannot be imputed to one party through another.

However, Howe lacks standing as well. For a party to have standing to sue, it must meet the following three requirements: 1) it must have suffered an injury in fact; 2) the injury must be causally connected to the causes of action; and 3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). Howe conceded in his deposition that he has not been personally affected by Act 130. (Howe Dep., p. 81, line 15 – p. 84, line 16.)¹ Instead, he is trying to assert standing on the basis of being a Charleston County taxpayer. Taxpayer standing requires a strong showing from a party that he or she has a special interest in the litigation. "For a plaintiff to have taxpayer standing, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of [his] fellow taxpayers." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 549, 590 S.E.2d 338, 347-48 (Ct. App. 2003) (citing *Beaufort Cnty. v. Trask*, 349 S.C. 522, 529, 563 S.E.2d 660, 664 (Ct. App. 2002)). Additionally, according to the Plaintiff's own deposition testimony, the Authority is not even funded by county taxes.

¹ The deposition transcript of Waring Howe is attached hereto as Exhibit A.

Q: Do the citizens of Charleston County pay any taxes to fund the Aviation Authority, or is their revenue generated just from fees you discussed earlier?

A: I believe the citizens of Charleston County [sic] contributions to the operation of the airport don't come in the way of taxes per se but in the form of interest charges when bonds are issued.

(Howe Dep., p. 88, line 19 – p. 89, line 2.) Howe is claiming taxpayer standing for a legislative act which affects an entity that is not even supported by his taxes.

Because neither plaintiff has standing to bring this action, the Complaint should be dismissed, and the Court need not address the substantive issues.

B. *Fairfield County* Does Not Apply Retrospectively

The Plaintiffs allege that the manner in which Act 130 was passed was unconstitutional pursuant to the Supreme Court's recent holding in *Bd. of Tr. of the Sch. Dist. of Fairfield Cnty. v. State*, 395 S.C. 276, 718 S.E.2d 210 (2011). In that case, the Court held that in order to override the governor's veto, at least two-thirds of a minimum quorum must vote in favor of the veto. *Id.* The Court found unconstitutional the legislature's long-standing practice that a veto could be overridden with two-thirds of the votes cast, not two-thirds of the members present. *Id.*

The Plaintiffs allege that the procedure the General Assembly used to override the governor's veto of Act 130 did not meet the requirements outlined in *Fairfield County*. (Compl. ¶ 15.) This allegation is not properly before this Court because Act 130 was passed four (4) years before *Fairfield County* was decided. "[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. Prospective application is required when liability is created where formerly none existed."

Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 87, 508 S.E.2d 565, 574 (1998) (quoting *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989)) (citations omitted); see also *Hardaway v. Lexington County*, 314 S.C. 22, 443 S.E.2d 569 (1994).

The Court's decision in *Fairfield County* did not create a new remedy to vindicate an existing right. There is no other evidence that the Court intended to apply the decision retroactively. Further, from a practical standpoint, the legislature utilized the pre-Fairfield County method of overriding vetoes for many years. If every piece of legislation passed in that manner was now constitutionally suspect, the Courts would be forced to spend their resources reviewing potentially thousands of legislative acts.

If this Court finds that the *Fairfield County* decision is prospective only, it should consider the additional arguments below. However, if this Court decides that the Supreme Court intended for its decision in *Fairfield County* to be retroactive and that Act 130 violated that holding, the Court need not decide the remaining issues in the Motion for Summary Judgment or in this brief because they would be rendered moot.

C. Act 130 Does Not Constitute Special Legislation and Single County Legislation

Turning to the more substantive arguments alleged by the Plaintiffs, issues of fact exist for each allegation and therefore should be decided by a jury. The Plaintiffs allege that Act 130 violates the constitutional prohibitions on special and single county legislation. S.C. Constitution Art. III, § 34 prohibits "special legislation" when general legislation can apply, and S.C. Constitution Art. VIII, § 7 prohibits single county legislation.

There is substantial evidence that Act 130 does not constitute either special or single county legislation. On the surface, it may appear that the Act affects only Charleston County. However, the Charleston International Airport is a regional airport and serves the entire lower

part of South Carolina. Defendant Limehouse stated in his affidavit that the Charleston County Aviation Authority manages and operates all airports serving the Charleston Metropolitan Statistical Area, which includes Berkeley and Dorchester Counties in addition to Charleston County.² Susan M. Stevens, the Director of Airports in Charleston, stated in her affidavit that the airport's primary service area is all three of those counties, but it also serves the entire region with an average of 64 daily departures.³ Additionally, in his deposition, Plaintiff Howe agreed that the Charleston International Airport serves citizens outside of Charleston County. (Howe Dep., p. 71, line 19 – p. 73, line 11.) He also stated that the airport has an effect on the economies of Berkeley and Dorchester Counties. *Id.* at p. 74, lines 14-23. At a minimum, there exists a genuine issue of material fact as to whether Act 130 constitutes either special or single county legislation.

D. Act 130 of 2007 Does Not Violate the Separation of Powers Provision of the S.C. Constitution, Art. I, § 8.

The Plaintiffs' third cause of action alleges that Act 130 violates the separation of powers requirement of the South Carolina Constitution, Art. I, § 8. The issue is whether the executive function has been "wholly usurped" by the legislative branch, and the controlling cases are *Edwards* and *Tall Tower*. *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E.2d 406, 409 (1977); *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 230, 363 S.E.2d 683 (1987).

In *Tall Tower*, the Supreme Court affirmed the *Edwards* test for "determining the constitutionality of the membership of a creature of legislative enactment (e.g. the Board) which garnered membership from different branches of government."

² The affidavit of Defendant Limehouse is attached hereto as Exhibit B.

³ The affidavit of Susan M. Stevens is attached hereto as Exhibit C.

(1) the legislators should be a numerical minority; and (2) the body should represent a cooperative effort to make available to the executive department the special knowledge and expertise of designated legislators in matters related to their function as legislators.

Tall Tower at 230. The composition of the Authority meets both of these requirements. First, a clear minority, only 2 legislators out of 13 members, serve on the Authority.

The facts of this case are completely consistent with controlling South Carolina precedent, including *Edwards* and *Tall Tower*. In *Edwards*, the plaintiff attacked the constitutionality of legislators serving on the State Budget and Control Board. *Edwards*, 269 S.C. 75. Two legislative members serve on the five member board. *Id.* Upholding the constitutionality of that statute, this Court stated that “[i]mportant in this case is the fact that the General Assembly has been careful to put the legislative members in a minority position on The Board.” *Id.* at 82-83. Additionally, the legislators serve a special purpose on the board because minority legislative representation encourages cooperation with the executive branch in actions reasonably incidental to their legislative duties. *Id.* These legislative members were able to offer “special knowledge and expertise” to the executive department. *Id.*

The *Edwards* holding was confirmed in *Tall Tower*, where up to four legislators could be appointed to the nine-member Procurement Review Panel. Because non-legislators would always make up the majority, the Court held that composition to be constitutional under S.C. Const. art. I, § 8. *Tall Tower*, 294 S.C. 225. In emphasizing the importance of the minority factor, this Court noted that the “‘legislative minority’ ingredient was present here.” *Id.* at 231.

Similarly, Act 130 allows only two legislators, a minority, to serve on the Authority, and the Plaintiffs have made no suggestion to the contrary. Thus, the Authority’s composition comports with the *Edwards* and *Tall Tower* tests.

As to the second prong of the *Edwards* test, the legislative members of the Authority facilitate cooperation by providing special knowledge and expertise resulting from their legislative duties, such as membership on various legislative committees and a working knowledge of economic development. "There is tolerated in complex areas of government of necessity from time to time some overlap of authority and some encroachment to a limited degree," *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313, 295 S.E.2d 633, 636 (1982) (holding that composition of Joint Appropriation Review Committee was unconstitutional because it was comprised *entirely* of General Assembly members). This Court previously has held on numerous occasions that cooperation between branches can be consistent with the separation of powers:

The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such service falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government.

State ex rel. McLeod v. Edwards, 269 S.C. 75, 84, 236 S.E.2d 406, 409 (1977) (citing *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786). In that case, the Court held that the "statutory composition of The [State Budget and Control] Board does not represent an attempt to usurp the functions of the executive department, but apparently represents a cooperative effort by making available to the executive department the special knowledge and expertise of [certain legislators] and the legislative process in general." *Id.* at 83.

Similarly, in *Tall Tower*, the Procurement Review Panel's composition was found to allow cooperation between the branches to facilitate the goals of the Procurement Code and was

therefore constitutional. *Tall Tower*, 294 S.C. 225. This Court gave "great weight to legislative discretion in the designation of which members of which committees possess the requisite 'special knowledge and expertise' to increase cooperation between the executive and legislative branches," and they found "no evidence sufficient to denigrate the legislature's conclusion that the [appointees] possess the skills to help reach this goal." *Id.* at 231-32.

Overseeing the management and operations of a large regional airport requires a variety of backgrounds and a variety of skill sets. As a legislator, Limehouse has experience in increasing economic development and building the infrastructure required for successful growth in South Carolina. As he stated in his attached affidavit, Limehouse focuses his efforts as Authority chairman on attracting airlines and jobs to the Charleston area, which is directly tied to his service as a legislator. His role on the Authority is to focus on economic development as opposed to actual transportation and the more executive aspects of the Authority. Limehouse worked on deals to lease airport land to Boeing as part of their economic package. He also worked on efforts to have certain roads and railways lead to and through airport property. Limehouse was able to accomplish these items for the Authority more easily because of his role as a legislator. Plaintiff Howe, a former Authority chairman, agrees that the role of chairman should involve marketing and development. He stated during his deposition that it is important and even "expected" that the chairman of the Authority be involved in economic development. (Howe Dep., p. 41, line 11 – p. 42, line 23.)

Plaintiffs focus a great deal on *Knotts* and *Bramlette*, cases in which the statutes at issue were held to be unconstitutional. Neither case is applicable to the facts of the present matter. In *Knotts*, the statute directed that money from the Water Recreational Resources Fund be allocated based upon approval from the Lexington County legislative delegation. *Knotts v. South Carolina*

Dep't of Natural Resources, 348 S.C. 1, 558 S.E.2d 511 (2002). That statute was held to be unconstitutional because the legislative delegation solely was responsible for those executive duties. *Bramlette* involved a road improvement statute that unconstitutionally delegated powers to a county legislative delegation. *Bramlette v. Stringer*, 186 S.C. 134, 195 S.E.2d 257 (1938). The Greenville County legislative delegation was given the complete power to determine the amount of bonds issued, the process for doing so, and which roads to improve. "In *Bramlette*..., the executive or administrative function was wholly usurped by the legislative branch." *Edwards*, 269 S.C. at 83.

Both of these cases are easily distinguishable from the instant case. A critical distinction is that the statutes in *Knotts* and *Bramlette* gave the county legislative delegations complete control over various duties deemed by the Court to be executive in nature. These cases are not examples of collaborative efforts of groups consisting only partially of legislative members, such as the board in *Edwards*. 269 S.C. at 83-84 (Minority legislative representation on the board was intended to allow for cooperation with the executive branch). In the instant case, however, legislative members on the Authority are not given sole discretion over any decisions. Instead, they are a minority part of a larger group placed on the Authority for the purpose of providing such expertise to their fellow member.

Even though the Authority performs other executive functions as well, the service of two legislators on the Authority encourages cooperation and does not result in those executive functions being "wholly usurped" by the legislative branch. Each individual on the Authority brings a different set of skills and background to the table. They cooperate and use each other's strengths to improve the Charleston area.

Although the Constitution requires the separation of powers, it does not require that the three branches operate in a vacuum. Just as in *Edwards* and *Tall Tower*, minority legislative representation on the Authority permits and encourages cooperation among the branches without violating the separation of powers requirement. The composition of the Authority is an example of cooperation from both branches, not usurpation by the legislative branch, and is appropriate to accomplish the goals of the airport.

The composition of the Authority thus satisfies the *Edwards* test and does not violate the separation of powers requirement. Therefore, summary judgment should be denied as to the third cause of action.

E. Act 130 of 2007 Does Not Violate the Dual Office Holding Provisions of the S.C. Constitution, Art. III, § 24, Art. VI, § 3, Art. XVII, § 1A.

The Plaintiffs' fourth cause of action alleges that Act 130 violates the dual office holding prohibitions. The South Carolina Constitution prohibits persons from holding "two offices of honor or profit at the same time." S.C. Const. art. VI, § 3. *See also* S.C. Const. art. III, § 24 and S.C. Const. art. XVII, § 1A. However, "[o]ur jurisprudence has a narrow, yet firmly established, exception" to these prohibitions called the "ex officio" or "incidental duties" exception. *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 125, 691 S.E.2d 453, 462 (2010). "Ex officio" is defined as "by virtue or because of an office." Black's Law Dictionary 616 (8th ed. 2004). This exception provides that the prohibitions against dual office holding are "not applicable to those officers upon whom other duties relating to their respective offices are placed by law." *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947).

The Plaintiffs allege that these two legislators already hold a legislative office, and by accepting a position on the Authority, they have violated the dual office holding constitutional

prohibitions. However, both legislative members serve on the Authority under the ex officio exception.

The Plaintiffs rely heavily on *Ashmore* and *Segars-Andrews* to try to establish dual office holding. In *Ashmore*, the Court found that members of the General Assembly could not sit on a board of trustees for a local auditorium. *Ashmore*, 21 S.C. 77. Although the Court found that the ex officio exception did not apply in this specific instance because the functions of the board did not have a relation to the legislative members' duties of office, it discusses the exception at length and recognizes its application under other circumstances. This Court has since distinguished the facts of *Ashmore*:

In *Ashmore*, there was no proper ex officio relationship between the legislative duties and the function assumed for the District. However, as previously pointed out, the minority legislative representation on The Board in this case was apparently intended to allow the chairman of the two committees *to cooperate with the executive branch in action reasonably incidental to their legislative duties*.

State ex rel. McLeod v. Edwards, 269 S.C. 75, 83-84 (1977).

In *Segars-Andrews*, a proper ex officio relationship was found even though the statute did not provide expressly that the legislative members of the commission would serve ex officio. *Segars-Andrews*, 387 S.C. 109. In contrast and as stated in Plaintiff Howe's affidavit attached to their Petition filed in the Supreme Court, Act 329 of 1971 specifically designates that service on the Authority is not an office of honor and profit. This designation clearly shows the legislature's understanding that the functions of the Authority relate to the duties of the legislators' offices and that their service on the Authority is incidental to their legislative responsibilities. Therefore, Limehouse fits the ex officio exception to the dual office holding prohibition.

Further, the legislative Authority members serve a legislative function. "The 'ex officio' or 'incidental duties' exception may be invoked properly where there is a constitutional nexus in terms of power and responsibilities between the first office and the 'ex officio' office." *Segars-Andrews* at 126. When an appropriate nexus exists, this Court has held that it views "the ex officio membership of the legislators on The [Budget and Control] Board as cooperation with the executive in matters which are related to their function as legislators and not usurpation of the functions of the executive department." *Edwards*, 269 S.C. at 83.

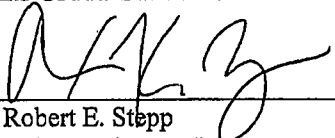
As discussed above, the service of the particular legislative members on the Authority are "reasonably incidental to the full and effective exercise of their legislative powers." *Segars-Andrews* at 127. Economic development is the nexus between Limehouse's power and responsibilities of being a legislator and his membership on the Authority. As a legislator, Limehouse serves his constituents by bringing businesses, jobs, and infrastructure to the Charleston area. *See Limehouse Aff.* As a member of the Aviation Authority, he seeks the same objectives: more businesses, jobs, and infrastructure for the Charleston regional area. His network as a legislator provides him with contacts and tools to accomplish these goals. Therefore, the powers and responsibilities of his first office are directly related to his service in the second office.

The composition of the Authority does not violate the dual office holding prohibitions. Therefore, summary judgment should be denied as to the fourth cause of action.

CONCLUSION

Genuine issues of material fact exist for each cause of action alleged in the Complaint, and the Plaintiffs' Motion for Summary Judgment should be denied.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Robert E. Stepp
Robert E. Tyson, Jr.
Alexis K. Lindsay
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211

**Attorneys for Defendant Representative Harry B.
"Chip" Limehouse III**

Columbia, South Carolina
February 8, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

South Carolina Public Interest
Foundation and Waring S. Howe, Jr.,
individually, and on behalf of all others
similarly situated,)

Plaintiffs,)

vs.)

Robert W. Harrell, Jr., in his official
capacity as Speaker of the S.C. House
of Representatives, Ken Ard in his
official capacity as President of the
S.C. Senate, Representative Harry B.
"Chip" Limehouse III, Senator Glenn
McConnell, and The State of South
Carolina,)

Defendants.)

IN THE CIRCUIT COURT

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-10-04969

AFFIDAVIT OF DEFENDANT
REPRESENTATIVE HARRY B. "CHIP"
LIMEHOUSE, III

PERSONALLY APPEARED BEFORE ME, Harry B. Limehouse, III, who, being first
duly sworn, deposes and testifies as follows:

1. My name is Harry B. ("Chip") Limehouse, III. I am over the age of 18
years old and I am competent to testify.
2. I have personal knowledge of the matters set forth within this affidavit.
3. I have been a member of the South Carolina House of Representatives
since 1995. I represent District 110, which includes parts of Charleston and Berkeley
Counties.
4. As a representative of the citizens in Charleston and Berkeley Counties, I
work to improve the area by bringing businesses and jobs to the area, building a better
infrastructure, increasing tourism, and improving the quality of life for local citizens.

5. The Charleston County Aviation Authority ("CCAA") is the governing board for airports serving the Charleston Metropolitan Statistical Area, which includes Charleston, Berkeley, and Dorchester Counties.

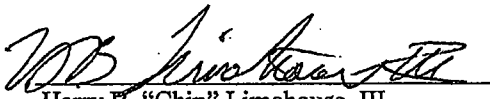
6. I have served on the CCAA as an ex officio member since 2007. I have served as chair of the CCAA September 2010.

7. As a member of the CCAA, I work to improve the area by bringing businesses and jobs to the area, building a better infrastructure, increasing tourism, and improving the quality of life for local citizens.

8. I bring the skills and network I have developed as a legislator to my service on the CCAA, which helps to bring more economic development to Charleston and Berkeley Counties.

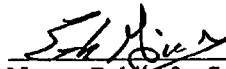
9. During my tenure on the CCAA, enplanements have increased and more airlines have begun serving the airport. (CCAA reports attached as **Exhibit A**). These developments have resulted in more jobs and increased revenue for Charleston and Berkeley Counties.

FURTHER AFFIANT SAYETH NOT.


Harry B. "Chip" Limehouse, III

SWORN TO AND SUBSCRIBED BEFORE ME

This 19th day of October, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 29, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

South Carolina Public Interest
Foundation and Waring S. Howe, Jr.,
individually, and on behalf of all others
similarly situated,

Plaintiffs,)

vs.)

Robert W. Harrell, Jr., in his official
capacity as Speaker of the S.C. House
of Representatives, Ken Ard in his
official capacity as President of the
S.C. Senate, Representative Harry B.
"Chip" Limehouse III, Senator Glenn
McConnell, and The State of South
Carolina,

Defendants.)

IN THE COURT OF COMMON PLEAS

IN THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-40-1589

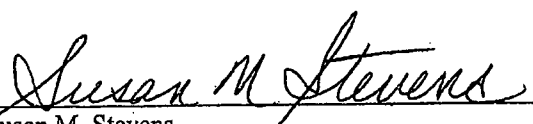
AFFIDAVIT OF SUSAN M. STEVENS

RICHLAND COUNTY
FILED
2012 APR -9 AM 9:21
JEANETTE W. McBRIDE
C.C.P. & G.S.

PERSONALLY APPEARED BEFORE ME, Susan M. Stevens, who states as follows:

1. I am over the age of eighteen (18) years, and I submit this affidavit based upon my personal knowledge.
2. I am employed by the Charleston County Aviation Authority as the Director of Airports.
3. The Charleston County Aviation Authority owns and operates three airports in Charleston County, including the Charleston International Airport, the Charleston Executive Airport, and the Mount Pleasant Regional Airport.
4. The primary service area of the Charleston County Aviation Authority includes the Berkeley, Charleston and Dorchester County Region.

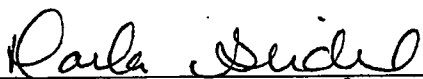
5. The Charleston International Airport serves the Region with an average of 64 daily departures in 2011 and over 20,000 total flights.
6. Pursuant to Act No. 1235 of the Acts and Joint Resolutions of the General Assembly of South Carolina, Regular Session of 1970, as amended, the Charleston County Aviation Authority performs other duties and functions in the Charleston area.


Susan M. Stevens

State of South Carolina

Sworn to and subscribed before me

This 28 day of MARCH, 2012



Notary Public for: SOUTH CAROLINA

MY COMMISSION EXPIRES
SEPT 22, 2013

My Commission Expires: _____

STATE OF SOUTH CAROLINA)

IN THE CIRCUIT COURT

COUNTY OF CHARLESTON)

NINTH JUDICIAL CIRCUIT

South Carolina Public Interest)
Foundation and Waring S. Howe, Jr.,)
individually, and on behalf of all others)
similarly situated,)

Civil Action No.: 2012-CP-10-04969

Plaintiffs,)

AFFIDAVIT OF DEFENDANT
REPRESENTATIVE HARRY B. "CHIP"
LIMEHOUSE, III

vs.)

Robert W. Harrell, Jr., in his official)
capacity as Speaker of the S.C. House)
of Representatives, Ken Ard in his)
official capacity as President of the)
S.C. Senate, Representative Harry B.)
"Chip" Limehouse III, Senator Glenn)
McConnell, and The State of South)
Carolina,)

Defendants.)

PERSONALLY APPEARED BEFORE ME, Harry B. Limehouse, III, who, being first
duly sworn, deposes and testifies as follows:

1. My name is Harry B. ("Chip") Limehouse, III. I am over the age of 18
years old and I am competent to testify.

2. I have personal knowledge of the matters set forth within this affidavit.

3. I have been a member of the South Carolina House of Representatives
since 1995. I represent District 110, which includes parts of Charleston and Berkeley
Counties.

4. As a representative of the citizens in Charleston and Berkeley Counties, I
work to improve the area by bringing businesses and jobs to the area, building a better
infrastructure, increasing tourism, and improving the quality of life for local citizens.

5. The Charleston County Aviation Authority ("CCAA") is the governing board for airports serving the Charleston Metropolitan Statistical Area, which includes Charleston, Berkeley, and Dorchester Counties.

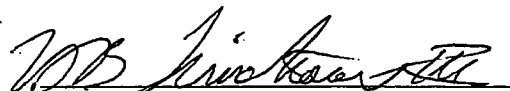
6. I have served on the CCAA as an ex officio member since 2007. I have served as chair of the CCAA September 2010.

7. As a member of the CCAA, I work to improve the area by bringing businesses and jobs to the area, building a better infrastructure, increasing tourism, and improving the quality of life for local citizens.

8. I bring the skills and network I have developed as a legislator to my service on the CCAA, which helps to bring more economic development to Charleston and Berkeley Counties.

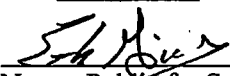
9. During my tenure on the CCAA, enplanements have increased and more airlines have begun serving the airport. (CCAA reports attached as **Exhibit A**). These developments have resulted in more jobs and increased revenue for Charleston and Berkeley Counties.

FURTHER AFFIANT SAYETH NOT.


Harry B. "Chip" Limehouse, III

SWORN TO AND SUBSCRIBED BEFORE ME

This 19th day of October, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: July 29, 2014

EXHIBIT A
TO
AFFIDAVIT OF DEFENDANT
REPRESENTATIVE HARRY B.
“CHIP” LIMEHOUSE III

CIVIL ACTION NO.: 2012-CP-10-04969

**CHARLESTON INTERNATIONAL AIRPORT (CHS)
OPERATIONS SUMMARY
CY-2007**

	ACTIVITY							AIRCRAFT OPERATIONS					
	PASSENGERS		MAIL (lbs.)		FREIGHT (lbs.)		EXPR. #	ITINERANT				LOCAL	TOTAL
	Enplaned	Deplaned	Enplaned	Deplaned	Enplaned	Deplaned	Enplaned	Air Carrier	Air Taxi	GA	Military	Civilian/ Military	
JANUARY	62527	61796	0	228	1107908	2041748	0	1547	2239	1725	1236	756	7503
FEBRUARY	60882	62842	0	257	198728	1178498	2122	1677	1959	2330	1335	763	8064
MARCH	84833	88501	31	642	210006	710031	0	1959	2407	2937	1370	845	9518
APRIL	95701	95138	0	49	275511	1215058	154	1987	2438	3300	1443	1446	10614
MAY	103037	101740	0	2	376105	1367900	0	2195	2496	2502	1282	1043	9518
JUNE	114377	114142	0	309	267862	1425838	0	1967	2706	2513	1470	866	9522
JULY	113902	111490	0	7	251124	1263736	0	1986	2530	2349	1509	960	9334
AUGUST	106502	106560	0	136	204018	1414492	0	2045	2615	2604	1629	1062	9955
SEPTEMBER	98036	94154	6	11	299482	1489755	2903	1974	2544	2604	1099	670	8891
OCTOBER	111356	110432	0	2000	325410	1669428	0	1960	2725	2661	1458	1055	9859
NOVEMBER	103576	102571	0	0	424122	1331760	0	1902	2767	2846	1597	1149	10261
DECEMBER	86632	84814	0	0	247353	1372307	0	1803	2823	2107	1480	977	9190
TOTALS	1141361	1134180	37	3641	4187629	16480551	5179	23002	30249	30478	16908	11592	112229

Charleston County Aviation Authority
5500 International Blvd., #101
Charleston, SC 29418

Phone: 843.767.1100
Fax: 843.760.3020

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2012

	ACTIVITY							AIRCRAFT OPERATIONS						
	PASSENGERS		MAIL (lbs.)		FREIGHT (lbs.)		EXPR. #	ITINERANT				LOCAL		TOTAL
	Enplaned	Deplaned	Enplaned	Deplaned	Enplaned	Deplaned	Enplaned	Air Carrier	Air Taxi	GA	Military	Civilian	Military	
JANUARY	83004	82381	0	27	568941	1700393	0	1955	2291	1928	1571	608	1126	9479
FEBRUARY	84329	85493	0	1838	676599	1775198	0	1854	2216	1764	1565	404	1132	8935
MARCH	111715	117272	0	1838	815683	1901912	0	2037	2508	1993	1595	480	1130	9743
APRIL	121660	118673	0	1838	877019	1945276	0	1883	2612	2241	1391	600	1218	9945
MAY	121887	122669	0	1838	864005	2138947	0	2022	2554	2007	1364	550	966	9463
JUNE	118400	116892	0	1838	592130	1872877	0	2022	2421	1781	1125	494	702	8545
JULY	112540	112220	0	0	650715	1933435	0	2125	2034	1587	928	594	615	7883
AUGUST	116470	115750	0	0	544799	2139797	0	2069	2284	1698	958	576	616	8201
SEPTEMBER														
OCTOBER														
NOVEMBER														
DECEMBER														
TOTALS	870005	871350	0	9217	5589891	15407835	0	15967	18920	14999	10497	4306	7505	72194

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

South Carolina Public Interest
Foundation and Waring S. Howe, Jr.,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

Robert W. Harrell, Jr., in his official
capacity as Speaker of the South
Carolina House of Representatives, Ken
Ard, in his official capacity as President
of the South Carolina Senate,
Representative Harry B. "Chip"
Limehouse III, Senator Glenn
McConnell, and the State of South
Carolina,

Defendants.

Civil Action No. 2012-CP-10-04969

**Memorandum in Support
of Speaker Harrell's Motion for
Summary Judgment**

Defendant Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, by and through the undersigned counsel, files this Memorandum in Support of his Motion for Summary Judgment.¹ As set forth below, this Court should issue an order granting summary judgment and dismissing this action with prejudice for the following reasons. First, the South Carolina Public Interest Foundation ("the Foundation") is collaterally estopped from maintaining this action because the Supreme Court has already ruled that the Foundation lacks standing to challenge the Act at issue here. Second, Plaintiff Howe has failed to plead any basis

¹ Speaker Harrell initially filed this as motion for judgment on the pleadings. After a hearing, the Court denied these arguments as to the pleadings only to allow the parties time to develop these issues in discovery. See Order filed October 24, 2012. Thus, these issues are now back before this Court on summary judgment.

for standing, and, in any event, he also fails to establish the standing necessary to maintain this action. Third, Plaintiffs' claims are barred by laches and/or waiver. Therefore, this Court should grant summary judgment and enter an order dismissing the action in its entirety with prejudice.

Argument

A motion for summary judgment should be granted where the Court is satisfied that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). Reliance on the allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRPC. "Instead [the] response to the motion must set forth specific facts, admissible in evidence" *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988) (citing Rule 56(e), SCRPC). "Plaintiff's own self-serving statements, without more, are insufficient to create a genuine dispute of fact." *Rogers v. Cotton*, No. 4:09-cv-1290-RBH-TER, 2012 U.S. Dist. LEXIS 14371, at *22-23 (D.S.C. Jan. 18, 2012) (collecting cases). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Hedgepath*,

348 S.C. at 355, 559 S.E.2d at 336. (citing *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)).

I. Summary judgment is proper because both the Foundation and Plaintiff Howe lack the standing needed to maintain their claims.

Both Plaintiffs lack the standing necessary to challenge the constitutionality of Act 130 of 2007 ("the Act" or "Act 130"). First, the South Carolina Supreme Court has previously held that the Foundation lacks the standing to challenge Act 130. Second, Plaintiff Howe also cannot demonstrate standing to maintain this action. Thus, this Court should grant summary judgment and enter an order dismissing the action in its entirety because the Foundation and Plaintiff Howe lack the standing necessary to maintain this action.

a. The Foundation lacks standing to challenge the constitutionality of Act 130 in this action.

Collateral estoppel bars the Foundation from maintaining any challenge to the constitutionality of Act 130. Our Supreme Court adjudicated this very standing issue in 2008. In that case, the Supreme Court unequivocally held that the Foundation lacked the standing to challenge the Act. As a result, the Foundation is estopped from re-arguing it has standing to challenge the Act in this action. Therefore, this Court should grant summary judgment to Speaker Harrell on this issue.

In 2008, the Foundation initiated an action in the original jurisdiction of our Supreme Court challenging the constitutionality of Act 130. *See South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 445, 663 S.E.2d 52, 54 (2008) (overruled on other grounds, *American Petroleum Inst. V. SC Dept. of Rev.*, 382 S.C.

572, 677 S.E.2d 16 (2009)).² Speaker Harrell defended the constitutional challenge to Act 130 on the ground that the Foundation lacked the standing to challenge Act 130. *Harrell*, 378 S.C. at 445, 663 S.E.2d at 54. The court fully weighed that defense, analyzed the Foundation's contrary position, and ultimately ruled on that exact issue. *Id.* Specifically, the court held that:

We decline to address Petitioners' contention that 2007 Act Nos. 130 . . . violat[es] the South Carolina Constitution Petitioners lack standing to challenge those acts. *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Harrell, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1 (emphasis added).³ Therefore, the issue of the Foundation's standing to challenge Act 130 was actually litigated to and decided by the Supreme Court in 2008.

The South Carolina Supreme Court previously held that the Foundation lacked the standing necessary to maintain a challenge to the constitutionality of Act 130. As such, the well-settled rules of collateral estoppel preclude the Foundation from asserting in this action that it has the standing necessary to maintain a challenge to the constitutionality of Act 130. Therefore, the Foundation lacks standing to maintain this

² The Supreme Court's holding in *American Petroleum* did not affect the 2008 holding that the Foundation lacked standing to challenge the constitutionality of the Act.

³ The Foundation was a petitioner in that action along with Edward D. Sloan, Jr. As petitioners, the Foundation challenged the constitutionality of Act 130 of 2007 along with other acts from that legislative year. Speaker Harrell also challenged the standing of Petitioner Sloan. The Supreme Court found Petitioner Sloan also lacked standing to challenge Act 130. Petitioner Sloan is not a party to the present action.

action. This Court should grant the motion for summary judgment and enter an order finding the Foundation lacks standing in this action.

Collateral estoppel prevents a party from relitigating an issue that was decided in a previous action. *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009); *S.C. Prop. & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Collateral estoppel applies regardless of whether the claims in the first action and subsequent action are the same. *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (cert. denied January 6, 2011). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

All three elements are satisfied and preclude the Foundation from maintaining a challenge to Act 130 in this action. First, the issue of whether the Foundation had standing to challenge the constitutionality of Act 130 was actually litigated in the 2008 *SCPIF v. Harrell* action. The Foundation brought the action challenging the constitutionality of Act 130. Speaker Harrell specifically defended on the grounds that the Foundation lacked standing. Thus, the standing issue was litigated in 2008. Accordingly, the first element of collateral estoppel is satisfied.

Second, the Supreme Court directly and finally determined this standing issue in the prior action. After consideration of the merits of the Foundation's numerous other constitutional challenges, this Court specifically held that the Foundation lacked the standing to challenge Act 130, noting that "Petitioners lack standing to challenge those acts." *Id.* Therefore, the Supreme Court definitively and unequivocally held in 2008

that the Foundation lacked standing to challenge Act 130 on constitutional grounds. Accordingly, the second element of collateral estoppel is satisfied.

Third, the Supreme Court's standing ruling was necessary to support the prior judgment and dispose of all the issues raised in the 2008 action. The Foundation raised challenges to several acts of 2007, including Act 130. The court ruled on all issues on various grounds. The ruling on Act 130 was necessary to support the Supreme Court's ruling and dispose of all the issues raised by the Foundation. Accordingly, the third element of collateral estoppel is satisfied.

Lastly, any claim that the standing issue does not apply because the constitutional challenges to Act 130 are rooted in different claims than was the case in the 2008 action should be rejected. Collateral estoppel bars issues and applies despite any claims that grounds alleged could not be used to challenge Act 130 in the 2008 action. See *Carolina Renewal*, 385 S.C. at 556, 684 S.E.2d at 783 (holding "[c]ollateral estoppel applies to specific *issues*, regardless of whether the claims in the first and subsequent suits are the same") (citations omitted, emphasis added). The issue in the 2008 action is the same as in this action—the constitutionality of Act 130. The basis asserted to challenge the constitutionality of Act 130 is immaterial. Thus, the Foundation is collaterally estopped from asserting it has standing in this action.

Based on the above, the Foundation is collaterally estopped from asserting it possesses the standing necessary to maintain this action. The issue of whether the Foundation has standing to challenge the constitutionality of Act 130 has been finally decided by the Supreme Court. The Supreme Court unequivocally held that the Foundation did not have standing. Therefore, collateral estoppel prevents the

Foundation from relitigating that issue now. As a result, the Foundation is barred from maintaining it has standing to challenge Act 130 in this action. Because the Foundation lacks standing to maintain a constitutional challenge to Act 130, this Court should grant Speaker Harrell's motion for summary judgment and enter an order finding the Foundation's claims are barred because the Foundation lacks standing in this action.

b. This Court should grant summary judgment as to all claims because Plaintiff Howe also lacks standing to challenge Act 130.

Speaker Harrell asserts that Plaintiff Howe lacks standing, and summary judgment is proper for two reasons. First, Plaintiff Howe failed to plead any proper basis for standing. Thus, Plaintiff Howe failed to establish a prerequisite to maintain this action. Second, summary judgment is proper because Plaintiff Howe cannot establish any of the recognized tenants of standing. He, therefore, cannot maintain this action. This Court should grant the motion for judgment on the pleadings and enter an order finding Plaintiff Howe lacks standing in this action.

Our Supreme Court holds that standing may be acquired in only three ways. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). First, a plaintiff may assert standing via a statute. *Preston*, 398 S.C. at 192, 728 S.E.2d at 43 (internal quotations omitted). Second, First, a party may acquire standing "through the rubric of constitutional standing." *Id.* Lastly, a plaintiff may acquire standing "under the public importance exception." *Id.* These rules of standing exist because "standing cannot be granted to every individual who is disgruntled by a governmental decision or policy; otherwise, the government would be forced to defend a constant barrage of lawsuits questioning its every move." *Newman v. Richland Cnty. Historic Preservation Com'n*,

325 S.C. 79, 480 S.E.2d 72 (1997). Plaintiff Howe cannot establish standing under any of the three tenants of standing.

1. Plaintiff Howe failed to plead any basis for standing.

As an initial matter, this Court should grant summary judgment because Plaintiff Howe failed to adhere to the requirement that standing must be pleaded. Here, the Complaint is silent as to Plaintiff Howe's basis for standing. *See* Complaint. He did not plead any basis for statutory standing, constitutional standing (namely, a concrete or particularized injury in fact), or standing under the public importance exception. It is well-settled that a plaintiff must *plead in the complaint* and prove one of these grounds for standing in order to maintain his action. *Preston*, 398 S.C. at 192, 728 S.E.2d at 43; *see also* *Beaufort Cnty. v. Trask*, 349 S.C. 522, 529 n.1, 563 S.E.2d 660, 663 (Ct. App. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Plaintiff Howe failed to do so. Therefore, his action fails as a matter of law. This Court should grant summary judgment on that basis alone.⁴

2. Plaintiff Howe cannot establish statutory standing.

Plaintiff Howe cannot establish any statutory basis for standing. Act 130 contains no provision that would provide a basis for Plaintiff Howe to acquire the standing needed to maintain this action. Therefore, no statutory basis for standing exists as a matter of law.

Moreover, Plaintiff Howe's decision to bring this action pursuant to the South Carolina Uniform Declaratory Judgments Act, section 15-53-10, *et seq.*, is insufficient

⁴ Assuming without conceding that the Foundation is not barred to argue standing by collateral estoppel, this Court should still grant summary judgment. Just as Plaintiff Howe failed to do so, the Foundation also failed to plead any basis for standing. Thus, the Foundation's action fails as a matter of law. *See Preston*, 398 S.C. at 192, 728 S.E.2d at 43.

to give him statutory standing in this action. In *Trask*, a plaintiff taxpayer brought an action challenging governmental activity by a city. *Beaufort Cnty. v. Trask*, 349 S.C. 522, 523, 563 S.E.2d 660, 661 (Ct. App. 2002). Defendants argued, *inter alia*, that plaintiff lacked standing necessary to maintain the action. *Id.* at 525, 563 S.E.2d at 661. The trial court agreed and held plaintiff could not acquire standing. *Id.* at 525, 563 S.E.2d at 662. On appeal, the plaintiff taxpayer argued she had standing to pursue the action by virtue of bringing her action pursuant to the South Carolina Uniform Declaratory Judgments Act. *Id.* at 529, 563 S.E.2d at 664. The Court of Appeals disagreed and held that "the presence of a justiciable controversy, however, does not by itself give a litigant standing to sue." *Id.* Thus, the Court of Appeal rejected an argument that the South Carolina Uniform Declaratory Judgments Act confers statutory standing on a plaintiff. Therefore, Plaintiff Howe cannot acquire standing via the South Carolina Uniform Declaratory Judgments Act.

In sum, Plaintiff Howe cannot establish any statutory basis for standing as a matter of law. This Court should grant summary judgment on this issue.

3. Plaintiff Howe cannot establish standing under the rubric of constitutional standing.

In the Complaint, Plaintiff Howe cannot establish any concrete or particularized injury in fact. He instead pleads his status as a taxpayer gives him the standing to pursue this challenge to Act 130. *See* Compl. ¶ 2. Thus, Plaintiff Howe relies solely on his status as a taxpayer to acquire standing. Our Supreme Court holds such an allegation is insufficient to vest a plaintiff with constitutional standing. Therefore, Plaintiff Howe cannot establish the rubric of constitutional standing.

To establish constitutional standing, the plaintiff must demonstrate two elements. First, the plaintiff must prove he suffered “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Second, a plaintiff must also show a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339. Plaintiff Howe cannot establish this test. Plaintiff Howe has failed to articulate any legally protected interest that was injured by the passage of the Act.

Plaintiff Howe only claims his status as a taxpayer in Charleston County is sufficient to provide the standing needed to maintain this action. Plaintiff Howe’s status as a taxpayer, standing alone, is insufficient to establish constitutional standing. In *Preston*, the Supreme Court addressed whether status as a taxpayer could satisfy the elements of constitutional standing. 398 S.C. at 192, 728 S.E.2d at 43. In that matter, the plaintiff argued his status as a taxpayer was sufficient to confer standing to maintain the action. 398 S.C. at 192, 728 S.E.2d at 43. The Supreme Court rejected this contention. *Id.* The Court held:

In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court in rejecting [plaintiff’s] claim of taxpayer standing under constitutional standing principles.

Id. at 193, 728 S.E.2d at 44. Therefore, the Supreme Court unequivocally held that a plaintiff's status as a taxpayer cannot establish constitutional standing.

Preston reaffirmed the Supreme Court's previous holding in *ATC* on this issue.

In that matter, the court rejected a plaintiff's contention that status as a taxpayer establishes constitutional standing. The court held:

[Plaintiff] further relies on its status as a taxpayer to acquire standing. The injury to [plaintiff], however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'

ATC, 380 S.C. at 198, 669 S.E.2d at 340-41 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). Thus, Plaintiff Howe's status as a taxpayer is insufficient to provide a basis for standing. Thus, summary judgment is appropriate on this issue.

Moreover, Plaintiff Howe cannot use his subjective beliefs to establish a basis for standing. Plaintiff Howe attempts to use his subjective sensitivity to these issues as a basis to support standing. However, such a claim of any perceived difference in degree of interest claimed by Plaintiff Howe has been rejected by our Court and does not affect the analysis.

Our Courts have rejected this subjective belief argument, noting that:

[T]axpayers are not authorized to maintain a suit . . . simply because they are taxpayers It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights. Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance.

Trask, 349 S.C. at 529 n.20, 563 S.E.2d at 664 (emphasis added). In his deposition, Plaintiff Howe testified as to his injury resulting from the passage of the Act. He testified that:

Q: How specifically were you injured or damaged by the passage of Act 130 of 2007?

A: It severely injures my sense of right and wrong, fairness, the concept of everybody going by the same rules, the proper reverence to something that would be denoted as a, quote, constitution. So yeah, in my life's desire to promote good government

See Depo. Trans. of Howe p. 22, line 25 through p. 23, line 8, attached hereto as Exhibit A. He continued:

Q: How have you been harmed? Let me make sure.

A: The convictions I hold personally in terms of my views and ideals of right and wrong have been damaged.

See Depo. Trans. of Howe p. 24, line 7-11, attached hereto as Exhibit B. Plaintiff Howe again reiterated his purported injury was common to all taxpayers in Charleston County:

Q: The individual harm to you, as I understand your answer, is you believe it's constitutionally suspect, and there are two members that are serving on there that shouldn't be. And that's your answer to how you've been harmed?

A: Yes, sir.

See Depo. Trans. of Howe p. 26, line 8-13, attached hereto as Exhibit C.

These claimed injuries are nothing more than an attempt to maintain this action to protect abstract rights and are insufficient to confer standing on Plaintiff Howe. *Trask*, 349 S.C. at 529 ("It is not sufficient that they maintain the proceeding merely as

a citizen to protect abstract rights"). These abstract claims of injuries are common to all taxpayers in Charleston County. Moreover, Plaintiff Howe's subjective heightened injury cannot form the basis for standing. *See Id.* ("Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance"). The Supreme Court's established and well-reasoned precedent establishes that Plaintiff Howe cannot establish the rubric of constitutional standing on this basis.

Additionally, Plaintiff Howe is nothing more than a sham plaintiff named solely to remedy the fact that the Foundation lacked the standing needed to bring this action alone. Plaintiff Howe was aware the Supreme Court held in 2008 that the Foundation lacked standing to challenge the Act, testifying that:

Q: [D]id you also understand that the court reached a decision, denying – as part of their decision in that case, they denied standing to the Public Interest Foundation, that decision was in June – rendered in June of 2008?

A: I believe that was brought to my attention.

See Depo. Trans. of Howe p. 85, line 12-19, attached hereto as Exhibit D. Notably, the Foundation sought an individual to rectify the "legal reasons" that the Foundation could not bring the action on its own. Plaintiff Howe admitted that he was brought into this action to alleviate this standing issue of the Foundation:

Q: How did you become involved in the lawsuit? How did you and Mr. Sloan get together on the same page, is what I am trying to ask.

A: It became known to me that his foundation was intending to bring this lawsuit, and it was desired that in addition to them as a plaintiff, that for certain legal reasons it perhaps would be helpful for a citizen of

Charleston County also be a plaintiff in this lawsuit to possibly satisfy certain legal considerations.

See Depo. Trans. of Howe p. 55, line 17 through p. 56, line 2 (emphasis added), attached hereto as Exhibit E. Moreover, Plaintiffs have admitted that the Foundation, and the Foundation alone, is paying the legal fees incurred by Plaintiff Howe in this action. See Plaintiffs' Responses to Speaker Harrell's Second Set of Interrogatories to Plaintiffs, attached hereto as Exhibit F. Based on the above, Plaintiff Howe has not suffered an individual injury from the passage of the Act and is merely in this lawsuit to circumvent the Foundations' lack of standing. This Court should reject any claims to the contrary and hold Plaintiff Howe lacks the constitutional basis for standing. This Court should grant summary judgment on this basis.

4. Plaintiff Howe cannot establish standing under the public importance exception.

Plaintiff Howe cannot acquire standing under the public importance exception. He has not alleged any overriding public interest or an extricable connection to the need for future guidance as required by our Supreme Court. This Court should, therefore, find that Plaintiff Howe cannot establish standing on this basis.

"The general rule is that a taxpayer may not maintain a suit based on the action of state officers when he has no special interest, and his only standing is the exceedingly small interest of a general taxpayer." *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. *Id.* Rather, the party must demonstrate some *overriding* public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. *Baird v.*

Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Our Supreme Court mandates that the public importance exception to these standing rules should apply "only where a resolution is needed for future guidance." *Preston*, 398 S.C. at 193, 728 S.E.2d at 44. "Thus, for a court to relax general standing rules, the matter of importance must, in the context of the case, be extricably connected to the public need for court resolution for future guidance." *Id.*; *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341 (internal quotations omitted). This rubric of standing does not apply in this action.

First, Plaintiff Howe failed to plead this basis for standing. The Complaint does *not* allege this is a matter of overriding public importance or that future guidance is needed from our courts. Therefore, this failure to plead the public importance exception precludes Plaintiff Howe from establishing standing on this basis. *See Preston*, 398 S.C. at 192, 728 S.E.2d at 43; *Trask*, 349 S.C. at 529 n.1, 563 S.E.2d at 663 (holding that a plaintiff must *plead in the complaint* one of these grounds for standing in order to maintain his action).

Second, Plaintiffs' actions establish that this matter contains no overriding public importance. Plaintiffs were aware of the passage of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, very shortly after Act 130 became effective. Plaintiff Howe testified that:

Q. ...When did you first learn that Representative Limehouse, in his capacity as chairman of the Charleston delegation, had been placed on the Aviation Commission?

A. You know, that's really hard. Probably very soon after the, what was it, '08 legislation was passed. And then, of course, he would have to get on there as being chairman of the Charleston County legislative delegation. So it would have been -I pay attention, and it would have been not that long after he actually took that position that I would have been aware of it. Because again, I pay attention.

Q. So were you aware, given the fact that you pay attention that Act 130 of 2007, when it was passed?

A. When it was passed?

Q. Not specifically the date it was passed, but did you have awareness that they had passed Act 130 of 2007?

A. Yeah.

See Depo. Trans. of Howe p. 19, line 25 through p. 20, line 21, attached hereto as

Exhibit G. He continued:

Q: I think you answered that you became aware of the act . . . sometime after it was passed"

A: I don't know exactly.

Q: But soon thereafter?

A: I'm thinking it was probably soon thereafter just because my usual way of keeping abreast.

See Depo. Trans. of Howe p. 32, line 8-16, attached hereto as Exhibit H.

Moreover, the Foundation first challenged the constitutionality of Act 130 in 2008. Despite this knowledge, Plaintiffs chose to not launch this second action contesting the constitutionality of Act 130 for nearly five years after the first challenge. The Plaintiffs testified that:

Q: So did you take any action from when the act was passed in 2007 before you became a good citizen of Charleston County and signed up in 2012?

A: Did I take any action?

Q: That's right.

A: No.

Q: Okay. Why not, if this issue bothered you?

A: As I understood it these same issues were already being or just had been brought to the judicial system of South Carolina.

See Depo. Trans. of Howe p. 57, line 7-16, attached hereto as Exhibit I. Also:

Q. Okay. Is there any reason why you haven't challenged or brought a suit to challenge Act 130 of 2007 since that decision?

A. The opportunity didn't really present itself. I didn't receive the -- you know, the personal motivation until it was brought earlier this year. I'm a pretty busy guy, Mr. Hitchcock, and undertakings like this can only be done at certain times.

Q. Okay. But, I mean -- and that would be -- you were -- you were too busy to bring -- you're saying that you were too busy to bring the lawsuit for the past four years since that decision was rendered?

A. Among, I'm sure, other reason.

See Depo. Trans. of Howe p. 85, line 20 through p. 86, line 9, attached hereto as Exhibit J.

This rationale and delay in taking action illustrates how Plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance or some immediate need for future guidance. Therefore, standing cannot be acquired on this basis, and summary judgment is proper.

II. Summary judgment should be granted because the doctrine of laches bars Plaintiffs' action.

In addition to their lack of standing, Plaintiffs have slumbered on their rights and have forfeited any opportunity to bring this second challenge to Act 130. Allowing this matter to continue or granting summary judgment to Plaintiffs after they failed to bring this action for over four years would disadvantage Speaker Harrell and other defendants and cause them to suffer injury and prejudice. As a result, this Court should find the doctrine of laches bars this action and grant Speaker Harrell's motion for judgment on the pleadings.

Laches follows the equitable maxim: "Equity aids the vigilant, not those who slumber on their rights." *Hemingway v. Mention*, 228 S.C. 211, 89 S.E.2d 369 (1955). Laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). Thus, the predicate for laches is an unreasonable and unexplained delay. "[T]o establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches."

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009) (quoting *Hallums*, 296 S.C. at 198, 371 S.E.2d at 527). In determining whether laches bars a claim, the court has broad discretion and should consider the circumstances of the case, "including whether the delay has worked injury, prejudice, or disadvantage to the other party." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 422, 434 S.E.2d 279, 281 (1993).

The above precedent leads to the inescapable conclusion that laches bars the Plaintiffs' action. The Foundation first unsuccessfully challenged Act 130 in the 2008 action before the Supreme Court. It did not launch this action for **nearly five years** from that opinion. Plaintiff Howe, for whatever reason, unreasonably decided to not bring this action until **over five years** after Act 130 became effective and **over four-plus years** after the Foundation's first challenge to the act. *See* Deposition testimony set forth fully in Section 1.b.4, *supra*.

Therefore, for that unreasonably long amount of time, Plaintiffs did not believe an immediate challenge to Act 130 was required or needed to protect the public interest or for future guidance. Plaintiffs now ignore this fact and ask this Court to rule in this action despite slumbering on their rights for over four-plus years. Allowing this matter to proceed would subject Speaker Harrell and the other defendants to the disadvantage of having to litigate the constitutionality of Act 130 a second time. This would prejudice Speaker Harrell by having to defend a constant barrage of lawsuits questioning Act 130. This Court should find that the doctrine of laches bars this action and reject that Plaintiffs' request to rule on Act 130. Therefore, this Court should grant summary judgment and dismiss Plaintiffs' complaint in its entirety.

Conclusion

Based on the foregoing, this Court should find Plaintiffs lack the standing needed to maintain this action, grant Speaker Harrell's motion for summary judgment, and dismiss the complaint in its entirety.

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By: 

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capacity as Speaker of the South Carolina House of
Representatives

Columbia, South Carolina

February 13, 2013

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1 I realized, well, it's not too late. If it's
2 unconstitutional, it needs to be addressed. And if
3 it's sooner or later or in between, it doesn't
4 matter. It simply needs to be addressed. And so
5 I, I guess in some way, took some initiative.

6 Q. What is the goal? What are you aiming
7 for with your lawsuit, assuming you get the relief
8 you want? What is the end game for you?

9 MR. CARPENTER: Objection; calls for a
10 legal conclusion.

11 THE WITNESS: I want the state
12 Constitution to be followed by whoever you are. If
13 you're the governor, if you're the speaker of the
14 house, if -- whoever you are. If you're not
15 following the Constitution, then please don't take
16 your oath before you take office.

17 BY MR. ANZELMO:

18 Q. Do you want all actions that the board
19 has taken since 2007 voided, reversed or set aside
20 in any manner?

21 MR. CARPENTER: Objection.

22 THE WITNESS: I don't know.

23 BY MR. ANZELMO:

24 Q. How specifically were you injured or
25 damaged by the passage of Act 130 of 2007?

1 MR. CARPENTER: Objection.

2 THE WITNESS: It severely injures my
3 sense of right and wrong, fairness, concept of
4 everybody going by the same rules, the proper
5 reverence to something that would be denoted as a,
6 quote, Constitution. So yeah, in my life's desire
7 to promote good government, it concerned me
8 severely.

9 MR. ANZELMO: That's actually all I
10 think I have right now. I might follow up with one
11 or two after Rob goes.

12 MR. TYSON: Mr. Howe, how are you doing
13 today?

14 THE WITNESS: I'm doing great. Nice to
15 meet you today.

16 MR. TYSON: I'm Rob Tyson from Sowell
17 Gray, and Alexis Lindsay is also here. We
18 represent Representative Limehouse.

19 EXAMINATION

20 BY MR. TYSON:

21 Q. Let me just follow up on a question
22 that Michael just asked. I didn't quite understand
23 the answer. Or let me ask it in a different way.
24 Have you been harmed by Act 130?

25 MR. CARPENTER: Objection.

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1 THE WITNESS: In my estimation, yeah.

2 BY MR. TYSON:

3 Q. And I thought that's what you said.

4 And you said -- can you explain to me again how
5 you've been harmed?

6 A. I feel --

7 Q. How you have been harmed? Let me make
8 sure.

9 A. The convictions I hold personally in
10 terms of my views and ideals of right and wrong
11 have been damaged. There's a -- the Constitution
12 speaks to a lot of these issues included in the
13 lawsuit. Clearly, it does.

14 And because you have the majority of a
15 legislative body and because maybe you hold the
16 highest position within a legislative body and
17 because you also hold the majority on, say, a
18 county legislative delegation doesn't give you the
19 right to ignore or violate constitutions or
20 statutes and I get to stand up and say so.

21 Q. Well, so you just have a disagreement
22 with the way the act was enacted.

23 A. And the effect --

24 MR. CARPENTER: Objection.

25 THE WITNESS: -- Mr. Tyson.

1 I'm trying to understand just very simple. I'm
2 from Mississippi.

3 A. Okay.

4 MR. CARPENTER: We'll speak slowly.
5 How's that?

6 MR. TYSON: Yes.

7 BY MR. TYSON:

8 Q. The individual harm to you, as I
9 understand your answer, is you believe it's
10 constitutionally suspect, and there are two members
11 that are serving on there that shouldn't be. And
12 that's your answer to how you've been harmed?

13 A. Yes, sir.

14 Q. Okay.

15 A. And by the way, the vice-chairman of
16 the legislative delegation, state Senator Chip
17 Campsen agrees with me.

18 Q. And Michael asked you another question.
19 This was, I thought, a very straightforward
20 question. What relief do you want?

21 A. The Constitution to be followed and
22 those -- those two ex officio members off.

23 Q. Okay. But not to have any actions --
24 if your interpretation of the Constitution is
25 correct and those members shouldn't be on there,

1 Q. Okay. Were you aware that the Public
2 Interest Foundation brought a suit in the original
3 jurisdiction of the Supreme Court in 2007,
4 challenging the composition or the -- challenging
5 the Constitutionality of Act 130 of 2007?

6 A. If I'm not mistaken, that may be the
7 very previous action that I referred to that ended
8 up not having had all the issues addressed and
9 disposed of. So I think that's the previous action
10 where I received an understanding that this had
11 been raised before and not finally disposed of.

12 Q. And did you -- did you also understand
13 that the court reached a decision, denying -- as
14 part of their decision in that case, they denied
15 standing to the Public Interest Foundation, that
16 that decision was in June -- was rendered in June
17 of 2008?

18 A. Mr. Hitchcock, I believe that someone
19 brought that to my attention.

20 Q. Okay. Is there any reason why you
21 haven't challenged or brought a suit to challenge
22 Act 130 of 2007 since that decision?

23 A. The opportunity didn't really present
24 itself. I didn't receive the -- you know, the
25 personal motivation until it was brought earlier

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1 A. Yes.

2 Q. Okay. And then you had a conversation
3 with him in February of 2012 concerning --

4 A. With reference to the first
5 conversation, yes.

6 Q. Okay. And the first -- and I guess
7 what -- I'm kind of following back up on Michael's
8 questions of how you came to be involved in this
9 lawsuit. And so you had a conversation with
10 Mr. Sloan in 2012; right?

11 A. I had a conversation with Mr. Sloan,
12 and I was trying to pin it down to February of
13 2012. If you're suggesting that it was as a
14 consequence of that conversation that I became
15 involved in this lawsuit, that would be incorrect.

16 Q. No, I'm not trying to suggest anything.
17 I'm just trying to ask: How did you become
18 involved in this lawsuit? How did you and
19 Mr. Sloan get together on the same page, is what
20 I'm trying to ask.

21 A. It became known to me that his
22 foundation was intending to bring this lawsuit, and
23 it was desired that in addition to them as a
24 plaintiff, that for certain legal reasons it
25 perhaps would be helpful if a citizen of Charleston

1 County also be a plaintiff in this lawsuit to
 2 possibly satisfy certain legal considerations. And
 3 when I heard that perhaps an individual citizen was
 4 needed, I said, you got me.

5 Q. When you said a second ago it became
 6 known that a lawsuit might be pending --

7 A. Brought.

8 Q. Brought. How did you hear that and
 9 from whom did you hear?

10 A. It may have been David Jennings the
 11 first time. It may have been -- I don't know if it
 12 was Mr. Sloan. I don't know if it was -- I'm not
 13 going to talk about what I talked about with
 14 Carpenter.

15 THE WITNESS: Ain't waiving any
 16 privilege over here, Jim.

17 MR. CARPENTER: No, sir.

18 THE WITNESS: Conversations with one of
 19 those and the fact that the -- reminding me of the
 20 addition of those two members from the '07-'08
 21 legislation, reminding me of that. And then a
 22 discussion about some of the legal
 23 issues/constitutional issues that can arise from
 24 that, and I'm a lawyer and a proponent of good
 25 government. And it struck me. So I said, yeah,

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STATE OF SOUTH CAROLINA

IN THE CIRCUIT COURT

COUNTY OF CHARLESTON

CASE NO: 2012-CP-10-04969

South Carolina Public Interest Foundation
and Waring S. Howe, Jr., individually, and
on behalf of all others similarly situated,
Plaintiffs,

v.

Robert W. Harrell, Jr., in his official
capacity as Speaker of the S.C. House of
Representatives, Ken Ard in his official
capacity as President of the S.C. Senate,
Representative Harry B. "Chip" Lime-
house III, Senator Glenn McConnell, and
The State of South Carolina,
Defendants.

**Plaintiffs' Responses to Speaker
Harrell's Second Set of
Interrogatories to Plaintiffs**

INTERROGATORIES

1. Is Plaintiff Howe incurring legal fees in conjunction with his role as plaintiff in this action?

RESPONSE: Yes.

2. Please identify by name the person, entity, organization, foundation, board, or other corporate structure that is paying those fees on behalf of Plaintiff Howe.

RESPONSE: The fees have been paid from a joint bank account in the name of Edward D Sloan, Jr.; as trustee for the South Carolina Public Interest Foundation and Waring S Howe, Jr. The Foundation has made all deposits to this joint bank account.

February 12, 2013

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read "J. Carpenter", with a large, sweeping flourish at the end.

James G. Carpenter, S.C. Bar No. 1136
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Attorney for the Plaintiffs

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1 prior to bringing the [REDACTED] you ever talk
2 to him, go to conventions related to this issue,
3 anything of that nature?

4 A. Understand that I'm an attorney, and I
5 haven't heard Mr. Carpenter object to this, but my
6 sense is we're getting pretty close to
7 attorney-client matters. And I'm squirming in my
8 seat as to whether I should answer that or not, and
9 my radar says not to.

10 MR. CARPENTER: I'll throw in an
11 objection. How's that?

12 MR. ANZELMO: Are you instructing him
13 not to answer based on privilege?

14 MR. CARPENTER: Yes, attorney-client.

15 MR. TYSON: I'm sorry. What was the
16 question again?

17 (The Court Reporter read the question
18 commencing on Page 18, Line 25.)

19 THE WITNESS: See the part about
20 talking to him?

21 MR. TYSON: I missed that.

22 BY MR. ANZELMO:

23 Q. I'll ask it this way: Well, we'll come
24 back to it.

25 When did you first learn that

1 Representative Limehouse, in his capacity as
2 chairman of the Charleston delegation, had been
3 placed on the Aviation Commission?

4 A. You know, that's really hard. Probably
5 very soon after the, what was it, '08 legislation.
6 was passed. And then, of course, he would have to
7 get on there as being chairman of the Charleston
8 County legislative delegation.

9 So it would have been -- I pay
10 attention, and it would have been not that long
11 after he actually took that position that I would
12 have been aware of it. Because again, I pay
13 attention.

14 Q. So were you aware, given the fact that
15 you pay attention, that Act 130 of 2007, when it
16 was passed?

17 A. When it was passed?

18 Q. Not specifically the date it was
19 passed, but did you have awareness that they had
20 passed Act 130 of 2007?

21 A. Yeah. And what probably rung my bell
22 about it was the fact that the membership increased
23 by two. And I have my own thoughts as to too many
24 cooks spoiling the broth and how maybe the size
25 over there is making things more unwieldy rather

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1 Q. Mr. Howe, then let me just -- last
2 point on this: If you determine what your answer
3 is to what relief you're seeking in the complaint,
4 will you please provide that to your attorney,
5 Mr. Carpenter, who then can provide that to us?

6 A. I certainly will.

7 Q. Okay. Following up on an earlier
8 question, I think you answered that you became
9 aware of act -- the act in -- sometime after it was
10 passed. You didn't have the time frame; is that
11 correct?

12 A. I don't know exactly.

13 Q. But soon thereafter?

14 A. I'm thinking it was probably soon
15 thereafter just because my usual way of keeping
16 abreast.

17 Q. And what did you do when you found out
18 about it soon thereafter?

19 A. Thought about the wrongfulness of it
20 and how the size -- I thought to myself about the
21 size of it getting to perhaps an unwieldy point and
22 how that served to change things and shaken up a
23 good bit since my days of serving on the Aviation
24 Authority. So I probably contemplated just how
25 different things would become as a result and

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1 okay. And Sloan's ~~cause~~ was going to be a
2 plaintiff. And again, it was thought that perhaps
3 to some degree it could be beneficial to also have
4 a named citizen of Charleston County, and I signed
5 up.

6 BY MR. TYSON:

7 Q. So did you take any action from when
8 the act was passed in 2007 before you became a good
9 citizen of Charleston County and signed up in 2012?

10 A. Did I take any action?

11 Q. That's right.

12 A. No.

13 Q. Okay. Why not, if this bothered you?

14 A. As I understood it, these same issues
15 were already being or just had been brought to the
16 judicial system of South Carolina. And within that
17 action some matters were decided by the state
18 Supreme Court.

19 These issues were, in some fashion,
20 kind of set aside and not judicially disposed of.
21 Therefore, not resolved. And it was -- there were
22 still open questions. And since they were still
23 open, it was time for them to get addressed anew by
24 the judicial system.

25 And you probably know that the first

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1 Q. Okay. Were you aware that the Public
2 Interest Foundation brought a suit in the original
3 jurisdiction of the Supreme Court in 2007,
4 challenging the composition or the -- challenging
5 the Constitutionality of Act 130 of 2007?

6 A. If I'm not mistaken, that may be the
7 very previous action that I referred to that ended
8 up not having had all the issues addressed and
9 disposed of. So I think that's the previous action
10 where I received an understanding that this had
11 been raised before and not finally disposed of..

12 Q. And did you -- did you also understand
13 that the court reached a decision, denying -- as
14 part of their decision in that case, they denied
15 standing to the Public Interest Foundation, that
16 that decision was in June -- was rendered in June
17 of 2008?

18 A. Mr. Hitchcock, I believe that someone
19 brought that to my attention.

20 Q. Okay. Is there any reason why you
21 haven't challenged or brought a suit to challenge
22 Act 130 of 2007 since that decision?

23 A. The opportunity didn't really present
24 itself. I didn't receive the -- you know, the
25 personal motivation until it was brought earlier

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1 this year. I'm a pretty busy guy, Mr. Hitchcock,
2 and undertakings like this can only be done at
3 certain times.

4 Q. Okay. But, I mean -- and that would
5 be -- you were -- you were too busy to bring --
6 you're saying that you were too busy to bring the
7 lawsuit for the past four years since that decision
8 was rendered?

9 A. Among, I'm sure, other reasons. If you
10 knew how busy I was, I'm sometimes hesitant to take
11 on new missions and new matters, and I try to --
12 because my life can be so hectic, I do try to
13 manage it and streamline in certain areas. That
14 would -- you know, that would have been one more
15 bundle of responsibilities, and it just seemed to
16 be better taken on when it was.

17 Q. Well, what particularly in regards to
18 your schedule allows you to take this on now versus
19 four years ago?

20 A. Well, now you're getting into kind of
21 some personal areas. Do you want to know like
22 my --

23 Q. You're saying that you were too busy
24 for the past four years to bring the lawsuit but
25 now you can, and I'm just wondering if -- I mean,

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

South Carolina Public Interest
Foundation and Waring S. Howe, Jr.,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

Robert W. Harrell, Jr., in his official
capacity as Speaker of the South
Carolina House of Representatives, Ken
Ard, in his official capacity as President
of the South Carolina Senate,
Representative Harry B. "Chip"
Limehouse III, Senator Glenn
McConnell, and the State of South
Carolina,

Defendants.)

Civil Action No. 2012-CP-10-04969

**Memorandum in Opposition to
Plaintiffs' Motion
for Summary Judgment**

Defendant Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives ("Speaker Harrell"), submits this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. As set forth more fully below, this Court should deny Plaintiffs' motion because:

1. As set forth in Speaker Harrell's Motion for Summary Judgment, all of Plaintiffs' claims should be dismissed for lack of standing;
2. Plaintiffs' arguments are unsupported by the law and record evidence; and
3. Plaintiffs have acted in a dilatory manner during the course of discovery, which has prevented the record of this case from being fully developed, and to the extent that it has been developed, disputed issues of fact remain as to each of Plaintiffs' claims.

LEGAL STANDARD

Summary judgment is only appropriate if the pleadings and other supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (Ct. App. 2001). In determining whether to grant summary judgment, a court must view the evidence and its reasonable inferences in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

ARGUMENT

As an initial matter, and as set forth in Speaker Harrell's motion for summary judgment, Plaintiffs' lawsuit should be dismissed, with prejudice, because Plaintiffs lack standing to maintain any of their causes of action. The arguments therein are incorporated herein fully. If the Court grants Speaker Harrell's motion, then it should deny Plaintiffs' motion as moot, and it need not consider any of the arguments set forth below. If the Court does not grant Speaker Harrell's motion, however, it should still deny Plaintiff's motion for the reasons set forth below.

- I. Summary judgment is improper because *Fairfield* does not apply to the 2007 vote, but, even if it did apply, the General Assembly complied with that mandate.

As explained below, the General Assembly properly overrode the Governor's veto of the bill that became Act 130 of 2007. Moreover, Plaintiffs' argument based on *Board of Trustees of the School District of Fairfield County v. State* fails as a matter of

law because (1) *Fairfield* is not retroactive and (2) in any event, the General Assembly complied with the requirements of *Fairfield* when it overrode the Governor's veto. 395 S.C. 276, 718 S.E.2d 210 (2011). Additionally, to the extent Plaintiffs dispute that the General Assembly complied with *Fairfield*, this contested issue of fact should be resolved by the fact finder and not the Court at the summary judgment stage.

a. *Fairfield* does not apply retroactively.

Plaintiffs rely entirely on *Fairfield* to support their argument that the General Assembly violated the constitution in enacting Act 130. Plaintiffs' argument fails, however, because *Fairfield* cannot be applied to retroactively invalidate the substantive law of this State.¹ Under South Carolina jurisprudence, "[t]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Toth v. Square D. Co.*, 298 S.C. 6, 8, 377 S.E. 2d. 584, 585 (1989). "Prospective application is required when liability is created where formerly none existed" and is also utilized in "situations where retroactive relief would have been unfair and inappropriate." *Id.*

In *Fairfield*, the South Carolina Supreme Court determined, for the first time, that article IV, section 21 of the South Carolina Constitution requires two-thirds of a quorum to override a veto. 395 S.C. at 284, 718 S.E. 2d at 214. Although the majority in *Fairfield* relied on *Smith v. Jennings*, the *Smith* case concerned a situation where two-thirds of a quorum had actually voted to override a veto. *Fairfield*, 395

¹ Speaker Harrell also brings to the Court's attention that at a prior hearing in this matter Plaintiffs, through their counsel, admitted that *Fairfield County* only applies prospectively because it created new law. Speaker Harrell will provide the Court with appropriate citations and quotations once he receives the transcript from that hearing.

S.C. at 281 n.1, 718 S.E.2d at 212 n.1. Thus, the *Smith* court was neither presented with, nor did it reach, the question of the constitutional sufficiency of a vote amounting to less than two-thirds of a quorum. Accordingly, *Fairfield* is the first ruling from a South Carolina court on this issue. Moreover, the *Fairfield* court recognized that its holding contradicted the then current practice followed by both houses of the General Assembly in overriding vetoes. *Id.* at 283, 718 S.E.2d at 213. Indeed, as Chief Justice Toal explained, the court's holding did not abide by the General Assembly's "long-standing precedent requiring the affirmative vote of two-thirds of the membership present and *acting upon the matter*, so long as a quorum is present to conduct business." *Id.* at 286, 718 S.E.2d at 215 (C.J. Toal dissenting) (emphasis in original); *see also Id.* at 279, 718 S.E.2d at 211.

Because *Fairfield* changed the manner by which the General Assembly can constitutionally override vetoes, it affects the substantive law of our State. Indeed, if *Fairfield* was applied retroactively, it would both create and destroy many substantive rights by invalidating dozens of laws that our General Assembly enacted before its entry. *See Id.* at 287, 718 S.E.2d at 216; *see also Id.* at 283, 718 S.E.2d at 213 (discussing legislation that would be invalidated if *Fairfield* was applied retroactively). Accordingly, *Fairfield* should only be applied prospectively, and therefore, the Court should not apply it to Act 130, which was enacted four years *before* the Supreme Court decided *Fairfield*. *See Toth*, 298 S.C. at 8, 377 S.E. 2d. at 585.

- b. The House of Representatives complied with *Fairfield* when it enacted Act 130.

This Court does not need to address this issue in light of the fact that *Fairfield* does not apply retroactively. However, Speaker Harrell will address this issue out of an abundance of caution. This Court should reject Plaintiffs' argument because the House of Representatives complied with *Fairfield* in overruling the gubernatorial veto.

Article IV, Section 21 of the South Carolina Constitution provides that if the Governor vetoes a bill or resolution, the bill or resolution is returned with objections to the originating house, and:

If after such reconsideration two-thirds of that house shall agree to pass it, it shall be sent, together with the objections, to the other house, by which it shall be reconsidered, and if approved by two-thirds of that house it shall have the same effect as if it had been signed by the Governor.

S.C. Const. art. IV, § 21 (emphasis added).² The key phrase is the term "agree" as used in the section.³ The *Fairfield* court recognized this issue and framed the issue before it as: "what does the constitutional mandate 'two-thirds of that house shall agree' mean?" *Fairfield*, 395 S.C. at 279, 718 S.E.2d at 211. Ultimately, the Supreme Court held that "the two-thirds mandate in article IV, section 21 of the South Carolina Constitution requires two-thirds of a quorum." *Id.* at 284, 718 S.E.2d at 214. The

² The use of the word "agree" is of paramount importance. The framers of the constitution used the word "vote" in all other sections of the constitution that address legislative action. This section (article IV, section 21) is the only time the framers used "agree" when referencing legislative action. This decision must be given import under our rules of interpretation, in particular the cannon of "expressio unius est exclusio alterius." See Thomas A. Limehouse, Jr., *Blinded by a Bright Line: An analysis of the Fairfield Formula and Its Impact on Existing Laws and Legislative Procedure*, 63 S.C. L. Rev. 819 (2012) (Speaker Harrell incorporates the arguments contained in the article herein as if verbatim).

³ The use of the term "agree" by the framers indicates the intent of the framers to be bound by the well-settled rules of abstentions as agreement to the action taken. See *Moore v. Wilson*, 296 S.C. 326, 372 S.E.2d 360 (1988).

court noted this meant 42 Representatives must agree to override the veto to comply with Article IV, Section 21. *Id.* In simplest terms, this means that two-thirds of a quorum must agree to override the veto in order to meet the constitutional mandate of Article IV, Section 21. The House of Representatives satisfied this *Fairfield* requirement in overriding the gubernatorial veto of Act 130 of 2007.

This is evident with *Fairfield* is read in conjunction and harmonized with prior Supreme Court precedent on legislative actions. The case cannot be read in isolation as advanced by Plaintiffs. When harmonized with the existing precedent of *Moore v. Wilson*, 296 S.C. 326, 372 S.E.2d 360 (1988), one conclusion exists—the House of Representatives complied with the required number of agreeing representatives needed to override a veto per *Fairfield*.

In *Moore*, the Supreme Court was tasked with construing the effect of abstentions on the actions of a legislative delegation's vote. *Moore*, 296 S.C. at 328, 372 S.E.2d at 361-62. In that case, a vote took place to confirm a nominee to a commission. *Id.* Three members voted for confirmation, zero voted to reject confirmation, and thirteen abstained. *Id.* The Supreme Court assumed nine votes were needed for election. *Id.* The question was what effect these abstentions had on the election and could the abstention defeat confirmation. *Id.* The Court held that:

[B]y operation of law, the thirteen abstentions are regarded as acquiescence in, or affirmance of, the three votes cast

Id. at 329, 372 S.E.2d at 361-62 (emphasis added). Thus, the Court held that the nominee was confirmed. *Id.* at 329, 372 S.E.2d at 362. The Court reasoned that such

a holding dovetailed with the general rule that construes an abstention as agreement with the vote. *Id.* The Court reasoned that:

It is well settled in other jurisdictions that a voter who declines to take part in the election process is deemed to have acquiesced in the result.

Id. (emphasis added and internal citations omitted). Moreover, the Court held that “whenever electors are present and do not vote at all they virtually acquiesce in the election made by those who do.” *Id.* (emphasis added and internal quotations omitted). Also, the Court held that abstentions “will be regarded as present for purposes for making a quorum and rendering the legal action taken.” *Id.* Thus, the Court held that “the members who abstained from voting . . . acquiesced in or affirmed the votes actually cast for the nominee.” *Id.* at 330, 372 S.E.2d at 362. In sum, the Supreme Court held that an abstention is equivalent to agreement in the action taken by the members who voted for the action.

As set forth by *Moore*, our Supreme Court holds that abstention is passive agreement in the action taken by the members voting on an action. This precedent establishes that the July 5, 2007 vote to override the veto on Act 130 of 2007 complied with the *Fairfield* pronouncement. Here, 116 members of the House of Representatives were present for the override vote of Act 130 of 2007. See Roll Call vote, House Journal dated Tuesday, July 5, 2007, setting forth 116 members present, attached hereto as Exhibit G. The vote on Act 130 was 12 in favor of veto override and 0 opposed to override. 104 members abstained from the vote. Thus, applying *Moore*, 116 Representatives agreed with the vote to override the veto as required by Article IV, Section 21.

This number far exceeds the *Fairfield* minimum. As a result, the House of Representatives complied with *Fairfield* and the gubernatorial veto was properly overridden. Therefore, this Court should reject Plaintiffs' argument and deny summary judgment.⁴

II. The Constitution specifically authorizes the General Assembly to regulate common carriers, and, therefore, the proscriptions against special legislation do not apply to Act 130.

Plaintiffs' special legislation argument fails because South Carolina's Constitution expressly authorized the General Assembly to enact Act 130. As explained by the supreme court, "[i]t is . . . an accepted principle, well established by our decisions, that the provisions of . . . Section 34 of Article III have no application to statutes which are specifically authorized by other specific provisions of the Constitution." *Ruggles v. Padgett*, 240 S.C. 494, 506, 126 S.E.2d 553, 559 (1962)⁵; see also *Martin v. Condon*, 1996 S.C. LEXIS 219, at *1-2 (S.C. Dec. 9, 1996) ("It is axiomatic that the prohibition against special laws found in article III, § 34(IX), of our constitution does not apply where another constitutional provision specifically authorizes a special law."). In *Ruggles*, the supreme court held that the proscription

⁴ At a minimum, a novel issue exists that precludes summary judgment. See *Shadwell v. Cragie*, 361 S.C. 492, 501-02, 605 S.E.2d 567, 571-72 (Ct. App. 2004) (reversing the trial court's grant of summary judgment where there was a novel issue); *Schmidt v. Courtney*, 357 S.C. 310, 318, 1592 S.E.2d 326, 331 (Ct. App. 2003) ("We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the novel issue involved in this case"). The issue of the affect of abstentions on a gubernatorial veto was not presented to or analyzed by the Supreme Court in *Fairfield*. Thus, summary judgment is improper and the Court finder of fact should address this issue.

⁵ Ignoring this binding opinion from the supreme court, Plaintiffs cite the Governor's veto message and an opinion from the South Carolina Attorney General. However, nether of these "authorities" are binding on this court, and they should be disregarded entirely in light *Ruggles*. See *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560-61, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding on this Court."); *Drummond v. Beasley*, 331 S.C. 559, 564, 503 S.E.2d 455, 458 (1998) ("Governor's veto message . . . does not have the force of law since it is not a legislative act nor an Executive Order.").

against special legislation did not apply to a statute that provided for the establishment and financing of a public sewage disposal system in Berkley County because the statute was authorized by Section 11 of Article VII, which empowers the General Assembly to "make special provisions for municipal government. 240 S.C. at 507, 126 S.E.2d at 559.

Act 130 was specifically authorized by Section 1 of Article IX, which states, "[t]he General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest." S.C. Const., art. IV, § 1. Airplanes and airports are considered common carriers. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 250 (11th ed. 2007) (defining common carrier as "a business or agency that is available to the public for transportation of persons, goods, or messages"); see also *Howell v. City Towing Assoc., Inc.*, 717 S.W.2d 729, 732 (Tex. Ct. App. 1986) ("It has been noted that the definition of common carrier includes railroads, buses, airplanes, taxis, street cars, and other vehicles."). Therefore, because the General Assembly had specific constitutional authority to enact Act 103, Plaintiffs' special legislation arguments fail as matter of law.

Additionally, even if subdivision 9 of Section 34 of Article III did apply to Act 130, Plaintiffs have failed to address the framework that the supreme court has established for determining whether special legislation exists. *Cabiness v. Town of James Island*, 393 S.C. 176, 189, 712 S.E.2d 416, 423 (2011). As explained in *Cabiness*, there are two hurdles that Plaintiffs must overcome to prevail on their special legislation argument:

[T]he first step is to identify the class of persons to whom the legislation applies. . . . If the statute treats all class members equally, then the law is general legislation and permissible. . . . The law must be general both in form and in operation.

If the legislation does not apply uniformly, the second step is to determine the basis for that classification. It is well-settled that the mere fact a statute creates a classification does not render it unconstitutional special legislation. Rather, it is only arbitrary classifications with no reasonable hypothesis to support them that are prohibited. . . . A classification is constitutional "if some intrinsic reason exists why the law should operate upon some and not upon all, or should affect some differently than others," or the special law "best meet [s] the exigencies of a particular situation." Put another way, "[t]he classification must bear some reasonable relation to the object sought to be obtained by the law."

Id.

In their motion, Plaintiffs did not identify the class of persons to whom Act 103 applies, and as discussed below, the identity of that class is a hotly contested issue of fact. Additionally, Plaintiffs have not presented any evidence or argument to establish that the act treats members of the class unequally, and even if it did, Plaintiffs have failed to clear their second hurdle, which is to show that the General Assembly acted without a rational basis. Therefore, because Plaintiffs have not addressed the two-prong *Cabiness* test, and because conducting that test would require the Court to decide disputed issues of fact, the Court should deny Plaintiffs' request for summary judgment on this ground.

III. Act 130 does not constitute "specific county legislation."

While an initial or cursory glance at Act 130 may suggest that it affects only Charleston County, the Charleston International Airport is, in fact, a regional airport

that serves the entire lower portion of South Carolina. As explained by Defendant Limehouse, the Charleston County Aviation manages and operates all airports serving the Charleston Metropolitan Statistical Area, which includes Berkley and Dorchester counties. (Def. Limhouse's Mem. in Opp., Ex. B, Limhouse Aff.) The Director of Airports in Charleston, Susan M. Stevens, explained that in addition to Berkley, Dorchester, and Charleston counties, the Charleston International Airport also serves the entire region with an average of sixty-four daily departures. (Id. at Ex. C, Stevens Aff.) Most importantly, Plaintiff Howe admits that the airport serves areas and populations outside of Charleston County. He testified that:

Q. Does the airport in Charleston serve citizens of the state outside of Charleston County?

A. ...Yea. The answer's yes.

(Howe Dep. p. 71:19-23, attached hereto as Exhibit A). He further admits that the airport directly impacts the economies of Berkley and Dorchester Counties. (Id. at p. 74:16-23 "Q: Does this -- does the Charleston airport have effect on the economies of Berkeley and Dorchester counties as well as Charleston County? A: In my opinion, I would say it does," attached hereto as Exhibit B). Lastly, he admitted that residents of other counties provide funding for the airport, noting:

Q. Do Berkeley and Dorchester County contribute at all to the funding of the airport?

A. The people or the governments, Mr. Smith?

Q. Either.

A. Yes.

(Howe Dep. p. 78:25-p. 79:5, attached hereto as Exhibit C).

Because Act 130 is not directed at a single county, it is not special legislation or single county legislation. Moreover, to the extent Plaintiffs' contest the foregoing evidence, these disputed issues of fact should be decided by the fact finder and not by the Court at the summary judgment stage.

III. Summary judgment is improper because Plaintiffs ignore the applicable test to analyze a separation of powers question under Article I, Section 8.

Although they devote over eight pages of briefing to their separation of powers argument, Plaintiffs wholly failed to address the applicable test for "determining the constitutionality of the membership of a creature of legislative enactment . . . which garner[s] membership from different branches of government." *Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 230, 363 S.E.2d 683 (1987); *see also State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E.2d 406 (1977). As explained in Defendant Limhouse's memorandum in opposition, and adopted herein by Speaker Harrell, Act 130 satisfies the *Tall Tower* test because, *inter alia*, (1) a minority of the Authority's members are legislators (i.e., 2 out of 13); and (2) the legislative members of the Authority facilitate cooperation by providing special knowledge and expertise resulting from their legislative duties. (Def. Limhouse's Mem. in Opp. pp. 6-12.)⁶

Indeed, Plaintiff Howe even admits that the legislative members service in a cooperative effort to provide special knowledge and expertise. He testified that:

A. ...For instance, what's taken place recently with Boeing locating on Aviation Authority property, it would be regarded that the chairman would probably be the lead

⁶ In the interest of judicial economy, Speaker Harrell incorporates by reference the arguments and authorities set forth in pages 6-12 of Defendant Limhouse's memorandum in opposition rather than rearguing those points herein.

person in some of those efforts and communications, discussions, overtures and so forth.

Q. So it was important for the chairman to be involved in business development?

A. It's expected.

Q. Economic development?

A. It's expected, yes.

(Howe Depo. p. 42:9-19, attached hereto as Exhibit D). Also, he testified that:

Q. Would it be fair to say that the direction and the objective of the Authority is to help chart the future of the county and the region?

A. I believe that's one way to characterize it and express it, among many others

Q. And I think you mentioned earlier you tried to bring in new airlines and businesses to the Charleston area. Would you consider those activities as a public purpose?

A. Yes.

(Howe Depo. p. 53:12-21, attached hereto as Exhibit E). Additionally, he admitted that interaction with the legislature was needed to foster economic development:

Q. Do you have any specific knowledge or personal knowledge of whether the members of the Authority interacted with members of the legislature to secure passage of that incentive package?

A. I do not have specific knowledge, but my assumption is pretty safe that that would take place.

Q. Okay. And that was to promote economic development; correct?

A. Yes, sir.

(Howe Depo. p. 60:16-p. 61:1, attached hereto as Exhibit F).

Each of the examples provided by Plaintiff Howe illustrates functions that are traditionally legislative functions, areas of legislative expertise, or require legislative cooperation. Therefore, Plaintiffs' separation of power's argument fails as a matter of law, and their motion for summary judgment should be denied.

III. Legislators that serve on the Authority are not dual office holding because they are serving in an ex officio capacity.

Plaintiffs' dual office argument fails because the legislators that serve on the Authority do so in an ex officio capacity by rendering services that are incidental to their roles in the General Assembly. Indeed, while the South Carolina Constitution prohibits persons from holding "two offices of honor or profit at the same time," S.C. Const. art. VI, § 3,⁷ "[o]ur jurisprudence has a narrow, yet firmly established, exception which provides [that the proscriptions against] 'double or dual office' holding . . . [are] *not applicable to those officers upon whom other duties relating to their respective offices are placed by law.*" *Seagers-Andrews v. JMSC*, 387 S.C. 109, 125, 691 S.E.2d 453, 462 (2010) (emphasis in original). "This exception is commonly referred to as the 'ex officio' or 'incidental duties' exception." *Id.* The exception may be invoked "where there is a constitutional nexus in terms of power and responsibilities between the first office and the 'ex officio' office." *Id.* Thus, "the Legislature may properly engage in the discharge of [non-legislative] functions to the extent, and to the extent only, that their performance is reasonably incidental to the full and effective exercise of its legislative powers." *Spartanburg Cnty. v. Miller*, 135 S.C. 348, 351, 132 S.E.2d 673, 677 (1924).

⁷ See also *id.* at art. III, § 24 and art. XVII, § 1A.

In *Segars-Andrews*, a proper ex officio relationship was found even though the statute did not provide expressly that the legislative members of the commission would serve ex officio. *Id.* at 109, 691 S.E.2d at 462. In the instant case, as stated in Plaintiff Howe's affidavit attached to Plaintiffs' Supreme Court petition for original jurisdiction, Act 130 specifically designates that service on the Authority is not an office of honor and profit. Thus, Plaintiffs have admitted that the General Assembly placed legislators on the Authority to provide services incidental to their legislative responsibilities.

Moreover, as discussed above, the South Carolina Constitution states that "[t]he General Assembly shall provide for appropriate regulation of common carriers." S.C. Const., art. IV, § 1. Because Section 1 of Article IV unequivocally grants the General Assembly the power to regulate common carriers, such as airlines, there is a constitutional nexus in terms of the powers and responsibilities that the legislators have as members of the General Assembly and as members of the Authority. Further, by serving on the Authority, the legislators also work to bring more businesses, jobs, and infrastructure to South Carolina—all of which are goals of the General Assembly. Thus, the services provided by the legislative members of the Authority are "reasonably incidental to the full and effective exercise of their legislative powers." *Segars-Andrews*, 387 S.C. at 127, 691 S.E.2d at 463. Accordingly, because the legislative members serve on the Authority in an ex officio capacity, the Court should reject Plaintiffs' dual office holding argument. *Id.* at 125, 691 S.E.2d at 462 (recognizing that "dual office holding in violation of the constitution is not applicable" when the ex officio exception applies).

Additionally, in *Edwards*, the Court recognized that when legislators serve in an ex officio capacity on committees "to cooperate with the executive branch in action reasonably incidental to their legislative duties," there is no separation of powers violation. 296 S.C. at 83-84; 236 S.E.2d at 409. Indeed, Plaintiffs argument to the contrary fails to recognize that the ex officio exception authorizes a legislator to engage in non-legislative functions where those functions are incidental to the full and effective exercise of legislative powers. See *Miller*, 135 S.C. at 351, 132 S.E.2d at 677.

Finally, Plaintiffs' heavy reliance on *Ashmore v. Greater Greenville Sewer District* is misplaced. First, the *Ashmore* court expressly recognized the validity of the ex officio exception, it just held that the exception did not apply to the facts before it—facts that are not present in this lawsuit. 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) ("[T]he present adjudication will not affect the state of the law with respect to ex officio officeholding as it is recognized in the law of this and other jurisdictions."). Second, and importantly to the Act in question here, the *Ashmore* court considered a situation similar to the one before the court and stated that it did not violate the separation of powers doctrine or the proscription against dual office holding:

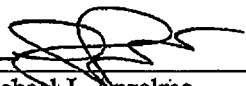
[O]bservation may be made with respect to ex officio members upon a governing board, commission or the like of an agency or institution in which the unit of government of the officer has only a part of joint ownership or management. In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective officers have reasonable relation to their functions ex officio.

Id. (emphasis added). Therefore, *Ashmore* actually supports Speaker Harrell's position, not Plaintiffs. Accordingly, and for the reasons set forth above, Plaintiffs' request for summary judgment on this claim should be denied.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Speaker Harrell's motion for summary judgment, Plaintiffs' motion should be denied, and their claims should be dismissed, with prejudice, for lack of standing.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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Attorneys for Robert W. Harrell, in his official
capacity as Speaker of the South Carolina House of
Representatives

Columbia, South Carolina

February 13, 2013

EXHIBIT

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1 whatever fashion the judicial system would,
2 hopefully along the lines of plaintiff's sentiments
3 expressed in the complaint.

4 Q. What is the usual size criteria by
5 which airports are ranked as to size? Is it
6 passage of boardings and --

7 A. Enplanements.

8 Q. Enplanements?

9 A. How many people ride the airlines which
10 serve their airports.

11 Q. Okay.

12 A. Atlanta is No. 1, I think Chicago is
13 No. 2, maybe LA 3, maybe Dallas 4. Yeah,
14 enplanements.

15 Q. How does the Charleston airport rank
16 within the state as to size, using that criteria?

17 A. I'm rather positive it's No. 1. And,
18 you know, tourism has a lot to do with that.

19 Q. Does the airport in Charleston serve
20 citizens of the state outside of Charleston County?

21 A. You don't have to show your residence
22 address to get on a plane in Charleston. Yeah.

23 The answer's yes.

24 Q. Do a considerable -- would you say a
25 considerable number of people using the Charleston

1 MR. CARPENTER: Objection.

2 MR. SMITH: What's the objection?

3 THE WITNESS: To form.

4 MR. CARPENTER: Well, do you want an
5 explanation? Do you want a speaking objection?

6 MR. SMITH: Well, I just didn't
7 understand what the objection was. If you want to
8 just put it on the record as an objection, you can
9 do that, but go ahead.

10 MR. CARPENTER: Well, it calls for
11 speculation, he's not qualified as an expert, it
12 doesn't call for facts, it calls for opinion.

13 BY MR. SMITH:

14 Q. Okay. Let me state the question, and
15 then answer it to the extent that you can.

16 Does this -- does the Charleston
17 airport have effect on the economies of Berkeley
18 and Dorchester counties as well as Charleston
19 County?

20 MR. CARPENTER: Same objection.

21 THE WITNESS: In my opinion, I would
22 say it does. And I could not venture any statement
23 that would go to the degree.

24 BY MR. SMITH:

25 Q. Okay. And is it the airport located

1 this -- my personal position and my personal
2 belief. I have strong legal objections on other
3 bases than it being just evidence or exhibition of
4 special legislation.

5 But to answer your question, yeah, I
6 would have a personal position as to it not being
7 healthy legislation.

8 BY MR. SMITH:

9 Q. And why is that? Why do you not think
10 it's healthy?

11 A. One thing: I believe, with my
12 experience in Aviation Authority, that in terms of
13 membership, more is not necessarily better. And I
14 think that its size is getting of such that there
15 could be some unwieldiness with too many cooks in
16 that kitchen.

17 And also with the particular nature of
18 these additional members as I -- in response to
19 Mr. Tyson's questions about maybe legislators have
20 some political side to them that perhaps they have
21 difficulty managing in all contexts, that with --
22 so the ilk of these particular additional members
23 would concern me more than if they were not as
24 political by nature.

25 Q. Do Berkeley and Dorchester County

1 contribute at all to the funding of the airport?

2 A. The people or the governments,
3 Mr. Smith?

4 Q. Either.

5 A. Yes.

6 Q. In what way?

7 A. When you use it, when you fly through
8 Charleston International you pay a passenger
9 facility charge included in their ticket. If you
10 buy a sandwich, it goes to the revenue of that
11 concessionaire, who I believe we get a percentage
12 of as well as rent. At least that's how it
13 operated in my day.

14 So citizens of Berkeley County who use
15 the airport would inherently contribute to its
16 operation by what they pay for when they go through
17 there.

18 Q. Is there any appropriation from
19 Berkeley or Dorchester County to the airport to
20 assist in the funding of it?

21 A. I'm pretty sure not.

22 Q. Okay. Is there any special charge
23 levied on the citizens of Berkeley or Dorchester
24 County to use the airport beyond just the fact that
25 they buy sandwiches and pay the same charges as

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1 And then also to help things in terms
2 of -- I guess it's in the name of economic
3 development, is also -- would be like the lead
4 person when we paid calls on travel agencies and
5 tourism bureaus around the United States and in
6 Europe and if there were any other, say, overtures
7 that we would choose to make in the name of
8 business development.

9 For instance, what's taken place
10 recently with Boeing locating on Aviation Authority
11 property, it would be regarded that the chairman
12 would probably be the lead person in some of those
13 efforts and communications, discussions, overtures
14 and so forth.

15 Q. So it was important for the chairman to
16 be involved in business development?

17 A. It's expected.

18 Q. Economic development?

19 A. It's expected, yes.

20 Q. And it was for you; correct?

21 A. I did my best. You know, whatever
22 opportunities. I felt derelict if I didn't address
23 them.

24 Q. How did you become chair?

25 A. It's a vote within the composition of

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1 MR. CARPENTER: Objection.

2 THE WITNESS: I don't know. Isn't it
3 that bit about the two-year session and what year
4 we're in and all that business and whether it has
5 to be reintroduced or whether it's already in the
6 hopper? I mean, you legislative government cats
7 know that better than I.

8 BY MR. TYSON:

9 Q. Okay.

10 A. Although I used to work on the state
11 Senate.

12 Q. Would it be fair to say that the
13 direction and the objective of the Authority is to
14 help chart the future of the county and the region?

15 A. I believe that's one way to
16 characterize it and express it, among many others.

17 Q. And I think you mentioned earlier you
18 tried to bring in new airlines and businesses to
19 the Charleston area. Would you consider those
20 activities as a public purpose?

21 A. Yes.

22 Q. Okay. All right. I'm going to move
23 forward a little bit kind of to this lawsuit, and
24 Michael asked you some questions about your
25 relationship with Mr. Sloan, and you said you had

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1 A. I would be sure they do.

2 Q. Are you talking about just the two
3 legislators or the other members of the Authority?

4 A. Do other members of the Authority at
5 times have discussion about the Authority with
6 other legislators? Okay. That -- I'm assuming
7 yes.

8 Q. All right. What I was trying to go
9 to -- let's say take Boeing; right?

10 A. Yes.

11 Q. And we know Boeing got -- there was a
12 financial incentive package that was granted by
13 the -- or approved by the General Assembly;
14 correct?

15 A. Yes, sir.

16 Q. Do you have any specific knowledge or
17 personal knowledge of whether the members of the
18 Authority interacted with members of the
19 legislature to secure passage of that incentive
20 package?

21 A. I do not have specific knowledge, but
22 my assumption is pretty safe that that would take
23 place.

24 Q. Okay. And that was to promote economic
25 development; correct?

1 A. Yes, sir.

2 Q. Okay. I'm going to say this question
3 with the understanding that I probably don't have a
4 full understanding of the Charleston politics and
5 the political situation, okay, of how funding is
6 going on right now. I know it's a big political
7 issue on funding 526 and all of the areas. But
8 what are options -- can you help describe some of
9 the options to fund the roads and/or interchanges
10 surrounding the Airport Authority?

11 A. Well, whatever my capacity is to know
12 about these things. There would possibly be an
13 application to the state infrastructure bank is
14 one.

15 Perhaps like we did on Aviation
16 Authority oftentimes. If it was to the betterment
17 of the operations, you can seek some FAA grant
18 money. And we've been pretty fortunate about
19 receiving that in a number of ways, whether it be
20 for improvements on the taxiways and such.
21 Likewise, I guess, some state appropriations from
22 budget items in the state budget.

23 I guess in some instances, Mr. Tyson,
24 if it can work out and it does in other contexts,
25 if you get some kind of arrangement with a kind of

South Carolina General Assembly
117th Session, 2007-2008
Journal of the House of Representatives

Tuesday, June 5, 2007
(Statewide Session)



~~Indicates Matter Stricken~~
Indicates New Matter

The House assembled at 12:00 noon.
Deliberations were opened with prayer by Rev. Charles E. Seastrunk, Jr., as follows:

Our thought for today is from Deuteronomy 26:11: "Celebrate with all the bounty that the Lord your God has given to you and to your house."

Let us pray. Generous provider, forgive us when we lose perspective. Teach us to see Your presence and provision in all circumstances. We give thanks for Your hand in our lives. May these Representatives discern what is good and pleasing to You and the people whom they serve. Bless our Nation, President, State, Governor, Speaker, staff and all who serve in government and private enterprise. Protect our defenders of freedom at home and abroad as they protect us. In Your name, we pray. Amen.

Pursuant to Rule 6.3, the House of Representatives was led in the Pledge of Allegiance to the Flag of the United States of America by the SPEAKER.

After corrections to the Journal of the proceedings of Friday, the SPEAKER ordered it confirmed.

MOTION ADOPTED

Rep. HERBKERSMAN moved that when the House adjourns, it adjourn in memory of Douglas E. Stetson of Hilton Head, which was agreed to.

REGULATION RECEIVED

The following was received and referred to the appropriate committee for consideration:

Document No. 3122
Agency: Department of Natural Resources
Statutory Authority: 1976 Code Sections 50-11-2200 and 50-11-2210
Wildlife Management Area Regulations
Received by Speaker of the House of Representatives
June 5, 2007
Referred to Agriculture, Natural Resources and Environmental Affairs Committee
Legislative Review Expiration May 4, 2008

MESSAGE FROM THE SENATE

The following was received:

Columbia, S.C., May 31, 2007
Mr. Speaker and Members of the House:

Funderburk, Gambrell, Govan, Gullick, Hagood, Haley, Hamilton, Hardwick, Harrell, Harrison, Hart, Harvin, Haskins, Hayes, Herbkersman, Hinson, Hiott, Hodges, Hosey, Howard, Huggins, Jefferson, Jennings, Kelly, Kennedy, Kirsh, Knight, Leach, Limehouse, Littlejohn, Loftis, Lowe, Lucas, Mack, Mahaffey, McLeod, Merrill, Miller, Mitchell, Moody-Lawrence, Moss, Mulvaney, J. M. Neal, Neilson, Ott, Owens, Parks, Perry, Phillips, Pinson, E. H. Pitts, M. A. Pitts, Rice, Rutherford, Sandifer, Scarborough, Scott, Sellers, Shoopman, Simrill, Skelton, D. C. Smith, F. N. Smith, G. M. Smith, G. R. Smith, J. E. Smith, J. R. Smith, W. D. Smith, Spires, Stavrinakis, Stewart, Talley, Taylor, Thompson, Toole, Umphlett, Vick, Viers, Walker, Weeks, Whipper, White, Whitmire, Williams, Witherspoon and Young: A CONCURRENT RESOLUTION TO EXTEND A WARM WELCOME TO HIS EXCELLENCY ABDULSALAM ABUBAKAR, FORMER PRESIDENT OF NIGERIA, TO THE STATE OF SOUTH CAROLINA AS HE SPEAKS AT COLUMBIA'S BENEDICT COLLEGE, AND TO HONOR HIM FOR HIS CONTRIBUTIONS TO ESTABLISHING A DEMOCRATICALLY ELECTED GOVERNMENT IN NIGERIA.

The Concurrent Resolution was agreed to and ordered sent to the Senate.

HOUSE RESOLUTION

The following was introduced:

H. 4221 (Word version) -- Rep. Ceips: A HOUSE RESOLUTION TO RECOGNIZE AND CONGRATULATE JOSEPH EDWARD ALLEN OF BEAUFORT COUNTY ON THE OCCASION OF HIS RETIREMENT AFTER A LONG AND DISTINGUISHED CAREER.

The Resolution was adopted.

ROLL CALL

The roll call of the House of Representatives was taken resulting as follows:

Alexander	Allen	Anthony
Bales	Ballentine	Bannister
Barfield	Battle	Bedingfield
Bingham	Bowen	Bowers
Brady	Branham	Brantley
Breeland	G. Brown	R. Brown
Cato	Ceips	Chalk
Chellis	Clemmons	Clyburn
Cooper	Crawford	Dantzler
Davenport	Delleney	Frye
Funderburk	Gambrell	Gullick
Hagood	Haley	Hamilton
Hardwick	Harrell	Hart
Harvin	Haskins	Hayes
Herbkersman	Hinson	Hiott
Hodges	Hosey	Howard
Huggins	Jefferson	Jennings
Kelly	Kennedy	Kirsh
Leach	Limehouse	Loftis
Lowe	Lucas	Mack
McLeod	Merrill	Miller
Mitchell	Moss	Mulvaney
J. H. Neal	J. M. Neal	Neilson
Ott	Owens	Parks

Perry
M. A. Pitts
Sandifer
Sellers
Skelton
G. R. Smith
Spires
Taylor
Umphlett
Walker
Whitmire
Young

Pinson
Rice
Scarborough
Shoopman
D. C. Smith
J. R. Smith
Stavrinakis
Thompson
Vick
Weeks
Williams

E. H. Pitts
Rutherford
Scott
Simrill
G. M. Smith
W. D. Smith
Talley
Toole
Viers
White
Witherspoon

STATEMENT OF ATTENDANCE

I came in after the roll call and was present for the Session on Tuesday, June 5.

Paul Agnew
Bill Cotty
James Harrison
Jackson "Seth" Whipper
Jerry Govan

Gilda Cobb-Hunter
Tracy Edge
Patsy Knight
Carl Anderson
Fletcher Smith

Total Present--116

LEAVE OF ABSENCE

The SPEAKER granted Rep. LITTLEJOHN a leave of absence for the week.

LEAVE OF ABSENCE

The SPEAKER granted Rep. MAHAFFEY a leave of absence for the week due to medical reasons.

LEAVE OF ABSENCE

The SPEAKER granted Rep. COLEMAN a leave of absence for the week.

LEAVE OF ABSENCE

The SPEAKER granted Rep. MOODY-LAWRENCE a leave of absence for the week due to illness.

LEAVE OF ABSENCE

The SPEAKER granted Rep. PHILLIPS a leave of absence for the week due to illness.

LEAVE OF ABSENCE

The SPEAKER granted Rep. DUNCAN a leave of absence for the day due to business reasons.

LEAVE OF ABSENCE

The SPEAKER granted Rep. STEWART a leave of absence for the day.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on
behalf of all others similarly situated, Petitioners,

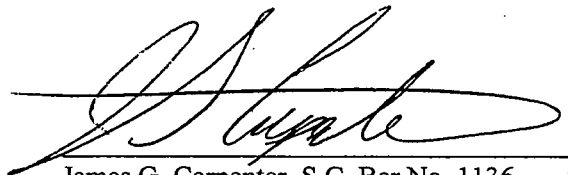
v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of Repre-
sentatives, Ken Ard in his official capacity as President of the S.C. Senate, Representative
Harry B. "Chip" Limehouse III, Senator Glenn McConnell, and The State of South Caro-
lina, Respondents.

NOTICE OF PETITION FOR ORIGINAL JURISDICTION

Pursuant to SCACR 245(c) Petitioners give notice to each Respondent that he has
20 days from the date of service to file an original and 6 copies of his return with the
Clerk of the Supreme Court and serve on all parties a copy of the return. Failure of a par-
ty to timely file a return may be deemed consent by that party to the matter being heard in
the original jurisdiction. Unless otherwise ordered by the Supreme Court, the Petition
shall be decided without oral argument. If the Petition is granted, the Respondents shall
have 30 days to serve and file an answer to the complaint.

October 31, 2011



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Attorney for Petitioners

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on
behalf of all others similarly situated, Petitioners,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of Repre-
sentatives, Ken Ard in his official capacity as President of the S.C. Senate, Representative
Harry B. "Chip" Limehouse III, Senator Glenn McConnell, and The State of South Caro-
lina, Respondents.

PETITION FOR ORIGINAL JURISDICTION

Petitioners move this Court to take original jurisdiction of the matters alleged in
the attached Complaint for reasons set forth herein, in the Complaint and in the Affidavit
filed herewith.

October 31, 2011

THE CARPENTER LAW FIRM, PC

James G. Carpenter, Esq. S.C. Bar No. 1136
Jennifer J. Miller, Esq., S.C. Bar No. 13611
L. Warren Clayton III, S.C. Bar No. 72500
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Attorneys for Petitioners

Petitioners incorporate by reference the factual and legal allegations in their Complaint, filed herewith, and the sworn testimony in the affidavit of Petitioner Waring S. Howe, Jr.

LEGAL CLAIMS

1. The General Assembly purported to override the veto of Act 130 of 2007 with a vote of 12 to 0 in the House and 43 to 1 in the Senate. Because the vote to override did not carry two-thirds of each house, the General Assembly did not properly and legally override the veto. South Carolina Constitution Article IV, § 21. *Board of Trustees of School District of Fairfield County v. State*, No. 27035 S.C. Sup. Ct., 2011 WL 3804797 (Aug. 29, 2011).
2. Act 130 of 2007 violates the South Carolina Constitution, Article III, § 34 and Article VIII, § 7. It is a special law for which a general law is applicable, and it applies only to Charleston County Aviation Authority, the governing body of the Charleston County Airport District, whose boundaries are the same as those of Charleston County. S.C. Code § 55-1-80 establishes a standard and method for the appointment of additional members to all county aviation commissions, but Act 130 of 2007 establishes procedures applicable only to the Charleston County. In *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011), this Court ruled that Plaintiff stated a claim that an act applicable only to the School District of Charleston County violated the South Carolina Constitution Article III, § 34 and Article VIII, § 7. The same analysis is applicable here. Instead of reducing state legislative involvement, Act 130 of 2007 continues the General Assembly's involvement in County and local matters, in the appointments to and governance of the Authority.

3. Act 130 violates the separation of powers provision of the South Carolina Constitution, Article I, § 8, by allowing members of the General Assembly to serve and fulfill executive functions on the Charleston County Aviation Authority. In *Ashmore v. Greater Greenville Sewer District*, this Court ruled, the “Board of the projected auditorium . . . is an executive body, charged with executive duties and functions.” *Id.* 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947). This Court held that Separation of Powers prohibited members of the General Assembly from serving on the district board. The same rationale is applicable here. The service of Respondents Limehouse and McConnell on the Charleston County Aviation Authority violates Separation of Powers. S.C. Constitution, Art. I, § 8.
4. The simultaneous holding of offices by Respondents Limehouse and McConnell both in the General Assembly and on the Charleston County Aviation Authority violates the Dual Office Holding provisions of the Constitution. In *Ashmore*, this Court also ruled,

The qualifications of members of the General Assembly are carefully set out in Article III of the constitution. Section 24 thereof forbids the holding of other public office or position, and provides that upon the acceptance of any such by a member he shall vacate his seat. The proposition seems to us to prove itself, that a *member cannot sit upon the board* of auditorium trustees established in the act under review *and* at the same time *retain his membership in the General Assembly*. The language of the fundamental law is *plain* and *unambiguous*. It admits of *no doubt* of its meaning.

Id. 211 S.C. 77, 90, 44 S.E.2d 88, 94 (1947).

This Court recently reaffirmed *both* holdings from *Ashmore* in *Segars-Andrews, v. Judicial Merit Selection Commission*,

“Service by members of the legislative branch in an office charged with the execution of the law *violates separation of powers and dual-office*

holding. That was the case in *Ashmore*. *Ashmore* referenced the “ex officio” or “incidental duties” exception: “A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, *and the functions of the board or commission are related to the duties of the office.*” *Id.* at 92, 44 S.E.2d at 95.

387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010) (emphasis added by the Court in *Se-gars -Andrews*).

In the case at bar, as in *Ashmore*, the Respondents’ duties to the Charleston County Aviation Authority are *not* incidental to the Respondents’ duties as a member of the General Assembly. Therefore, Respondents’ service on the Authority violates *both* the Separation of Powers and Dual Office Holding provisions of the Constitution.

I. The Public Interest Is Involved in This Matter.

These issues are matters of public great public importance in the purest sense and justify the use of the original jurisdiction in this Court. SCACR 245 (a) states,

If the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition with supporting affidavits.

Id. Because further delay in the lower courts before a final determination of this matter does not protect public interest, this Court has the constitutional right and responsibility to take original jurisdiction.

It may well be as stated in plaintiff’s brief that the framers of the Constitution, by adding the embracing words, “and other original and remedial writs,” intended to grant to the Supreme Court the right to take original jurisdiction of such matters as might in emergencies and in protection of the public interest be more properly determined in the original jurisdiction

than relegated to the equity calendars of lower courts with the attendant delay before final determination.

Daniel v. Conestee Mills, 183 S.C. 337, 191 S.E. 76 (1937), citing *King v. Aetna Ins. Co.*, 168 S.C. 84, 167 S.E.12 (1932). Thus, this case addresses matters of great public importance, requiring the immediate attention of this Court.

II. The Matter Cannot Be Determined in a Lower Court in the First Instance Without Material Prejudice to the Rights of the Parties Because an Appeal of a Lower Court Decision Would be Likely and the Ultimate Decision Delayed.

SCACR 245 (a) requires,

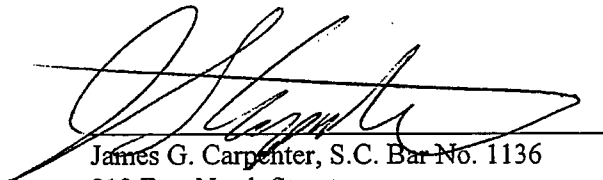
The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.

Id.

Petitioners respectfully submit that these matters require immediate consideration by this Court because of the gravity and repetition of the Constitutional violations and the likelihood of further violations within the time required for a lower court action and appeal. Any delay required by appeals of a lower court decision would prolong these Constitutional violations, as well as the harm to this State that the Constitution seeks to prevent. Accordingly, Petitioners will suffer prejudice if this Court does not grant original jurisdiction. For the foregoing reasons, Petitioners move this Court to take original jurisdiction of this matter.

October 31, 2011

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf
of all others similarly situated, Petitioners,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of Representatives,
Ken Ard in his official capacity as President of the S.C. Senate, Representative Harry B. "Chip"
Limehouse III, Senator Glenn McConnell, and The State of South Carolina, Respondents.

**AFFIDAVIT OF WARING S. HOWE, JR.
IN SUPPORT OF THE
PETITION FOR ORIGINAL JURISDICTION**

Petitioners submit this Affidavit in support of their petition for this Court to take original
jurisdiction of the matters alleged in the attached Complaint.

October 28, 2011

THE CARPENTER LAW FIRM, PC

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Attorneys for Petitioners

The undersigned, being first duly sworn on oath, deposes and states as follows:

1. My name is Waring S. Howe Jr. I am a citizen, resident, taxpayer, and registered elector of Charleston County. On many occasions, I have used the Charleston County Airport, which is owned and operated by the Charleston County Airport District. I have paid fees and taxes to the Charleston County Airport District. I served as a member of the Charleston County Aviation Authority 1989-2001, and as Chairman 1996-1999. I am a Petitioner in this action, and I petition the Court to take this action in its original jurisdiction. I submit this affidavit pursuant to Rule 245 of the South Carolina Rules of Appellate Practice.
2. Before Home Rule, the General Assembly enacted Act 1235 of 1970 (**Exhibit A**), which established the Charleston County Airport District. "*The territory embraced by the County of Charleston* is hereby constituted as an airport district and a political subdivision of this State the functions of which shall be *public and governmental*, and the inhabitants of the territory are hereby constituted a *body politic and corporate*." *Id.* § 2 (emphasis added). Thus, the Airport District has the same boundaries as Charleston County.
3. Pursuant to Act 1235, Section 3, "The corporate powers and duties of the Charleston County Airport District shall be exercised and performed by an authority to be known as Charleston County Aviation Authority." Section 3 also established the membership of the Authority. The Governor appointed five of the seven members upon the recommendations of the County House delegation, the Senators of Charleston County, the City Council of Charleston and the County Council. In addition, the Mayor of Charleston and the Chairman of County Council were *ex officio* members.

4. As to the *ex officio* members, the General Assembly stated the following:

In making the foregoing *ex officio* designations, the General Assembly finds that the successful operation of the airport system has a distinct relation to the welfare of the City of Charleston and the County of Charleston. It has, therefore, determined that those responsible for the operation of such municipal governments should likewise participate in the operation of the authority.

Act 1235, Section 3.

5. The General Assembly provided for the election of officers known as the Chairman, Vice Chairman, and Secretary and further provided, "Offices on the authority, shall be deemed an office of honor within the meaning of the provision of Section 2 of Article 2 of the Constitution of South Carolina." Act 1235, Section 4.
6. By Act 329 of 1971(Exhibit B), also prior to Home Rule, the General Assembly deleted the foregoing sentence related to *offices* and stated instead,

Membership on the *authority* shall *not* be deemed an office of honor or profit within the meaning of the provisions of Section 2 of Article 2 of the Constitution of South Carolina and any *ex officio* members shall be eligible for the position of chairman or any other office of the authority.

Id. at Section 2 (emphasis added).

7. I respectfully suggest that the General Assembly made the correct analysis the *first* time. Membership on the Authority is considered a key position in helping chart the future of the County and the region.
8. I further suggest that the following provisions of Act 1235 lead irrevocably to the conclusion that membership on the Authority, and certainly election as an officer of the Authority, should be considered an office of honor or profit, within the meaning of the Constitution of South Carolina:

- a. The District is a "political subdivision of a State, the functions of which shall be public and governmental, and the inhabitants of the territory are hereby constituted a body politic and corporate." *Id.*, § 2.
- b. "The members of the authority shall be allowed the usual per diem, mileage and subsistence as provided by law for members of boards, commissions and committees and their actual and necessary expenses while in performance of duties prescribed under this act." *Id.*, § 3.
- c. To establish and govern the airports of Charleston County, the General Assembly gave the Authority nineteen enumerated powers, including the following: perpetual succession, a corporate seal, the power to make bylaws, the power to make rules and regulations that govern the airport facilities, the power to construct and operate facilities, the power to restrict the height of nearby buildings or obstructions, the power to make rates and charges, the power of eminent domain, the power to hire and appoint officers and agents, the power to employ professionals, the power to make contracts for construction and repair, the power to apply for and receive federal, state, county, or municipal grants and loans, the power to issue general obligation bonds, the power issue revenue bonds, the power to tax the property in the District, the power to purchase existing airport facilities, and finally, the power to "[d]o all other acts and things necessary or convenient to carry out any function in power competitor granted to the District." *Id.*, § 5.

9. After Home Rule, the General Assembly enacted and amended what became **SC Code Ann. § 55-1-80, Appointment of additional members to county aviation commission, (Exhibit C)**, which, authorized the following, not only for Charleston County, but for any county in the State:
- a. Any county aviation authority may be increased by two members:
 - i. One appointed by the county House Delegation.
 - ii. One appointed by the county Senate Delegation.
 - b. Any County governing body may add two members to the Authority.
 - c. In Counties having two cities with populations in excess of 50,000, the mayors of such cities may serve *ex officio*.
10. Thereafter, the General Assembly enacted Act 130 of 2007, which applies *only* to Charleston County (**Exhibit D**). Act 130 added two more members to the Charleston County Aviation Authority, the Chairman and Vice Chairman of the Charleston County Legislative Delegation, or their designees.
11. The Governor vetoed Act 130 (**Exhibit E**), stating that the Act violated Article III, § 34 and Article VIII § 7 of the S.C. Constitution.
12. Act 130 *does* violate S.C. Constitution Article III § 34 and Article VIII § 7.
13. On June 5, 2001, the House purported to override the veto by a vote of 12 to 0 (**Exhibit F**). The next day the Senate overrode the veto 43 to 1 (**Exhibit G**).
14. This vote to override the veto was illegal, lacking a sufficient quorum or majority of both Houses. South Carolina Constitution, Art. IV, § 21; *Board of Trustees of School District of Fairfield County v. State*, No. 27035, (Aug. 29, 2011).
15. Since 2007, State Representative Limehouse of Charleston has been serving not only as a member of the General Assembly, but also as a member of the Charleston County

Aviation Authority, pursuant to Act 130. Recently, he has also been serving as Chairman of the Authority.

16. Since 2007, Respondent McConnell has not only held office as a member of the General Assembly, but also simultaneously held office as a member of the Charleston County Aviation Authority, pursuant to Act 130.

17. The Charleston County Aviation Authority is an executive body, charged with executive duties and functions.

18. Article I, § 8 of the South Carolina Constitution states:

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.

19. The General Assembly may not consistently with Article I, § 8, undertake both to pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators. Representative Limehouse and Senator McConnell were elected for the purpose of making laws, not administering them. *See Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947).

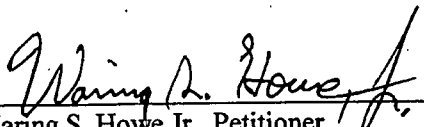
20. For the reasons stated above, I respectfully suggest that the service of Respondents Limehouse and McConnell in more than one office simultaneously violates the dual office holding prohibition of the South Carolina Constitution. *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 90-92, 44 S.E.2d 88, 94-95 (1947).

21. The taxpayers, citizens, and electors of Charleston County and South Carolina are entitled to have their government representatives abide by the South Carolina Constitution.

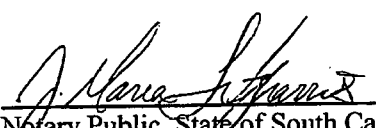
22. In addition, I am informed and believe that House Bill 4143 of 2011(**Exhibit H**), pending in the General Assembly will, if enacted, compound the unconstitutional nature of the governance of the Charleston County Aviation District by adding *two more members of the General Assembly* to the Charleston County Aviation Authority, one from the House and one from the Senate. I respectfully suggest that House Bill 4143 of 2011, if enacted, would cause additional violations of the Constitution, similar to those set out above.
23. These actions of the General Assembly have made and threaten to continue to make changes in the local government of the District, which, when found unconstitutional, must be changed again.
24. If this matter were heard in the Circuit Court, the normal time of the trial process would likely extend for several years, including appeals, during which time ongoing and additional Constitutional violation would likely occur.
25. The Charleston County Airport District expends millions of dollars of public funds annually.
26. During the course of a normal trial and appeal, much or all of the public funds will be expended and difficult or impossible to recoup.
27. I anticipate that Respondents will not dispute the contents or authenticity of Act 130 of 2007 or House Bill 4143.
28. I anticipate that this case will raise no factual issues, but will simply require the interpretation and application of the South Carolina Constitution to the legislation in question.

29. I respectfully submit that this case involves strong public interest and presents special grounds of emergency, and that the Supreme Court should exercise its original jurisdiction.

Further the Affiant saith naught.


Waring S. Howe Jr., Petitioner

Subscribed and sworn to before me
this 28th day of October, 2011.


Notary Public, State of South Carolina
My commission expires April 7, 2021.

SECTION 2. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 14th day of May, 1970.

(R1463, H2869)

No. 1235

An Act To Create The Charleston County Airport District; To Define Its Area; To Establish A Governing Authority Therefor; To Prescribe The Functions And Powers Of The District And Its Authority; To Make Provisions For Borrowing By The District, Including The Issuance Of General Obligation Bonds Of The District; To Prescribe The Terms And Conditions Under Which Such Money May Be Borrowed By The District And To Make Provision For Its Payment; To Provide For The Application For And Use Of Funds Which May Be Allocated To The District By The Federal, State, Or Other Governments; To Provide For The Continuing Operation Of The Facilities Of The District; And To Provide For The Investment Of Funds Of The District.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Findings.—The General Assembly finds that the public interest requires the establishment, within the District hereby created, of modern air transport facilities capable of providing service for all modern air transport. It has, therefore, determined to constitute all of the territory embraced by the County of Charleston into an Airport District, to commit to such District the function of acquiring, constructing, operating and maintaining adequate air transport facilities of suitable size and with suitable equipment to enable all types of air transport to utilize same; to authorize the Airport District to finance all costs that may be incurred by it in the acquisition, construction and equipment of such facilities through the issuance as defined herein of general obligation bonds of the Airport District.

SECTION 2. Airport District constituted.—The territory embraced by the County of Charleston is hereby constituted an Airport District and a political subdivision of this State, the functions of which shall be public and governmental, and the inhabitants of the territory are hereby constituted a body politic and corporate. The

corporate name of the Airport District shall be Charleston County Airport District, and by that name the Airport District may sue and be sued.

SECTION 3. Powers and duties.—The corporate powers and duties of the Charleston County Airport District shall be exercised and performed by an authority to be known as Charleston County Aviation Authority. The authority shall be composed of seven members, two of whom shall be appointed by the Governor upon the recommendation of a majority of the Charleston County House Delegation, two of whom shall be appointed by the Governor upon the recommendation of a majority of the Senators from Charleston County, and one of whom shall be appointed by the Governor upon the recommendation of the City Council of Charleston and the County Council of Charleston. The remaining two members shall be the Mayor of the City of Charleston and the Chairman of the Charleston County Council who shall be ex officio members of the authority. In making the foregoing ex officio designations, the General Assembly finds that the successful operation of the airport system has a distinct relation to the welfare of the City of Charleston and the County of Charleston. It has, therefore, determined that those responsible for the operation of such municipal governments should likewise participate in the operation of the authority. The members appointed by the Governor shall serve for terms of four years and until their successors are appointed and qualify, such terms to commence on the first day of the month following the approval of this act by the Governor. Vacancies shall be filled in the same manner as the original appointments for the unexpired portion of the term only. The members of the authority shall be allowed the usual per diem, mileage and subsistence as provided by law for members of boards, commissions and committees and their actual and necessary expenses while in performance of duties prescribed under this act.

SECTION 4. Officers.—The authority shall elect one of its members as chairman, one of its members as vice-chairman, and one of its members, or any other competent person, as secretary of the authority. The officers shall hold office at the pleasure of the authority. In the event that the office of chairman shall become vacant, the duties of the chairman shall be temporarily performed by the vice-chairman. Offices on the authority, shall be deemed an office of honor within the meaning of the provision of Section 2 of Article 2 of the Constitution



of South Carolina. The secretary of the authority shall have such term as shall be fixed by the authority.

SECTION 5. Powers and duties further.—There is hereby committed to the authority the functions of acquiring, planning, establishing, developing, constructing, enlarging, improving, maintaining, equipping, operating, regulating, protecting and policing airports and suitable air navigation facilities to serve the people of the Charleston County Airport District and the public generally. To this end the authority shall be empowered:

1. To have and enjoy perpetual succession.
2. To adopt, use and alter a corporate seal.
3. To make bylaws for the management and regulation of its affairs, and to define a quorum for its meetings, which shall require the presence of at least four members. Adequate notification of all meetings and the time and place shall be given to each member.
4. To acquire, establish, develop, construct, enlarge, improve, maintain (which term shall include the power to establish a reasonable reserve for maintenance), equip, operate, regulate, protect and police its airport and air navigation facilities under such reasonable rules and regulations as the authority may from time to time promulgate.
5. To maintain, construct, and extend runways, terminals, maintenance shops, access roads, utilities systems, concessions, accommodations, and other facilities of whatever nature or kind for the comfort and accommodations of air travelers and air freight; to purchase and sell supplies, goods and commodities as an incident to the operation of its airport facilities; and for all such purposes, the authority may, by purchase, gift, devise, lease, eminent domain proceedings, or otherwise, acquire, hold, develop, use, lease, mortgage, sell, transfer, and dispose of any property, real, or personal, or any interest therein, including easements in or over land needed to prevent airport hazards, or land outside the boundaries of its airport or airport site, necessary to permit the removal, elimination obstruction-marking or obstruction-lighting, of airport hazards, or to prevent the establishment of airport hazards.
6. To license, lease, rent, sell or otherwise provide for the use of any of its airport facilities, and facilities auxiliary thereto, including the privilege of supplying goods, commodities, things, services or facilities at such airport by itself or by any persons or corporations qualified therefor, on such terms and conditions as its

discretion may dictate, including the granting of exclusive franchises; *provided*, that in no case shall the public be deprived of its rightful, equal, and uniform use of its airport and air navigation facility.

7. For the purpose of promoting the safety of the airport and for the general welfare of air transportation, the authority is empowered by regulation to restrict the height of any building, structure or obstruction including, but not limited to towers, dwellings, trees, or any other object which might constitute a hazard to air transportation at its facilities within the area herein described. The authority may by regulation restrict the construction or erection of any building, structure or obstruction on lands located on the projection of any runways of its airport facilities at a height above a glide angle for aircraft of fifty feet to one foot measured outward from the boundaries of the end of any runway at the airport, for a distance of up to ten thousand feet along a prolongation of the center line of the runways and extending laterally from the projection of the center lines of the runways from a distance of one thousand feet each way at the airport boundary, increasing to a lateral distance of four thousand feet each way from the center of any runway at a distance of ten thousand feet from the boundary of the airport.

It may also by regulation restrict the erection of any building or other type construction of any nature whatsoever on lands adjacent to its air transport facilities at any point adjacent to them, not covered by the preceding paragraphs, at a height above a glide angle for aircraft of fifteen feet to one foot, measured outward from the boundaries of any such air facilities for a distance of twenty-five hundred feet.

The authority shall, if it shall undertake to adopt regulations prohibiting such construction, conduct a public hearing prior to taking action of their own. Notice of the hearing shall be published in a newspaper of general circulation within the district not less than seven days prior to the date fixed for the holding of the meeting. The notice shall state the time and place of the meeting and shall briefly indicate the scope of the proposed regulation. At the meeting all persons affected by the proposed regulation shall be entitled to appear and to be heard. If, after the meeting, the regulation restricting the erection of any such buildings or structures is adopted, notice of the adoption of the regulation shall be given by filing a certified copy thereof in the office of the clerk of court for

the county, and additional copies shall be posted in the county courthouse; and notice of the adoption of such regulations shall be published at least once during each of three successive weeks in a newspaper published in and having general circulation in the district. The regulations shall not become effective until the foregoing has been complied with.

The authority is expressly authorized to apply to any court of general jurisdiction within the district for the enforcement of such regulations through the means of mandatory injunctions and other remedial proceedings and such courts are specifically empowered to render mandatory injunctions and such other remedial orders as shall appear to such courts to be just and reasonable.

8. To place in effect, and, from time to time, revise such schedules of licenses, rates, and charges for the use of its facilities as may be necessary or desirable to the orderly operation of its airport facility; provided that all such licenses, rates, and charges shall be reasonable and nondiscriminatory; *provided*, further, that the provisions of this section shall not be construed to be in conflict with the provisions of item 6, which authorize the leasing of land and buildings auxiliary to its airport facility.

9. To exercise the power of eminent domain for any corporate function. The power of eminent domain may be exercised through any procedure prescribed by Section 25-161 through Section 25-170, Code of Laws of South Carolina, 1962. All powers conferred on municipalities under such provisions are conferred hereby on the Charleston County Aviation Authority.

10. To appoint officers, agents, employees and servants, and to prescribe the duties of such, including the right to appoint persons charged with the duty of enforcing the rules and regulations promulgated pursuant to the provisions of this act, to fix their compensation, and to determine if, and to what extent they shall be bonded for the faithful performance of their duties.

11. To employ engineers, architects and attorneys, and to contract for such other services of a technical or professional nature as may be necessary or desirable to the performance of the duties of the authority.

12. To make contracts for the construction, erection, maintenance and repair of the facilities in its charge, by competitive bidding, after ten days published notice, if such contracts are in

excess of ten thousand dollars. If the contracts are less than ten thousand dollars, they may be made without competitive bids.

13. To deposit monies derived from the sale of any bonds authorized by the General Assembly and issued under the provisions of this act or from revenue-producing facilities in any bank or trust company having an office within the district, and to withdraw the monies for the purpose of operating, maintaining, constructing, improving and extending any facility in its charge.

14. To apply for, accept, receive, receipt for, disburse, and expend Federal, State, County, or Municipal monies and other monies, public or private, made available by grant or loan, or both, to accomplish, in whole or in part, any of the purposes of this act, and to this end, to continue to prosecute any application heretofore filed with the Federal Aviation Agency, or any other Federal agency, by the previous owner of any air facilities acquired by the authority. All federal monies accepted under this section shall be accepted and expended by the authority upon such terms and conditions as are prescribed by the United States, and as are consistent with State law; and all other monies accepted under this section shall be accepted and expended by the authority upon such terms and conditions as are prescribed by the State or other sources thereof.

15. To accept donations of all sorts.

16. To issue under the conditions prescribed in item 18 of this section general obligation bonds of the District.

17. In addition to the powers given by item 16 of this section, to borrow on behalf of the District money and to make and issue negotiable bonds, notes and other evidences of indebtedness payable solely from the revenue derived from the operation of any revenue-producing facility, or facilities, in its charge. The sums borrowed may be those needed to pay costs incident to the acquisition, operation and maintenance of its airport facility, or such sums as may be needed to pay the costs of any extension, addition, or improvement to its airport facility, or both. If the method of financing authorized by this item is used, neither the faith and credit of the State of South Carolina, the city or county of Charleston, nor of the District itself shall be pledged to the payment of the principal and interest of the obligations, and there shall be on the face of such obligation a statement, plainly worded, to that effect. Neither the members of the authority nor any person signing the obligations shall be personally liable thereon. In order that a convenient procedure for borrowing

money pursuant to this item may be prescribed, the District shall be fully empowered to avail itself of all powers granted by Chapters 4, 5 and 6, Title 59, Code of Laws of South Carolina, 1962, as now and hereafter amended. In exercising the powers conferred upon the District by such code provisions, the District may make all pledges and covenants authorized by any provision thereof, and may confer upon the holders of its securities all rights and liens authorized by such code provisions. Specifically and notwithstanding contrary provisions in any such code provisions, the District may:

(a) Provide that such bonds, notes, or other evidences of indebtedness be payable, both as to principal and interest, from the net revenues derived from the operation of any revenue-producing facility or facilities, as such net revenues may be defined by the authority.

(b) Covenant and agree that upon its being adjudged in default as to the payment of any installment of principal and interest upon any obligation issued by it or in default as to the performance of any covenant or undertaking made by it, that in such event the principal of all obligations of such issue may be declared forthwith due and payable, notwithstanding that any of them may not have then matured.

(c) Confer upon a corporate trustee the power to make disposition of the proceeds from all borrowings, and also all revenues derived from the operation of the revenue-producing facility whose revenues are pledged for the payment of such obligations, in accordance with and in the order of priority prescribed by resolution adopted by the authority as an incident to the issuance of any notes, bonds, or other evidences of indebtedness.

(d) Dispose of its obligations at public or private sale and upon such terms and conditions as it shall approve.

(e) Make such provision for the redemption of any obligations issued by it prior to their stated maturity, with or without a premium, and on such terms and conditions as the authority shall approve.

(f) Covenant and agree that any cushion fund established to further secure the payment of principal, and interest of any obligation shall be a fixed amount.

(g) Covenant and agree that it will not enter into any agreements with any person, firm, corporation, or with the government of this State, the United States, or any of the political subdivisions

of the same for the furnishing of free services where such services are ordinarily charged for.

(h) Prescribe the procedure, if any, by which the terms of the contract with the holders of its obligations may be amended, the number of obligations whose holders must consent thereto, and the manner in which such consent shall be given.

(i) Prescribe the evidences of default and conditions upon which all or any obligation shall become or may be declared due before maturity and the terms and conditions upon which such declaration and its consequences may be waived.

(18) The authority, on behalf of the District, shall be empowered to issue upon authorization of the General Assembly general obligation bonds of the District, whose proceeds shall be used to defray the cost of acquiring, constructing and establishing suitable airport facilities within the District. For the purpose of this section, the terms "acquire, construct and establish" shall embrace the cost of direct construction, the cost of acquiring present airport facilities, the cost of all land, property, rights, easements, and franchises acquired which are deemed necessary for the construction and use of runways, terminal buildings, maintenance shops, freight depots, service establishments, and any and all facilities incident, or in anywise appurtenant to an airport facility, and all machinery and equipment needed therefor, payments to contractors, laborers, or others for work done or material furnished, financing charges, interest incurred in connection therewith, interest on the bonds herewith authorized, cost of engineering services, architectural services, legal and engineering expenses, plans, specifications, surveys, projections, drawings, brochures, administrative expenses, and such other expenses as may be necessary or incident to the acquisition, construction and operation of an airport facility within the district, hereafter incurred, for the purposes for which the District is created. All or any general obligation bonds issued pursuant to this paragraph shall conform to the following specifications and be subject to the following procedures:

(a) They shall be issued as a single issue, or from time to time as several separate issues. They shall bear such date or dates as the authority shall determine, and bonds of any issue shall mature in such equal or unequal installments as may be determined by the authority. They shall be made payable at such place or places as the authority shall prescribe, and they shall bear interest at such

rate or rates, and shall be payable in such manner as the authority may determine. The bonds may be issued with the privilege of having them registered as to principal on the books of the authority and the principal thus made payable to the registered holder (unless the last registered transfer shall have been to bearer), upon such conditions as the authority may prescribe. Any bond issued pursuant to this paragraph may be made subject to redemption prior to its stated maturity, on such terms and conditions and with such redemption premium as the authority shall prescribe.

(b) They shall be sold at not less than par and accrued interest to the date of their respective deliveries at public sale. At least ten days prior to any sale, notice announcing the intention to receive bids for sale of such bonds shall be published in a newspaper of general circulation in the State of South Carolina. In offering the bonds for sale, the authority shall reserve the right to reject any and all bids, and if all bids shall be rejected, the authority may negotiate privately for the disposition of such bonds.

(c) Such bonds and all interest to become due thereon shall have the tax exempt status prescribed by Section 65-4.1 of the 1962 Code.

(d) All general obligation bonds issued by the District shall be manually signed by the chairman of the authority. The seal of the District shall be affixed to, impressed or reproduced upon each of such bonds, and each of such bonds shall be attested by the secretary of the authority. The coupons attached to such bonds shall be authenticated by a facsimile of the signatures of the chairman and the secretary of the authority, who shall be in office on the date of the adoption of the resolution of the authority authorizing the bonds.

(e) The delivery of any bonds so executed and authenticated shall be valid notwithstanding any changes in officers or seal occurring after such execution and authentication.

(f) There shall be irrevocably pledged for the payment of such bonds and interest as they mature the full faith, credit and resources of the District. Until the principal and interest of all bonds issued under this act shall be fully paid, there shall be levied on all taxable property in the District an annual tax ad valorem sufficient to pay the principal and interest of all general obligation bonds issued by the District as levied by the Auditor of Charleston County and collected by the Treasurer of Charleston County at the same time and in the same manner as other county

taxes are collected. The Treasurer of Charleston County shall set such taxes apart in a special fund and apply them solely to the payment of principal and interest of the bonds so long as any such principal or interest remains outstanding. The tax to be levied under the provisions of this paragraph shall not be substantially greater than the amount necessary to pay principal and interest of bonds maturing during the year in which moneys produced by such levy will come into the hands of the Charleston County Treasurer, as reduced by the anticipated balance of funds actually in the hands of the Charleston County Treasurer, on the occasion when it becomes necessary to fix such tax levy, produce by: (a) additional collections from such levies made in prior years; (b) net revenues derived by the authority from the operation of its facilities not required to meet costs of operating, maintaining, enlarging and improving its facilities, or to discharge covenants securing bonds issued pursuant to item 17 of this section. When all principal and interest of outstanding bonds have been paid, the Charleston County Treasurer shall transfer any balance remaining in the special fund created under the terms of this paragraph to the general fund of the authority subject to its draft or money order for any legitimate purpose incident to the operation, maintenance or extension of the District's airport facilities.

(g) The proceeds derived from the sale of such bonds shall be deposited with the Treasurer of Charleston County in a separate and special fund, and shall be subject to transfer, upon warrants or orders of the authority, to any bank or trust company having an office within the District, to be expended by the authority for the purposes specified herein, and no others; *provided*, however, that any premium received shall be deposited with the Treasurer of Charleston County and applied by him to the first installment of principal becoming due on the bonds, and any accrued interest received shall be applied by the Charleston County Treasurer to the first installment of interest becoming due on the bonds and *provided*, further, pending such withdrawals, the Treasurer of Charleston County shall, upon the request of the authority, be empowered to invest and reinvest the proceeds derived from the sale of the bonds in direct general obligations of the United States of America having a maturity of not more than one year from the date as of which such investment shall be made. Income derived from such investments shall be applied to the payment of any interest to accrue on the general obli-

gation bonds of the District. Neither the purchaser of the bonds nor any subsequent holders thereof shall be responsible for the proper application of the proceeds of sales.

19. To purchase existing airport terminal and auxiliary facilities in Charleston County, with or without the acquisition of landing areas, if there is in existence contracts or agreements which will inure to the benefit of the District providing for the use of such landing areas.

20. Do all other acts and things necessary or convenient to carry out any function or power committed or granted to the District.

SECTION 6. Tax levy.—In order to obtain funds for general operating purposes, including the preparation of plans, estimates and surveys, the authority is authorized to impose an annual tax levy commencing in 1970 not to exceed one-half mill, exclusive of any millage imposed for bond debt service. Upon certification by the authority to the county auditor of the tax levy to be imposed, the auditor shall levy and the county treasurer shall collect the millage so certified upon all taxable property in the District.

SECTION 7. Disposition of revenues.—All revenues derived by the authority from the operation of any revenue-producing facility which may not be required to operate, maintain, enlarge and improve its airport facilities or to pay obligations incurred in the issuance of any revenue bonds sold pursuant to the authorizations of paragraph 17 of Section 5 shall be paid over to the Charleston County Treasurer and held by him for the payment of interest and principal of general obligation bonds of the District.

SECTION 8. Rates not subject to regulation.—The rates charged for services furnished by any revenue-producing facility of the District as constructed, improved, enlarged or extended shall not be subject to supervision or regulation of any State bureau, commission, board, or other like instrumentality or agency thereof.

SECTION 9. Exempt from taxes.—Property and income of the District shall be exempt from all taxes levied by the State, County or any municipality, division, subdivision, or agency thereof direct or indirect.

SECTION 10. Obligations not to be impaired.—So long as the District shall be indebted to any person, firm or corporation on any

bonds, notes or other obligations issued pursuant to the authority of this act, provisions of this act and the powers granted to the District and the authority shall not be in any way diminished, and the provisions of this act shall be deemed a part of the contract between the District and the holders of such obligations.

SECTION 11. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 22nd day of May, 1970.

(R1464, H2878)

No. 1236

An Act To Require The Clerk Of Court Of Laurens County To Index Property Transfers Resulting From Tax Sales In The Name Of The Former Owner.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Tax sales—indexing.—In Laurens County, in addition to all other indexing required by law, the clerk of court shall index tax sales in the direct index for deeds in the name of the owner of the property at the time of the tax sale, and shall further list the name of such former owner in the indirect index, in parenthesis, along with the name of the actual grantor.

SECTION 2. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 22nd day of May, 1970.

(R1465, H2883)

No. 1237

An Act To Amend Act 881 Of 1962, As Amended, Relating To Mobile Homes And House Trailers Used As Dwellings, So As To Add A Special Provision Relative To Utility Company Or Rural Electric Co-operative Connections In Charleston County.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Electrical connections to be reported.—Section 5A of Act 881 of 1962 is amended by adding at the end:

- (1) Contact prospective employers; or
- (2) Secure a suitable residence for use when released on parole or upon discharge; or
- (3) Obtain medical services not otherwise available; or
- (4) Participate in a training program in the community or any other compelling reason consistent with the public interest; or
- (5) Visit or attend the funeral of a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person though not a natural parent, has acted in the place of a parent), brother or sister.

The willful failure of a prisoner to remain within the extended limits of his confinement or to return within the time prescribed to the place of confinement designated by the county engineer shall be deemed an escape from the custody of the county engineer punishable as provided in Section 55-6 of the 1962 Code.

SECTION 2. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 2nd day of June, 1971.

(R454, H1921)

No. 329

An Act To Amend Act No. 1235 Of 1970, Relating To The Charleston County Airport District, So As To Provide For Certain Technical Changes.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Findings.—Section 1 of Act No. 1235 of 1970 is amended by inserting after "obligation" on the last line "or revenue". The section when amended shall read as follows:

"Section 1. The General Assembly finds that the public interest requires the establishment, within the District hereby created, of modern air transport facilities capable of providing service for all modern air transport. It has, therefore, determined to constitute all of the territory embraced by the County of Charleston into an Airport District, to commit to such District the function of acquiring, constructing, operating and maintaining adequate air transport facilities of suitable size and with suitable equipment to enable all types of

air transport to utilize same; to authorize the Airport District to finance all costs that may be incurred by it in the acquisition, construction and equipment of such facilities through the issuance as defined herein of general obligation or revenue bonds of the Airport District."

SECTION 2. Officers.—Section 4 of Act No. 1235 of 1970 is amended by inserting after "secretary" on line three "or treasurer or secretary and treasurer" and by striking the fourth sentence in its entirety and inserting: "Membership on the authority shall not be deemed an office of honor or profit within the meaning of the provisions of Section 2 of Article II of the Constitution of South Carolina and any ex officio member shall be eligible for the position of chairman or any other office of the authority." The section when amended shall read as follows:

"Section 4. The authority shall elect one of its members as chairman, one of its members as vice-chairman, and one of its members, or any other competent person, as secretary or treasurer or secretary and treasurer of the authority. The officers shall hold office at the pleasure of the authority. In the event that the office of chairman shall become vacant, the duties of the chairman shall be temporarily performed by the vice-chairman. Membership on the authority shall not be deemed an office of honor or profit within the meaning of the provisions of Section 2 of Article II of the Constitution of South Carolina and any ex officio member shall be eligible for the position of chairman or any other office of the authority. The secretary of the authority shall have such term as shall be fixed by the authority."

SECTION 3. May adopt seal.—Item 2 of Section 5 of Act No. 1235 of 1970 is amended by striking the period at the end thereof and adding: "for the District and the authority." The item when amended shall read as follows:

"2. To adopt, use and alter a corporate seal for the District and the authority."

SECTION 4. Notice of hearings.—The third paragraph of Item 7 of Section 5 of Act No. 1235 of 1970 is amended by striking "their" on line 3 and inserting "its". The paragraph when amended shall read as follows:

"The authority shall, if it shall undertake to adopt regulations prohibiting such construction, conduct a public hearing prior to taking action of its own. Notice of the hearing shall be published in

a newspaper of general circulation within the district not less than seven days prior to the date fixed for the holding of the meeting. The notice shall state the time and place of the meeting and shall briefly indicate the scope of the proposed regulation. At the meeting all persons affected by the proposed regulation shall be entitled to appear and to be heard. If, after the meeting, the regulation restricting the erection of any such buildings or structures is adopted, notice of the adoption of the regulation shall be given by filing a certified copy thereof in the office of the clerk of court for the county, and additional copies shall be posted in the county courthouse; and notice of the adoption of such regulations shall be published at least once during each of three successive weeks in a newspaper published in and having general circulation in the district. The regulations shall not become effective until the foregoing has been complied with."

SECTION 5. Deposits and withdrawals.—Item 13 of Section 5 of Act No. 1235 of 1970 is amended by inserting after "bank" on line three ", savings and loan association". The item when amended shall read as follows:

"13. To deposit monies derived from the sale of any bonds authorized by the General Assembly and issued under the provisions of this act or from revenue-producing facilities in any bank, savings and loan association or trust company having an office within the district, and to withdraw the monies for the purpose of operating, maintaining, constructing, improving and extending any facility in its charge."

SECTION 6. Investments.—Section 5 of Act No. 1235 of 1970 is amended by adding a new item to be Item 13A which shall read as follows:

"13A. To invest funds which it is holding, and which are not needed to meet current obligations, and which otherwise would be on deposit, in direct general obligations of the United States of America, having maturity of not more than one year from the date such investment shall be made."

SECTION 7. Execution of bonds.—Subitem (d) of Item 18 of Section 5 of Act No. 1235 of 1970 is amended by inserting "Authority" after "District" on line three. The subitem when amended shall read as follows:

"(d) All general obligation bonds issued by the District shall be manually signed by the chairman of the authority. The seal of the

District-Authority shall be affixed to, impressed or reproduced upon each of such bonds, and each of such bonds shall be attested by the secretary of the authority. The coupons attached to such bonds shall be authenticated by a facsimile of the signatures of the chairman and the secretary of the authority, who shall be in office on the date of the adoption of the resolution of the authority authorizing the bonds."

SECTION 8. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 2nd day of June, 1971.

(R445, H1733)

No. 339

An Act To Further Provide For Game Management Areas And Partial Financing By The Users Thereof.

Whereas, many individuals and corporations, at no charge, have made their lands available to the South Carolina Wildlife Resources Department for game management areas upon which public hunting has been enjoyed by the sportsmen of South Carolina who have been charged no fee therefor; and

Whereas, because of a growing demand for hunting areas these lands formerly being provided as aforesaid are being rented to individuals and hunting clubs and less lands are available for public hunting; and

Whereas, the members of the General Assembly feel that the State, acting through the South Carolina Wildlife Resources Department, should provide public hunting for its citizens within its financial means, upon such game management areas as are available to it, and upon such areas should carry out proper management procedures such as planting, stocking, improving habitat, etc., all of which are expensive and beyond the present financial means of the Department and, further, that persons over the age of fourteen who use the areas should render financial assistance in support thereto. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Permits.—The South Carolina Wildlife Resources Department shall issue its Rule and Regulation requiring each person above the age of fourteen years who hunts upon its game manage-

Code of Laws of South Carolina 1976 Annotated
Title 55. Aeronautics
Chapter 1. General Provisions

Code 1976 § 55-1-80

§ 55-1-80. Appointment of additional members to county aviation commission.

Currentness

(A) Any county aviation commission or like authority may be increased by two members, one of whom must be appointed by the House of Representatives' delegation of the county and one of whom must be appointed by the Senatorial delegation of the county. The additional members shall serve terms of the same length as other members of the commission or like authority.

(B) Any county governing body who has the authority to appoint members to the aviation commission or like authority may add two members for terms as provided in this section.

(C) In counties that have two municipalities with a population in excess of fifty thousand persons according to the latest official United States Census, and the county has an aviation commission or like authority, then the mayors of such municipalities having a population in excess of the fifty thousand persons shall serve, ex officio, as members of the commission or authority.

Credits

HISTORY: 1984 Act No. 471; 1985 Act No. 64; 1993 Act No. 181, § 1288, eff July 1, 1993.

Current through End of 2010 Reg. Sess.

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End of Document

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South Carolina General Assembly
117th Session, 2007-2008

A130, R69, H3409

STATUS INFORMATION

General Bill

Sponsors: Reps. Scarborough and Limehouse

Document Path: I:\council\bill\swb\5108cm07.doc

Introduced in the House on January 31, 2007

Introduced in the Senate on February 7, 2007

Passed by the General Assembly on May 22, 2007

Governor's Action: June 4, 2007, Vetoed

Legislative veto action(s): Veto overridden

Summary: Aviation Authority membership

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/31/2007	House	Introduced and read first time HJ-17
1/31/2007	House	Referred to Charleston Delegation HJ-17
2/1/2007	House	Delegation report: Favorable Charleston Delegation HJ-2
2/6/2007	House	Read second time HJ-14
2/7/2007	House	Read third time and sent to Senate HJ-19
2/7/2007	Senate	Introduced, read first time, placed on local & uncontested calendar SJ-26
5/9/2007	Senate	Read second time SJ-13
5/22/2007	Senate	Read third time and enrolled SJ-21
5/29/2007		Ratified R 69
6/4/2007		Vetoed by Governor
6/5/2007	House	Veto overridden by originating body Yeas-12 Nays-0 HJ-53
6/6/2007	Senate	Veto overridden Yeas-43 Nays-1
6/13/2007		Copies available
6/13/2007		Effective date 06/06/07
7/30/2007		Act No. 130

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VERSIONS OF THIS BILL

1/31/2007

2/1/2007

2/7/2007



(A130, R69, H3409)

AN ACT TO PROVIDE THAT THE CHARLESTON COUNTY AVIATION AUTHORITY'S MEMBERSHIP SHALL BE INCREASED BY TWO MEMBERS, AND TO PROVIDE THAT THESE MEMBERS SHALL BE THE CHAIRMAN AND VICE CHAIRMAN OF THE CHARLESTON COUNTY LEGISLATIVE DELEGATION, OR THEIR DESIGNEES.

Be it enacted by the General Assembly of the State of South Carolina:

Charleston County Aviation Authority membership

SECTION 1. The Charleston County Aviation Authority shall be increased by two members who shall be the Chairman and Vice Chairman of the Charleston County Legislative Delegation, or their designees.

Time effective

SECTION 2. This act takes effect upon approval by the Governor.

Ratified the 29th day of May, 2007.

Vetoed by the Governor -- 6/4/07.

Veto overridden by House -- 6/5/07.

Veto overridden by Senate -- 6/6/07.

R. 69, H. 3409--ORDERED PRINTED IN THE JOURNAL

The SPEAKER ordered the following Veto printed in the Journal:

June 4, 2007

The Honorable Robert W. Harrell, Jr.
Speaker of the House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Mr. Speaker and Members of the House:

I am hereby vetoing H. 3409, R. 69. Though the legislation was well-intended in an effort to improve the cost of operations at the Charleston Aviation Authority, I am regrettably compelled to veto this legislation because of my record opposing this type of legislation on the grounds of unconstitutionality.

This Bill mandates that two members be added to the Charleston County Aviation Authority and that those two members be the Chair and Vice-Chair of the Charleston County Legislative Delegation. The State Constitution clearly prohibits the enactment of special legislation where a "general law can be made applicable." S.C. Const. Art. III, Section 34(IX). The General Assembly has established a general statute addressing the appointment of additional members to county aviation commissions. *See* S.C. Code Section 55-1-80, as amended. It is unconstitutional for the General Assembly to pass special legislation, like H. 3409, R. 69, in contravention of a general law. Each county's aviation board or commission should be subject to the same general law, whether that includes the chair and vice-chair of the legislative delegation as additional members or not.

Additionally, this Bill affects only Charleston County and is, therefore, clearly an act for a specific county. Such acts are in violation of Article VIII, Section 7 of the Constitution of the State of South Carolina, which provides that "[n]o laws for a specific county shall be enacted."

For these reasons, I am vetoing H. 3409, R. 69.

Sincerely,
Mark Sanford
Governor
Received as information.



R. 69, H. 3409--GOVERNOR'S VETO OVERRIDDEN

The Veto on the following Act was taken up:

(R69) H. 3409 (Word version) -- Reps. Scarborough and Limehouse: AN ACT TO PROVIDE THAT THE CHARLESTON COUNTY AVIATION AUTHORITY'S MEMBERSHIP SHALL BE INCREASED BY TWO MEMBERS, AND TO PROVIDE THAT THESE MEMBERS SHALL BE THE CHAIRMAN AND VICE CHAIRMAN OF THE CHARLESTON COUNTY LEGISLATIVE DELEGATION, OR THEIR DESIGNEES.

The question was put, shall the Act become a part of the law, the Veto of his Excellency, the Governor to the contrary notwithstanding, the yeas and nays were taken resulting as follows:

Yeas 12; Nays 0

Those who voted in the affirmative are:

Breeland	R. Brown	Dantzler
Harrell	Jefferson	Limehouse
Mack	Merrill	Miller
Scarborough	Stavrinakis	Whipper

Total--12

Those who voted in the negative are:

Total--0

So, the Veto of the Governor was overridden and a message was ordered sent to the Senate accordingly.



Message from the House

Columbia, S.C., June 5, 2007

Mr. President and Senators:

The House respectfully informs your Honorable Body that it has overridden the veto by the Governor on R.69, H. 3409 by a vote of 12 to 0:

(R69, H3409) -- Reps. Scarborough and Limehouse: AN ACT TO PROVIDE THAT THE CHARLESTON COUNTY AVIATION AUTHORITY'S MEMBERSHIP SHALL BE INCREASED BY TWO MEMBERS, AND TO PROVIDE THAT THESE MEMBERS SHALL BE THE CHAIRMAN AND VICE CHAIRMAN OF THE CHARLESTON COUNTY LEGISLATIVE DELEGATION, OR THEIR DESIGNEES.

Very respectfully,
Speaker of the House

Received as information.

VETO OVERRIDDEN

(R69, H3409) -- Reps. Scarborough and Limehouse: AN ACT TO PROVIDE THAT THE CHARLESTON COUNTY AVIATION AUTHORITY'S MEMBERSHIP SHALL BE INCREASED BY TWO MEMBERS, AND TO PROVIDE THAT THESE MEMBERS SHALL BE THE CHAIRMAN AND VICE CHAIRMAN OF THE CHARLESTON COUNTY LEGISLATIVE DELEGATION, OR THEIR DESIGNEES.

The veto of the Governor was taken up for immediate consideration.

Senator CLEARY moved that the veto of the Governor be overridden.

The question was put, "Shall the Act become law, the veto of the Governor to the contrary notwithstanding?"

The "ayes" and "nays" were demanded and taken, resulting as follows:

Ayes 43; Nays 1

AYES

Alexander
Cleary
Drummond
Ford
Hawkins
Jackson
Leatherman
Malloy

Anderson
Courson
Elliott
Gregory
Hayes
Knotts
Leventis
Martin

Bryant
Cromer
Fair
Grooms
Hutto
Land
Lourie
Matthews



McConnell
O'Dell
Pinckney
Ritchie
Setzler
Thomas
Williams

McGill
Patterson
Rankin
Ryberg
Sheheen
Vaughn

Moore
Peeler
Reese
Scott
Short
Verdin

**Total--43
NAYS**

Campsen

Total--1

The necessary two-thirds vote having been received, the veto of the Governor was overridden, and a message was sent to the House accordingly.

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charleston county aviation found 1 time. ➤

H 4143

H 4143 General Bill, By Gilliard, R.L. Brown, Mack and Whipper

A BILL TO AMEND ACT 1235 OF 1970, AS AMENDED, RELATING TO THE CHARLESTON COUNTY AIRPORT DISTRICT AND ITS GOVERNING BOARD, SO AS TO ADD TWO MEMBERS OF THE CHARLESTON COUNTY LEGISLATIVE DELEGATION, EX OFFICIO, TO THE GOVERNING BOARD OF THE DISTRICT; TO PROVIDE THAT CERTAIN MEMBERS OF THE AUTHORITY MAY SERVE AS ITS CHAIRMAN, AND TO PROVIDE THAT MEMBERS WHO ARE APPOINTED BY THE LEGISLATIVE DELEGATION OR COUNTY COUNCIL SHALL SERVE ONE FOUR-YEAR TERM.

04/27/11 House Introduced, read first time, placed on calendar
without reference (House Journal-page 81)
04/28/11 Scrivener's error corrected
05/03/11 House Amended (House Journal-page 15)
05/03/11 House Read second time (House Journal-page 15)
05/03/11 House Roll call Yeas-11 Nays-0 (House Journal-page 15)
05/04/11 House Read third time and sent to Senate
(House Journal-page 13)
05/05/11 Senate Introduced, read first time, placed on local &
uncontested calendar (Senate Journal-page 14)

VERSIONS OF THIS BILL

4/27/2011
4/27/2011-A
4/28/2011
5/3/2011
5/5/2011

H. 4143

<http://www.scstatehouse.gov/cgi-bin/query.exe?first=DOC&querytext=charleston%20cou...>

9/20/2011



INTRODUCED

May 5, 2011

H. 4143

Introduced by Reps. Gilliard, R.L. Brown, Mack and Whipper

L. Printed 5/5/11--S.

Read the first time May 5, 2011.

A BILL

TO AMEND ACT 1235 OF 1970, AS AMENDED, RELATING TO THE CHARLESTON COUNTY AIRPORT DISTRICT AND ITS GOVERNING BOARD, SO AS TO ADD TWO MEMBERS OF THE CHARLESTON COUNTY LEGISLATIVE DELEGATION, EX OFFICIO, TO THE GOVERNING BOARD OF THE DISTRICT; TO PROVIDE THAT CERTAIN MEMBERS OF THE AUTHORITY MAY SERVE AS ITS CHAIRMAN, AND TO PROVIDE THAT MEMBERS WHO ARE APPOINTED BY THE LEGISLATIVE DELEGATION OR COUNTY COUNCIL SHALL SERVE ONE FOUR-YEAR TERM.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Act 1235 of 1970, as last amended by Act 456 of 1998, is further amended by adding:

"SECTION 3B. There is added as members of the **Charleston County Aviation** Authority two members from the Charleston County Legislative Delegation, one who is appointed by the delegation's members of the House of Representatives and one who is appointed by the delegation's members of the Senate. Both members shall serve, ex officio, a term which begins on August eighth, and shall exercise the powers and duties as other ex officio members of the authority. A member of the authority who is eligible, including the permanent proxy of an elected official, may be elected to serve as chairman."

SECTION 2. This act takes effect upon approval by the Governor.

----XX----

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<http://www.scstatehouse.gov/cgi-bin/query.exe?first=DOC&querytext=charleston%20cou...> 9/20/2011

STATE OF SOUTH CAROLINA

South Carolina Public Interest Foundation
and Waring S. Howe, Jr., individually, and
on behalf of all others similarly situated,
Petitioners,

v.

Robert W. Harrell, Jr., in his official ca-
pacity as Speaker of the S.C. House of
Representatives, Ken Ard in his official
capacity as President of the S.C. Senate,
Representative Harry B. "Chip" Lime-
house III, Senator Glenn McConnell, and
The State of South Carolina,
Respondents.

IN THE SUPREME COURT

CASE NO: _____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Petitioners, complaining of the Respondents would show unto the Court:

1. South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution.
2. Waring S. Howe, Jr. is a citizen, resident, taxpayer, and registered elector of Charleston County, who has used the Charleston County Airport and paid fees and taxes to the Charleston County Airport District. He served as a member of the Charleston County Aviation Authority 1989-2001, and as Chairman 1996-1999. He brings this action individually on his behalf and on behalf of all others similarly situated.
3. Respondents Harrell and Ard are the leaders of the S.C. General Assembly and are named in their official capacities.

4. Respondent Representative Harry B. "Chip" Limehouse III has held office since 1995 as a member of the South Carolina General Assembly from Charleston County. Since 2007 he has simultaneously held office as a member of the Charleston County Aviation Authority. Recently he has held office as the Chairman of the Charleston County Aviation Authority. He is named as a Respondent in his official capacity as to *all three* named offices.
5. Respondent Senator Glenn McConnell has held office since 1980 as a member of the South Carolina Senate from Charleston County. Since 2007, he has simultaneously held office as a member of the Charleston County Aviation Authority. He is named as a Respondent in his official capacity as to *both* named offices.
6. This Court possesses jurisdiction under SCACR 245; the following provisions of the South Carolina Constitution: Art. I, § 8, Art. III, § 24, Art. III § 34, Art. IV, § 21, Art. VI, § 3, Art. VIII § 7; and Art. XVII, § 1A; and the following decisions: *American Petroleum Institute v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69

(1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). and S.C. Code Ann. §15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.

7. The Charleston County Aviation Authority governs the Charleston County Aviation District, a political subdivision created by Act 1235 of 1970 (**Howe Affidavit, Exhibit A**). The District's geographic boundaries are the same as Charleston County.
8. From 1984 to 1993, the General Assembly enacted and amended SC Code Ann. § 55-1-80, **Appointment of additional members to county aviation commission (Howe Affidavit, Exhibit C)**, which governs the membership of the Charleston County Aviation Authority, as well as similar aviation authorities across the State.
9. The General Assembly enacted Act 130 of 2007 (**Howe Affidavit, Exhibit D**), modifying the membership of the Charleston County Aviation Authority. Act 130 reads, "The Charleston County Aviation Authority shall be increased by two members who shall be the Chairman and Vice Chairman of the Charleston County Legislative Delegation, or their designees." Act 130 applies *only* to Charleston County.
10. The Governor vetoed Act 130, citing Article III, § 34 and Article VIII § 7 of the Constitution. In his veto message, the Governor wrote,

This bill mandates that two members be added to the Charleston County Aviation Authority and that those two members be the Chair and Vice-Chair of the Charleston County Legislative Delegation. The state Constitution clearly prohibits the enactment of special legislation where a "general law can be made applicable." S.C. Const. Art. III, Section 34(IX). The General Assembly has established a general statute addressing the appointment of additional

members to county aviation commissions. *See* S.C. Code § 55-1-80, as amended. It is unconstitutional for the General Assembly to pass special legislation, like H. 3409, R-69, in contravention of a general law. Each county's aviation board or commission should be subject to the same general law, whether that includes the Chair and Vice-Chair of the legislative delegation as additional members or not.

Additionally, this bill affects only Charleston County and is, therefore, clearly an act for a specific county. Such acts are in violation of Article VIII, Section 7 of the Constitution of the State of South Carolina, which provides that "[n]o laws for a specific county shall be enacted."

For these reasons, I am vetoing H. 3409, R-69.

(Howe Affidavit, Exhibit E).

11. The General Assembly purported to override the veto of Act 130 with a vote of 12 to 0 in the House and 43 to 1 in the Senate **(Howe Affidavit, Exhibits F, G)**.
12. Since 2007, Respondent Limehouse has not only held office as a member of the General Assembly, but also simultaneously held office as a member of the Charleston County Aviation Authority, pursuant to Act 130. Recently, he has also simultaneously held the office of Chairman of the Authority.
13. Since 2007, Respondent McConnell has not only held office as a member of the General Assembly, but also simultaneously held office as a member of the Charleston County Aviation Authority, pursuant to Act 130.

FIRST CAUSE OF ACTION

14. Petitioners incorporate by reference all the foregoing paragraphs.
15. The Governor vetoed Act 130, and the General Assembly overrode the veto with a vote of 12 to 0 in the House and 43 to 1 in the Senate, the vote was insufficient of override the veto, and Act 130 was legally vetoed. South Carolina Constitution,

Art. IV, § 21; *Board of Trustees of School District of Fairfield County v. State*, No. 27035, (Aug. 29, 2011).

16. All offices and officers thereby created are null and void, and should be declared null and void by this Court

SECOND CAUSE OF ACTION

17. Petitioners incorporate by reference all the foregoing paragraphs.
18. South Carolina Constitution, Article III § 34 states, "The General Assembly . . . shall not enact local or special laws. . . . IX. . . . Where a general law can be made applicable, no special law shall be enacted"
19. South Carolina Constitution Article VIII § 7 states in part, "No laws for a specific county shall be enacted and no county shall be exempted from the general laws."
20. Act 130 applies only to Charleston County, and thereby violates S.C. Constitution Article III § 34 and Article VIII § 7.

THIRD CAUSE OF ACTION

21. Petitioners incorporate by reference all the foregoing paragraphs.
22. Article I, § 8 of the South Carolina Constitution states,

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.
23. The Charleston County Aviation Authority is an executive body, charged with executive duties and functions.

24. The General Assembly may not consistently with Article I, § 8 undertake both to pass laws and to execute them by setting its own members to the task of discharging such functions by virtue of their office as legislators. Representative Limehouse and Senator McConnell were elected for the purpose of making laws, not administering them. *See Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89, 44 S.E.2d 88, 93-94 (1947).
25. Holding office as a member of the Charleston County Aviation Authority by Respondents Limehouse and McConnell, while they also hold office in the General Assembly, violates the separation of powers provision of S.C. Constitution Article I, § 8.

FOURTH CAUSE OF ACTION

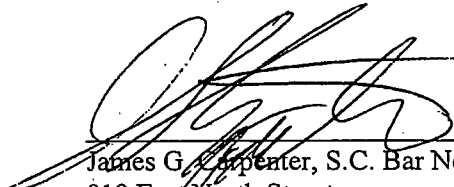
26. Petitioners incorporate by reference all the foregoing paragraphs.
27. The South Carolina Constitution, Art. III, § 24, Art. VI, § 3, and Art. XVII, § 1A prohibit dual office holding.
28. Since 2007, Respondents Limehouse and McConnell have been in violation of the foregoing Constitutional provisions.

WHEREFORE, Petitioners pray the Court:

1. To declare that when Act 130 of 2007 was vetoed, the General Assembly did not properly override the veto in accord with South Carolina Constitution, Article IV, § 21;
2. To declare that Act 130, if validly enacted, violates S.C. Constitution Article III § 34 and Article VIII § 7, and is therefore invalid;

3. To declare that the holding office as a member of the Charleston County Aviation Authority by Respondents Limehouse and McConnell violates the Separation of Powers provision of S.C. Constitution Article I, § 8
4. To declare that Respondent Limehouse and McConnell are and have been since 2007 in violation of the Constitutional provisions prohibiting dual office holding;
5. To grant Petitioners their costs and attorneys fees under S.C. Code Ann. § 15-77-300 ff.; and
6. To grant such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



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Greenville, SC 29601
Tel. (864) 235-1269
Fax (864) 331-3083
Attorney for the Petitioners

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on
behalf of all others similarly situated, Petitioners,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of
Representatives, Ken Ard in his official capacity as President of the S.C. Senate,
Representative Harry B. "Chip" Limehouse III, Senator Glenn McConnell, and The State
of South Carolina, Respondents.

PROOF OF SERVICE

I certify that I have served Petitioner's Notice of Petition for Original Jurisdiction,
Petition for Original Jurisdiction, Complaint for Declaratory Judgment, and Affidavit of
Waring S. Howe, Jr. on all Respondents by certified mail, return receipt requested, and
delivery restricted to the addressee, on October 31, 2011, addressed as follows:

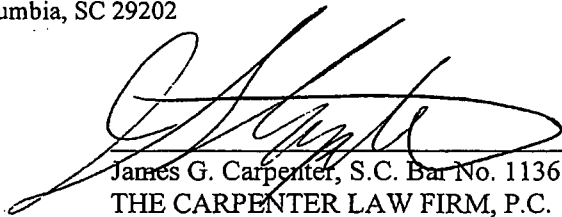
The Hon. Robert W. Harrell,
Jr., Speaker
SC House of Representatives
P.O. Box 11867
Columbia, SC 29211

The Hon. Harry B. "Chip"
Limehouse
SC House of Representatives
P.O. Box 11867
Columbia, SC 29211

State of South Carolina
Office of the Atty. General
P.O. Box 11549
Columbia, SC 29211.

The Hon. Ken Ard
SC Senate
P.O. Box 142
Columbia, SC 29202

The Hon. Glenn McConnell
SC Senate
P.O. Box 142
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Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and Waring
S. Howe, Jr., individually, and on behalf of all others
similarly situated, ... Petitioners,

v.

Robert W. Harrell, Jr., in his official capacity as
Speaker of the S.C. House of Representatives, Ken Ard
in his official capacity as President of the S.C. Senate,
Representative Harry B. "Chip" Limehouse, III,
Senator Glenn McConnell, and The State of South
Carolina, ... Respondents.

Return to Petition for Original Jurisdiction

Pursuant to Rule 245(c) of the South Carolina Appellate Court Rules, Respondent Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, hereby files his Return to the Petition for Original Jurisdiction. The petition should be denied for the following reasons. First, collateral estoppel bars Petitioners from maintaining this action. Second, no issues exist that warrant this Court entertaining this action in its original jurisdiction. The issues presented by Petitioners can fully be adjudicated in the trial courts of this State. Our trial courts have analyzed and ruled upon issues of a similar nature in the past and should be allowed to consider this matter in the first instance. Third, no exigent circumstances or other good reason exists to remove this action from an initial determination by a trial court. Despite Petitioners' claim to the contrary, no party will

be prejudiced by allowing the trial court to first address this matter. Thus, this Court should deny the petition.

Argument

I. The petition should be denied because collateral estoppel bars Petitioners from maintaining this action.

This Court has previously held that Petitioner South Carolina Public Interest Foundation ("SCPIF") lacks the standing necessary to maintain a challenge to the constitutionality of Act 130 of 2007 ("the Act" or "Act 130"). The well-settled rules of collateral estoppel preclude SCPIF from asserting it has the standing necessary to maintain a challenge to the constitutionality of Act 130. Petitioner Waring S. Howe, Jr. ("Howe") likewise is barred by collateral estoppel from challenging Act 130. Therefore, Petitioners lack standing to maintain this action. This Court should deny the petition and decline to entertain this matter in its original jurisdiction.¹

Collateral estoppel prevents a party from relitigating an issue that was decided in a previous action. *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009); *S.C. Prop. & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Collateral estoppel applies regardless of whether the claims in the first action and subsequent action are the same. *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (cert. denied January 6, 2011). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

¹ This Court could, in the alternative, grant the petition and enter an order dismissing the action due to Petitioners' lack of standing. Speaker Harrell opposes a grant of the petition for any reason other than a dismissal for lack of standing.

All three elements are satisfied in this matter and preclude SCPIF from maintaining a challenge to Act 130 in this action. First, the issue of whether SCPIF had standing to challenge the constitutionality of Act 130 was actually litigated to this Court in *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), overruled on other grounds, *American Petroleum Inst. V. SC Dept. of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009). In that action, SCPIF challenged, *inter alia*, the constitutionality of Act 130 of 2007. *Id.* at 445, 663 S.E.2d at 54. Speaker Harrell defended the constitutional challenge to Act 130 on the ground that SCPIF lacked the standing to challenge Act 130.² *Id.*; see also 2008 Brief of Speaker Harrell filed January 7, 2008. This Court considered that defense and ultimately ruled on that exact issue. *Id.* at 445 n.1, 663 S.E.2d at 54 n.1. As a result, the issue of SCPIF's standing to challenge Act 130 was actually litigated to this Court in 2008. Second, this Court directly and finally determined this standing issue in the prior action. After consideration of the merits of SCPIF's numerous other constitutional challenges, this Court specifically held that SCPIF lacked the standing to challenge Act 130, noting that "Petitioners lack standing to challenge those acts." *Id.*³ Third, this Court's standing ruling was necessary to afford complete relief on all the issues raised in the 2008 action.

Based on the above, SCPIF is collaterally estopped from asserting it possesses the standing necessary to maintain this action. The issue of whether SCPIF has standing to challenge the constitutionality of Act 130 was litigated and finally decided

² Speaker Harrell also challenged the standing of Petitioner Sloan. This Court found Petitioner Sloan also lacked standing to challenge Act 130. Petitioner Sloan is not a party to the present action.

³ SCPIF and Sloan also challenged the constitutionality of Acts 136, 142, 143, and 151 of 2007.

by this Court in the 2008 action. This Court held SCPIF did not. Therefore, collateral estoppel prevents SCPIF from relitigating that issue now. As a result, this Court should deny the petition for original jurisdiction because SCPIF lacks standing to re-challenge Act 130.

Further, this Court's 2008 holding on the standing issue likewise precludes Petitioner Howe from asserting he has the standing necessary to maintain this action. Our courts have abolished the mutuality requirement from our collateral estoppel jurisprudence. Hence, Petitioner Howe cannot assert his absence from the 2008 action insulates him from issue preclusion. His inclusion in this action is immaterial and does not preclude the application of collateral estoppel by Speaker Harrell. Thus, both Petitioner SCPIF and Petitioner Howe are collaterally estopped from asserting they have standing in this action.

South Carolina courts have dispensed with the traditional requirement that mutuality of parties was necessary for collateral estoppel to bar relitigation of an issue. *See Doe v. Doe*, 346 S.C. 145, 149, 551 S.E.2d 257, 259 (2001); *Graham v. State Farm Fire & Cas. Ins. Co.*, 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982). Now, the identity of parties and their relationships to one another are irrelevant in applying collateral estoppel to prevent relitigation of an issue in a subsequent action. *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (cert. denied January 6, 2011).

Carolina Renewal establishes that Petitioner Howe is collaterally estopped from arguing he has standing to maintain this constitutional challenge to Act 130. In that action, Carolina Renewal entered into a contract with the South Carolina Department of

Transportation ("SCDOT"). *Carolina Renewal*, 385 S.C. at 552, 684 S.E.2d at 781. Ultimately, Carolina Renewal instituted a breach of contract action and sought breach damages under the contract with SCDOT. *Id.* at 553, 684 S.E.2d at 781. SCDOT defended the suit, arguing collateral estoppel barred Carolina Renewal's claim for contract damages because SCDOT had already defended a suit where those damages were at issue. *Id.* Carolina Renewal was not a party to the initial action where the contract damages were at issue. *Id.* at 555, 684 S.E.2d at 782. Specifically, SCDOT argued Carolina Renewal's absence from the initial action was immaterial because the issue of contract damages was fully argued and decided in the prior lawsuit. *Id.* The trial court agreed with SCDOT and dismissed the action, finding collateral estoppel barred Carolina Renewal's subsequent action. *Id.* at 553, 684 S.E.2d at 781.

On appeal, Carolina Renewal argued that collateral estoppel did not bar its action because Carolina Renewal was not a party to the prior action. *Id.* at 555, 684 S.E.2d at 782. The Court of Appeals, relying on precedent from this Court, rejected that argument. *Id.* The Court of Appeals held that the absence of Carolina Renewal from the prior lawsuit did not preclude a finding that it was collaterally estopped from relitigating the issue of damages under the contract with SCDOT. *Id.* The Court of Appeals reasoned that:

As these decisions make clear, the identity of parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel.

Id. Thus, because the issue of contract damages was already litigated, collateral estoppel prevented Carolina Renewal from relitigating the same issue in a second action against SCDOT. *Id.*⁴

Such is the case here. The issue of standing to challenge the constitutionality of Act 130 was already litigated and adjudicated in favor of Speaker Harrell in the 2008 action. Petitioner Howe seeks to have that same issue relitigated against Speaker Harrell in this action. That is precisely what *Carolina Renewal* found to be improper and barred by collateral estoppel. Therefore, Petitioner Howe cannot assert his absence from the 2008 action insulates him from issue preclusion. Petitioner Howe is estopped from asserting he has standing to maintain this action.

Moreover, Petitioner Howe cannot claim his action is barred by collateral estoppel because he was denied a full and fair opportunity to litigate this standing issue against Speaker Harrell.⁵ *Carolina Renewal* again defeats this position. There, Carolina Renewal argued that because it was the only party that could bring the breach action against SCDOT, then the court should not prevent it from litigating the issue. *Carolina Renewal*, 385 S.C. at 556, 684 S.E.2d at 782. The Court of Appeals rejected this position. *Id.* The Court of Appeals found the interests of Carolina Renewal and the prior plaintiff were identical as both sought contract damages from SCDOT. *Id.* Thus, the court concluded that the identity of common interest afforded Carolina Renewal a full and fair opportunity to litigate the issue even though it was not a party to the prior action. *Id.* (holding that “because the interests of Carolina Renewal and [the

⁴ This Court declined to review the holding and rationale of *Carolina Renewal* on January 6, 2011.

⁵ A court can apply collateral estoppel when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. *Carolina Renewal*, 385 S.C. at 555, 684 S.E.2d at 782. This concept applies even if the plaintiff was not a party to the prior action. *Id.*

prior plaintiff] are identical, we see no reason to find Carolina Renewal lacked a full and fair opportunity to litigate the issue of damages under the contract with SCDOT”).

This action is analogous. The interests of SCPIF and Howe are identical in this action. Both parties seek the same goal, namely to have Act 130 declared unconstitutional. Therefore, because SCPIF had a full and fair opportunity to litigate the issue, Petitioner Howe cannot claim he was denied a full and fair opportunity to litigate the standing issue. Because Petitioners both lack standing, this Court should deny this petition for original jurisdiction.

Lastly, SCPIF and Petitioner Howe cannot allege that collateral estoppel does not apply to the standing issue because the constitutional challenges to Act 130 are rooted in different claims than was the case in the 2008 action. Such a claim lacks merit. Collateral estoppel bars issues and applies despite the claims or grounds SCPIF or Petitioner Howe utilize to challenge Act 130. *See Carolina Renewal*, 385 S.C. at 556, 684 S.E.2d at 783 (holding “[c]ollateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same”) (citations omitted, emphasis added). The issue in the 2008 action is the same as this action—whether a party has standing to challenge the constitutionality of Act 130. The basis asserted to challenge the constitutionality of Act 130 is immaterial. Thus, both Petitioner SCPIF and Petitioner Howe are collaterally estopped from asserting they

have standing in this action. This Court should deny the petition for original jurisdiction.⁶

II. This matter does not warrant the grant of original jurisdiction because our trial courts are well-suited to address the matter raised by Petitioners.

Assuming this Court moves past the Petitioners' lack of standing presented above, compelling reasons do not exist that would warrant this Court entertaining this action in its original jurisdiction. In the petition, Petitioners request original jurisdiction due to the delay and prejudice that would be caused by allowing this matter to proceed in the trial court. These arguments are without merit and do not support this Court entertaining this matter in its original jurisdiction. Any delay in this matter would not be caused by allowing this matter to be addressed by the trial court. Rather, the delay and any prejudice is directly attributable to Petitioners' decision to defer a challenge to Act 130 for over three years.

First, Petitioners allege that "further delay in the lower courts" would "not protect the public interest." (Petition p. 4). This claim ignores the fact that Petitioners choose to file this action in 2011 despite Act 130 having been enacted in 2007. As set forth above, SCPIF first challenged Act 130 in 2008. This Court rejected that challenge. Petitioners then waited three more years to launch this second action contesting the constitutionality of Act 130. Thus, for that three-year period, Petitioners, for whatever reason, did not believe an immediate challenge to Act 130 was

⁶ Even assuming *Carolina Renewal* was somehow inapplicable to this action, Petitioner Howe's standing to bring this action would still be challenged. Such a challenge would be best suited to be addressed by a trial court. Petitioner Howe's past service on the Charleston County Aviation Authority is insufficient to grant him standing. *Blanding v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

required or that their delay was prejudicing the public interest. Petitioners ignore this fact and ask this Court to expedite this matter in order to overcome the delay caused by their decision to not file this action for over three years. This Court should reject that request and allow this matter to proceed in the trial court.

Second, Petitioners claim that “[a]ny delay required by appeals of lower court decisions” would prejudice Petitioners. (Petition p. 5). This is also without merit. In the petition, Petitioners make bare allegations of prejudice. However, Petitioners fail to set forth how they are actually prejudiced. Allowing litigation to originate in the trial court cannot be a basis for prejudice absent a true emergency situation. This is not such a situation. Act 130 has been law for over four years and has previously been challenged by SCPIF.

Moreover, our judicial system is generally designed for actions to first be decided by a trial court. The aggrieved party may then seek appellate review in the Court of Appeals. Finally, if the situation warrants, this Court may review the matter upon a grant of certiorari. This structure ensures fairness to litigants through complete factual review, analysis of legal issues, and review of potential errors by the appellate courts. Under Petitioners’ logic, any litigant whose action must first begin at the trial level is prejudiced by the time it takes to complete a fair and thorough review by an appellate court. Such a rule would flood this Court with original jurisdiction requests anytime a constitutional challenge is raised and would further remove one level of judicial review from our judicial structure. This should not be the rule in South Carolina. This Court should deny the petition and allow this matter to proceed in the trial court.

A review of South Carolina jurisprudence indicates that numerous actions presenting issues analogous to this matter have originated in the trial court and been reviewed in this Courts' appellate capacity. In those matters, the trial court was allowed to rule on the issues, including constitutional challenges and challenges to legislative enactments, before appellate review was given by this Court and/or the Court of Appeals. See, e.g., *Sloan v. Greenville Hosp. Sys.*, 388 S.C. 152, 694 S.E.2d 532 (2010); *Sloan v. S.C. Dept. of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008); *McSherry v. Spartanburg County Council*, 371 S.C. 586, 641 S.E.2d 431 (2007); *South Carolina Public Interest Foundation v. Judicial Merit Selection Comm.*, 369 S.C. 139, 632 S.E.2d 277 (2006); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006); *Sloan v. S.C. Dept. of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Greenville County*, 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009); *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000). These cases demonstrate that our trial courts are well-suited to hear matters such as this. This Court should deny the petition and allow the trial court to hear the matter in the first instance.

The recent case of *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011), further demonstrates that this matter should be first addressed by trial court. In that action, the school district filed a declaratory judgment action challenging the constitutionality of Act 189 of 2005. *Charleston Cnty. Sch. Dist.*, 393 S.C. at 556, 713 S.E.2d at 607. The school district argued the act was unconstitutional special legislation. *Charleston Cnty. Sch. Dist.*, 393 S.C. at 556, 713 S.E.2d at 607. In 2008, the school district filed a petition with this Court asking the court to entertain

the matter in its original jurisdiction. *See* Petition for Original Jurisdiction filed November 24, 2008. The school district argued the matter warranted the exercise of original jurisdiction because the constitutionality of a legislative enactment was at issue and because it was an issue of great public importance. *Id.* Ultimately, this Court disagreed. The petition was denied, and this Court allowed the action to proceed in the trial court. *See* Order denying Petition dated February 4, 2009. The matter then proceeded to the trial court for an initial determination of the issues. *Charleston Cnty. Sch. Dist.*, 393 S.C. at 556, 713 S.E.2d at 607. After the trial court initially ruled, this Court entertained the matter in its appellate capacity and remanded the matter back to the trial court for further proceedings. *Id.* at 561, 713 S.E.2d at 609. Thus, this Court's decision to decline to entertain the constitutional challenge in its original jurisdiction and then remand to the trial court for further proceedings indicated the court was not concerned with any delay associated with allowing the matter to proceed through the usual judicial process. This Court should reject the petition here for the same reasons.

This matter is analogous. This matter involves a constitutional challenge to a legislative enactment and the subsequent revisions just as *Charleston County* did. Additionally, Act 130 is being challenged on the same basis as the act in *Charleston County*. Lastly, Petitioners seek to hear this matter in this Court's original jurisdiction on the same basis as the school district. As the *Charleston County* opinion shows, this Court recognizes that our trial courts are well-suited to decide these constitutional challenges to legislative enactments. Just as in that case, this Court should not be

concerned with the time it may take to first allow this matter to proceed in the trial court. Thus, this Court should reject the petition for original jurisdiction.

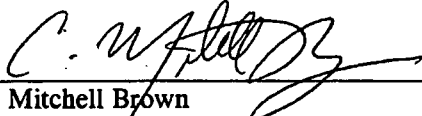
III. Petitioners' class allegations are best resolved by a trial court and not via the exercise of this Court's original jurisdiction.

On the face of the petition and the complaint, Petitioners appear to assert this matter as a class action "on behalf of all other similarly situated." *See Petition and Complaint* filed October 31, 2011. However, the body of the petition and complaint fail to adequately support such a request. This discrepancy will be the subject of motions best served to proceed in a trial court. This Court should decline to entertain this matter in its original jurisdiction.

Conclusion

Based on the foregoing, this Court should deny the petition for original jurisdiction.

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Columbia, South Carolina

January 11th, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Public Interest Foundation and Waring S. Howe, Jr. individually, and on
behalf of all others similarly situated.....Petitioner,

v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the S.C. House of
Representatives, Ken Ard, in his official capacity as President of the S.C. Senate,
Representative Harry B. "Chip" Limehouse, III, Senator Glenn McConnell, and the State
of South Carolina.....Respondents, (

RETURN OF STATE TO PETITION FOR ORIGINAL JURISDICTION

Under Rule 245, SCACR, the Court "will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties."¹ The State of South Carolina objects to this Petition because this matter can be determined in the lower court pursuant to this provision.

The statute at issue provides for the addition of two members to the Charleston

1. Rule 245, SCACR, also provides that "[i]f the public interest is involved or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition with supporting affidavits."

County Aviation Authority who shall be the Chairman and Vice Chairman of the Charleston County Legislative Delegation or their designees. Act No. 130, 2007 S.C. Acts ___, Petitioners claim that this Act is unconstitutional on multiple grounds including that the veto override vote was insufficient under *Board of Trustees of School District of Fairfield County v. State*, ___ S.E. 2d ___ (S.C. Sup. Ct., 2011 WL 3804797 (Aug. 29, 2011), and that the statute violates the special legislation provisions of art. III §34 under *Charleston County School District v. Harrell*, 393 S.C. 552, 713 S.E. 2d 604 (2011). Therefore, these cases cited by Petitioners as well as other authority should provide guidance to a Circuit Court regarding those issues. *Charleston* reversed a Circuit Court decision dismissing that case and remanded the case to the Circuit Court for further proceedings. When that case was remanded, no reason exists for this Court to take original jurisdiction of the instant case asserting the same issue.

Although Petitioners also contend that this Act violates Home Rule, S.C. Const. art. VIII, §7 and cite *Charleston, supra*, that case does not appear to have addressed that issue. Nevertheless, ample precedent exists regarding Home Rule to guide a Circuit Court. *See, eg., City of Myrtle Beach v. Richardson*, 280 S.C. 167, 171, 311 S.E.2d 922, 925 (1984)(“This Court has said many things about the scope of the Home Rule Act . . .”).

Petitioners also claim that the Act violates art. I, §8 concerning separation of powers and art. III, §24 concerning dual office holding citing precedent that they believe is controlling, *Segars-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, 691 S.E. 2d 453 (2010) and *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E. 2d 88 (1947). Again, precedent is available to guide the Circuit Court.

Petitioners merely argue generalities as to why this Court should take up this matter in the first instance. No urgency exists to vault this case over the normal course of beginning first in the Circuit Court. The statute was passed nearly five years ago in 2007. If it could wait until now for judicial consideration, it can await consideration in the Circuit Court.

For these reasons, the State of South Carolina respectfully requests that this Petition be denied. The State does not now take any position regarding the merits of the issues raised in this case and reserves all claims and defenses that it may have as to this case until such time as this case may be considered by a Circuit Court or this Court.

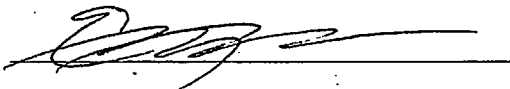
Respectfully submitted,

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ATTORNEYS FOR THE
STATE OF SOUTH CAROLINA

January 9, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation
and Waring S. Howe, Jr. individually, and on
behalf of all others similarly situated, ... Petitioners,

v.

Robert S. Harrell, Jr., in his official capacity as
Speaker of the S.C. House of Representatives,
Ken Ard, in his official capacity as President of the S.C. Senate,
Representative Harry B. "Chip" Limehouse III,
Senator Glenn F. McConnell, and the State of S.C., ... Respondents.

**RETURN TO THE PETITION FOR ORIGINAL JURISDICTION
OF KEN ARD, IN HIS OFFICIAL CAPACITY AS PRESIDENT
OF THE S.C. SENATE,
AND SENATOR GLENN F. MCCONNELL**

By and through their undersigned counsel, Lt. Governor Ken Ard and Senator Glenn F. McConnell submit that the Court should deny the Petition for Original Jurisdiction in this matter because the Petitioners have failed to demonstrate that this matter is one that is appropriately addressed in the Court's Original Jurisdiction. Rule 245 of the South Carolina Appellate Court Rules governs when the exercise of this Court's Original Jurisdiction is appropriate and provides:

The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties. If the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition with supporting affidavits.

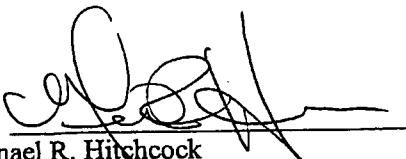
The challenged Act was passed almost five years ago in 2007 and the Petitioners have failed to provide any reason demonstrating a sudden pressing need for this matter to be immediately resolved in this Court rather than allowing it to progress normally through the lower courts. If the adjudication of this matter were an urgent one for the Petitioners, they could have initiated this action shortly after the act's passage. The Petitioners' failure to bring this action at a time more proximate with the passage of this act indicates that they are unlikely to suffer material prejudice if this matter is determined by a lower court in the first instance. Further, the Petitioners fail to allege any particularized harm to them that has occurred resulting from the passage of this act. If the Petitioners have not suffered material prejudice to themselves directly since the passage of this act, then they are unlikely to suffer material prejudice while this case is decided below and progresses through the appellate process.

Further, Petitioners' claims do not present novel issues of first impression that need to be addressed by this Court to provide guidance to the lower Courts on the areas of the law implicated by the Petitioners' claims. There is ample precedent from this Court for the lower courts to apply to each of the claims presented by the Petitioner to reach an informed decision in this matter.

Therefore, the Petition for Original Jurisdiction should be denied because the Petitioners have failed to demonstrate why this matter cannot be determined by a lower court in the first instance.

[SIGNATURE OF COUNSEL ON THE FOLLOWING PAGE]

Respectfully submitted,

BY: 

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January 11th, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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v.

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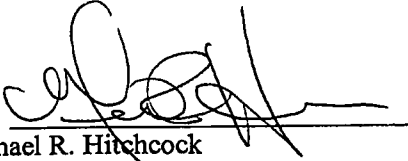
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McConnell

January 11th, 2012

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on
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Harry B. "Chip" Limehouse III, Senator Glenn McConnell, and The State of South Caro-
lina, Respondents.

REPLY TO RETURNS TO PETITION FOR ORIGINAL JURISDICTION

Petitioners submit this Reply to Respondents' Returns to the Petition for Original
Jurisdiction.

January 19, 2012

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Attorneys for Petitioners

Petitioners challenge Act 130 of 2007. Respondents make three main arguments in response to the Petition. All three are without merit, and the first two are inherently contradictory. They argue:

1. Petitioners waited four years to challenge Act 130, and therefore there is no urgency for a ruling.
2. Because Petitioner South Carolina Public Interest Foundation ("SCPIF") attempted to challenge Act 130 in *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), but was ultimately denied standing, SCPIF and all other South Carolinians are collaterally estopped from challenging Act 130.
3. Because the legal precedents on the four legal claims are so clear, any court could see the proper result; and the Supreme Court does not need to take the case.

I. SCPIF Did Not Wait Four Years to Challenge Act 130.

SCPIF attempted to challenge Act 130 as soon as it was enacted. *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008). In 2008, when Mr. Sloan and SCPIF challenged Act 130 (along with several other single county acts and three "bobtailed" acts), the Court originally granting Original Jurisdiction as to all eight challenged acts, but after briefing and oral argument, the Court ruled that Sloan and SCPIF lacked standing to challenge the special, single county Acts, and decided only the bobtail issues. SCPIF did not wait four years to challenge Act 130.

II. The Prior Challenge to Act 130 Does Not Bar This Action.

Respondent Harrell argues that because this Court ruled SCPIF would not be granted standing in *South Carolina Public Interest Foundation v. Harrell*, now no one will ever possess standing to challenge Act 130 on any basis. This argument is preposterous. See *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003).

First, in 2008 SCPIF and Mr. Sloan requested standing both as a taxpayer and based upon the public importance of the issues. Initially, the Court took the whole case in its original jurisdiction, signifying the public importance of all the claims. The parties briefed and orally argued all issues, including the challenges to the special, single county acts. In its opinion, footnote 1, the Court declined to rule on the five special single county acts because Sloan and SCPIF had no personal stake in the legislation related to any of the individual counties.

FN1. We decline to address Petitioners' contention that 2007 Act Nos. 130, 136, 142, 143 and 151 constitute special laws in violation of South Carolina Constitution, Article VIII, § 7, and Article III, § 34. Petitioners lack standing to challenge those acts. *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Id.

The present action is distinguishable from the previous action. First, a petitioner in this action, Waring Howe, is a resident of Charleston County and a former Commissioner on the Airport Commission. Neither SCPIF nor Mr. Sloan, a resident of Green-

ville County, had such a personal connection to the challenged special legislation in the prior action.

Second, this action is distinguishable from the prior action challenging Act 130 because this action contains four distinct legal arguments, and the prior action addressed only one of them. Any one of those four arguments carries the significant public importance necessary to justify public importance standing and to grant Petitioners' Motion for Original Jurisdiction. The four claims are as follows:

1. The General Assembly voted to override the veto of Act 130 of 2007 with a vote of 12 to 0 in the House and 43 to 1 in the Senate, thus lacking sufficient votes in the House. South Carolina Constitution Article IV, § 21. *Board of Trustees of School District of Fairfield County v. State*, 718 S.E.2d 210 (S.C. 2011). The prior action did not address this issue, and this Court issued the controlling precedent after the 2008 action.
2. Act 130 of 2007 violates the South Carolina Constitution, Article III, § 34 and Article VIII, § 7. Act 130 is a special law for which a general law is applicable, and it applies only to Charleston County. S.C. Code § 55-1-80 establishes a standard and method for the appointment of additional members to all county aviation commissions, but Act 130 of 2007 establishes procedures applicable only to the Charleston County. In *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), the Attorney General agreed that Act 130 violated Article III, § 34 and Article VIII, § 7.
3. Act 130 allows members of the General Assembly to serve and fulfill executive functions on the Charleston County Aviation Authority, which violates the separa-

tion of powers provision of the South Carolina Constitution, Article I, § 8. *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947). *Segars-Andrews, v. Judicial Merit Selection Commission*, 387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010). The prior action did not address this issue, and this Court issued *Segars-Andrews* after the 2008 action.

4. The simultaneous holding of offices by Respondents Limehouse and McConnell both in the General Assembly and on the Charleston County Aviation Authority violates the Dual Office Holding provisions of the Constitution. *Ashmore*, 211 S.C. 77, 90, 44 S.E.2d 88, 94 (1947). *Segars-Andrews, v. Judicial Merit Selection Commission*, 387 S.C. 109, 127, 691 S.E.2d 453, 463 (2010). Similarly, the prior action did not address this issue, and this Court issued *Segars-Andrews* after the 2008 action.

Thus, this action is distinguishable from *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), and the prior action does not bar this one.

III. The Court Should Address These Claims Because the Speaker Requested Clarification, and the Respondents Oppose the Rulings of this Court.

On January 10, 2012, the House Journal quoted Speaker Harrell discussing *Board of Trustees of School District of Fairfield County v. State*, 718 S.E.2d 210 (S.C. 2011), and the number of votes necessary to override vetoes. He lamented that he did not know what *Fairfield County* means, that he had asked many lawyers what it means, and they did not know either. Speaker Harrell reported that he had asked the Supreme Court for clarification, but this Court refused.

PARLIAMENTARY INQUIRY

Rep. LUCAS made a Parliamentary Inquiry and requested that the Speaker, in light of the Supreme Court's recent decision in the case of the *Board of Trustees of the School District of Fairfield County v. The State of South Carolina*, inform the body of the Court's ruling concerning the process whereby the House may override or sustained a veto of the Governor.

SPEAKER HARRELL responded by thanking Rep. LUCAS for asking the question making the parliamentary inquiry. The Speaker stated the following:

"As many of you know, the Supreme Court issued an opinion this past August striking down the General Assembly's long established interpretation of the law relating to the vote necessary to override a veto. This was done in a case that involved Act 308 of 2010, a piece of local legislation passed by this body in February, 2010 and which this body overrode the Governor's veto in March 2010. While the particular legislation at issue in this case involves local legislation, the Court's decision has a much further reaching impact that affects the required vote on all questions before this body regarding overriding a Governor's veto.

Many of you know that I don't agree with the Court's decision in this case. I believe the decision overrules long established precedent of this body as well as the Court's prior decisions.

While I strongly disagree with the decision, I also recognize that our government was established by the founders of this great country and state to put in place a system of checks and balances.

In this system, the Judicial Branch is given the authority and responsibility to interpret the law, and, in this case, that law is our South Carolina Constitution. Thus, we must abide by the Court's decision, and that is why I have made my best effort to interpret the Court's decision so that it can be implemented into the voting procedures of this House.

I have devoted a great deal of time in the months since the Court's decision in an attempt to interpret exactly what the Court meant. *Unfortunately*, even after lengthy consultation with our various in-house legal counsel as well as various private outside counsel, *I have been unable to come to a definitive conclusion as to the Court's intent.*

Please know that I attempted to resolve this confusion and *requested* that the Court provide *much needed clarification* to their decision - clarification I felt was necessary in order to implement the Court's decision into our voting process. Unfortunately, *the Court denied this clarification* and that has left us in the *dilemma* we are in today.

I'm afraid *it is impossible to come to a definitive conclusion of the Court's intent.* Thus, what I have done is come to a conclusion and interpretation based on my best efforts to understand the Court's ruling and the

advice of legal counsel. I assure you that I did not come to this conclusion lightly, but I believe it is the most accurate reflection of the Court's decision based on the limited guidance we currently have available.

Thus, the necessary vote to override a Governor's veto in the House is an affirmative vote of at least 2/3 of those members present and voting with a minimum of at least 2/3 of a quorum of the body voting in the affirmative to override. Thus, assuming the House has 124 elected members, a quorum of the House would be 63. A 2/3 majority of this quorum would be 42.

Therefore, the necessary vote to override a veto of the Governor would be an affirmative vote of at least 2/3 of those members present and voting with a minimum of at least 42 members voting in the affirmative to override. Any vote to override that does not meet this standard will be sustained.

After lengthy consideration I firmly believe this is the most straight-forward of all of the possible interpretations of the Court's ruling. I will also reiterate that I do not agree with the Court's decision in this case. However, I believe this interpretation complies with the Court's intent, as best as we can discern the intent and language of the Court's decision. Our system of government requires that we abide by that decision.

Again, my ruling is that the necessary vote to override a veto in the House is an affirmative vote of at least 2/3 of those members present and voting with a minimum of at least 2/3 of a quorum of the body voting in the affirmative to override. Any vote to override that does not meet this standard will be sustained."

MOTION TO RECONSIDER TABLED

Journal of the House of Representatives of the State of South Carolina, Regular Session
Beginning Tuesday, January 10, 2012 (Statewide Session) (*emphasis added*).

Perhaps this present action affords the Court a chance to clarify matters for the Speaker.

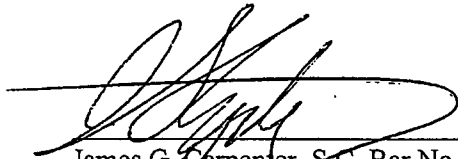
On the other hand, if, as the Respondents contend herein, the controlling precedent is so clear, the Respondents could have offered a Consent Order to resolve the case, but instead they have chosen to litigate.

CONCLUSION

Petitioners respectfully request the Court to take this case in its Original Jurisdiction and rule on the many important public issues it raises.

January 19, 2012

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line.

James G. Carpenter, S.C. Bar No. 1136
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Greenville, South Carolina 29601
Tel. (864) 235-1269
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Attorneys for Petitioners



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 8, 2012

James G. Carpenter, Esquire
Jennifer J. Miller, Esquire
L. WSarren Clayton, III, Esquire
819 East North Street
Greenville, SC 2960, SC 29601

Re: SC Public Interest v. Harrell, et al.

Dear Counsel:

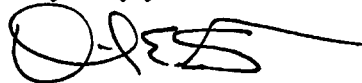
The following Order has been endorsed on your Petition for Original Jurisdiction in the above entitled matter:

"Petition for Original Jurisdiction is denied.

s/ Jean H. Toal C.J.
For the Court

February 08, 2012."

Very truly yours,



CLERK

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated, ... Appellant,

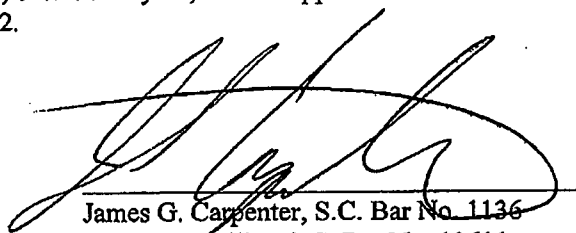
v.

Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, Glenn McConnell, in his official capacity as President of the South Carolina Senate, Representative Harry B. "Chip" Limehouse III, Senator George E. "Chip" Campsen, and the State of South Carolina, ... Respondents.

NOTICE OF APPEAL

South Carolina Public Interest Foundation and Waring S. Howe, Jr., individually, and on behalf of all others similarly situated appeal the Judgment filed March 11, 2013, and the Order of the Honorable R. Markley Dennis, Jr., entered May 13, 2012. Appellants received written notice of the entry of the Order May 17, 2012.

May 24, 2013



James G. Carpenter, S.C. Bar No. 1136
Jennifer J. Miller, S.C. Bar No. 13611
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SC Public Interest v. Harrell, et al.

Page 2

February 8, 2012

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cc: Bradley S. Wright, Esquire
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Michael J. Anzelmo, Esquire
Michael R. Hitchcock, Esquire
John P. Hazzard, V, Esquire
Robert E. Stepp, Esquire
Alexis K. Lindsay, Esquire
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State of South Carolina**

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-10-4969

South Carolina Public Interest Foundation, et al.

Robert W. Harrell, Jr., in his official capacity
as Speaker of the S.C. House of
Representatives, et al.

PLAINTIFF(S)

DEPENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41 SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICATION BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion for Judgment is granted based on lack of Plaintiffs' standing only and this Court is not ruling on any other matters raised in Defendant's motion. As a result of this ruling, Plaintiffs' Motion for Summary Judgment is now moot and the Complaint is dismissed in entirety. Formal order to follow.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

Defendant Harrell's Motion for Summary Judgment was initially filed as Motion for Judgment on the pleadings. Court denied that Motion (see Court's order filed on October 24, 2012), and the issues came back before the Court on the Motion for Summary Judgment on February 14, 2013, which this Court is ultimately granting.

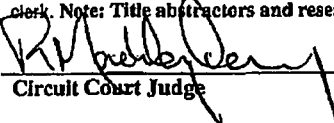
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$

		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2060
Judge Code

3/01/2013
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

South Carolina Public Interest
Foundation and Waring S. Howe, Jr.,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

Robert W. Harrell, Jr., in his official
capacity as Speaker of the South
Carolina House of Representatives, Ken
Ard, in his official capacity as President
of the South Carolina Senate,
Representative Harry B. "Chip"
Limehouse III, Senator Glenn
McConnell, and the State of South
Carolina,

Defendants.

Civil Action No. 2012-CP-10-04969

Order Granting Speaker Harrell's
Motion for Summary Judgment
and Dismissing Plaintiffs' Action
in its Entirety

FILED
2013 MAY 13 PM 12:41
JULIE J. ARMSTRONG
CLERK OF COURT
BY *[Signature]*

BEFORE THE COURT is the Motion for Summary Judgment of Defendant Robert W. Harrell, Jr., in his official capacity as Speaker of the South Carolina House of Representatives ("Speaker Harrell"), asserting that Plaintiffs lack the standing to maintain this action against all Defendants. This Court held a hearing on this matter on February 14, 2013, at which Michael J. Anzelmo, Esquire, appeared on behalf of Speaker Harrell; Rob Tyson, Esquire, appeared on behalf of Representative Harry B. "Chip" Limehouse III; Emory Smith, Esquire, appeared on behalf of the State of South Carolina; and Michael Hitchcock, Esquire, appeared on behalf of Defendants Glen McConnell, in his official capacity as President of the South Carolina Senate, and

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Senator George E. Campsen, III.¹ Jim Carpenter, Esquire, appeared on behalf of the Plaintiffs. At the hearing, counsel for Defendant Limehouse and counsel for Defendants Glen McConnell and Senator George E. Campsen, III, supported and joined in Speaker Harrell's Motion for Summary Judgment. Counsel for the State concurred in the Motion.

After consideration of the pleadings, the parties' written submissions, and oral argument of counsel, the Court finds no issues of material fact exist and Defendants are entitled to judgment as a matter of law. Therefore, this Court grants the Motion for Summary Judgment and dismisses this action in its entirety as more fully set forth below.

Factual Background

The issues in this case relate to the General Assembly's passage of Act 130 in 2007 ("the Act" or "Act 130"). In 2008, the Foundation launched an initial action challenging the constitutionality of Act 130. See *S.C. Pub. Interest Found. v. Harrell*, 378 S.C. 441, 445, 663 S.E.2d 52, 54 (2008) (overruled on other grounds, *Am. Petroleum Inst. v. SC Dept. of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009)).² In that action, Speaker Harrell defended the constitutional challenge to Act 130 on the ground

¹ Plaintiffs originally sued former Lieutenant Governor Ken Ard, in his official capacity as President of the South Carolina Senate, and then Senator Glen McConnell due to his position as vice-chairman of the Charleston County Delegation, and by virtue of that office, as a member of the Charleston County Aviation Authority. Since that time, Senator McConnell became Lieutenant Governor of South Carolina and President of the South Carolina Senate. As a result of that action, Senator Campsen replaced Lieutenant Governor McConnell as vice-chairman of the Charleston County Delegation, and by virtue of that office, as a member of the Charleston County Aviation Authority. This Court granted the substitutions via order dated October 30, 2012.

² The Supreme Court's holding in *American Petroleum* does not affect the 2008 holding that the Foundation lacked standing to challenge the constitutionality of the Act.

that the Foundation lacked the standing to challenge Act 130. *Harrell*, 378 S.C. at 445, 663 S.E.2d at 54. The Supreme Court fully weighed that defense, analyzed the Foundation's contrary position, and ultimately ruled on that exact issue. *Id.* Specifically, the court held that:

We decline to address Petitioners' contention that 2007 Act Nos. 130 . . . violat[es] the South Carolina Constitution . . . Petitioners lack standing to challenge those acts. *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (as a general rule, a litigant must have a personal stake in the subject matter of the litigation to have standing); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985) (private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom).

Harrell, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1 (emphasis added).³

Thereafter, on November 1, 2011, the Plaintiffs, the South Carolina Public Interest Foundation ("the Foundation") and Waring S. Howe, Jr. ("Plaintiff Howe"), filed a petition for original jurisdiction of the Supreme Court again alleging that Act 130 and the manner in which it was passed violated several constitutional provisions. The Supreme Court denied that request. Plaintiffs thereafter filed this action in the circuit court.⁴ In the Complaint, Plaintiffs rely on Plaintiff Howe's status as a taxpayer of Charleston County as the basis for standing. Plaintiffs did not plead any proper basis for statutory standing or standing under the public importance exception.

³ The Foundation was a petitioner in that action along with Edward D. Sloan, Jr. As petitioners, the Foundation challenged the constitutionality of Act 130 of 2007 along with other acts from that legislative year. Speaker Harrell also challenged the standing of Petitioner Sloan. The Supreme Court found Petitioner Sloan also lacked standing to challenge Act 130. Petitioner Sloan is not a party to the present action.

⁴ This matter was transferred from Richland County to Charleston County Court of Common Pleas by order dated July 16, 2012.

Summary Judgment Standard

A motion for summary judgment should be granted where the Court is satisfied that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 333 (Ct. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). Reliance on the allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCF. "Instead [the] response to the motion must set forth specific facts, admissible in evidence" *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988) (citing Rule 56(e), SCRCF). "Plaintiff's own self-serving statements, without more, are insufficient to create a genuine dispute of fact." *Rogers v. Cotton*, No. 4:09-cv-1290-RBH-TER, 2012 U.S. Dist. LEXIS 14371, at *22-23 (D.S.C. Jan. 18, 2012) (collecting cases). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Hedgepath*, 348 S.C. at 355, 559 S.E.2d at 336. (citing *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997)).

Conclusions of Law

Both Plaintiffs lack the standing necessary to challenge the constitutionality of Act 130 of 2007 ("the Act" or "Act 130"). First, this Court holds that the Foundation is collaterally estopped from asserting it has standing to maintain this current challenge Act 130. Second, this Court holds that Plaintiff Howe also fails to establish the necessary standing to maintain this action. Thus, summary judgment is proper and this action should be dismissed in its entirety.

I. The Foundation lacks standing to challenge the constitutionality of Act 130.

Collateral estoppel bars the Foundation from maintaining any challenge to the constitutionality of Act 130. This Court holds that our Supreme Court adjudicated this very standing issue in 2008 and unequivocally held that the Foundation lacked the standing to challenge Act 130. As a result, this Court concludes that the Foundation is estopped from relitigating the issue of its standing to challenge the Act in this case. Therefore, summary judgment is proper as a matter of law.

Collateral estoppel prevents a party from relitigating an issue that was decided in a previous action. *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009); *S.C. Prop. & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.B.2d 625, 627 (1991). Collateral estoppel applies regardless of whether the claims in the first action and subsequent action are the same. *Carolina Renewal, Inc. v. S.C. Dept. of Transp.*, 385 S.C. 550, 554, 684 S.B.2d 779, 782 (Ct. App. 2009) (cert. denied January 6, 2011). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

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This Court concludes that all three elements are satisfied and that the Foundation is collaterally estopped from maintaining a challenge to Act 130 in this action.

First, the issue of whether the Foundation had standing to challenge the constitutionality of Act 130 was actually litigated in the 2008 *SCPIF v. Harrell* action. The Foundation brought the action challenging the constitutionality of Act 130. Speaker Harrell specifically defended on the grounds that the Foundation lacked standing. Thus, the standing issue was litigated in 2008. Accordingly, this Court holds that the first element of collateral estoppel is satisfied.

Second, the Supreme Court directly and finally determined this standing issue in the prior 2008 action. After considering the merits of the Foundation's numerous other constitutional challenges, the court specifically ruled that "[the Foundation] lack[ed] standing to challenge [Act 130]." *Harrell*, 378 S.C. at 445 n.1, 663 S.E.2d at 54 n.1. Therefore, the Supreme Court directly determined in the 2008 action that the Foundation lacked standing to challenge Act 130 on constitutional grounds. Accordingly, this Court concludes the second element of collateral estoppel is satisfied.

Third, the Supreme Court's standing ruling was necessary to support the prior judgment and dispose of all the issues raised in the 2008 action. The Foundation raised challenges to several acts of 2007, including Act 130. The court ruled on all challenges brought by the Foundation in that action. The standing ruling on Act 130 was necessary to support the Supreme Court's ruling and dispose of all the issues raised by the Foundation. Accordingly, this Court concludes Speaker Harrell established the third element of collateral estoppel as a matter of law.

Lastly, this Court rejects the Foundation's claim that collateral estoppel does not apply because the constitutional challenges to Act 130 are rooted in different claims than were asserted in the 2008 action. *Carolina Renewal*, 385 S.C. at 556, 684 S.E.2d at 783 (holding "[c]ollateral estoppel applies to specific *issues*, regardless of whether the claims in the first and subsequent suits are the same") (citations omitted, emphasis added). The issue in the 2008 action is the same as in this action—whether the Foundation had standing to challenge the constitutionality of Act 130. The basis asserted to challenge the constitutionality of Act 130 is immaterial. Because the Supreme Court decided this standing issue in the 2008 action, the Foundation is collaterally estopped from relitigating this issue in this case.

Based on the above, this Court holds collateral estoppel bars the Foundation from asserting it possesses the standing necessary to maintain this action. Because the Foundation lacks standing to maintain a constitutional challenge to Act 130, this Court grants Speaker Harrell's motion for summary judgment and dismisses the Foundation's claims against all defendants with prejudice.

II. Plaintiff Howe also lacks standing to challenge Act 130.

This Court finds that no genuine issues of material fact exist and concludes that Plaintiff Howe lacks standing as matter of law under any of the recognized tenets of standing. "[S]tanding cannot be granted to every individual who is disgruntled by a governmental decision or policy; otherwise, the government would be forced to defend a constant barrage of lawsuits questioning its every move." *Newman v. Richland Cnty. Historic Preservation Com'n*, 325 S.C. 79, 480 S.E.2d 72 (1997). Accordingly, standing may only be acquired in three ways. *Freemantle v. Preston*, 398 S.C. 186,

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192, 728 S.E.2d 40, 43 (2012). First, a plaintiff may assert standing via a statute. *Preston*, 398 S.C. at 192, 728 S.E.2d at 43 (internal quotations omitted). Second, a party may acquire standing "through the rubric of constitutional standing." *Id.* Third, a plaintiff may acquire standing "under the public importance exception." *Id.* This Court holds that Plaintiff Howe cannot establish standing under any of the three tenets of standing.

- a. **Plaintiff Howe did not plead any proper basis for standing under the tenets of statutory standing or standing under the public importance exception.**

Here, the Complaint relies solely on Plaintiff Howe's status as a taxpayer as the basis for standing. As discussed below, however, Plaintiff Howe's taxpayer status does not establish standing in this case. It is well-settled that a plaintiff must *plead in the complaint* and prove his grounds for standing in order to maintain his action. *Preston*, 398 S.C. at 192, 728 S.E.2d at 43; *see also Beaufort Cnty. v. Trask*, 349 S.C. 522, 529 n.14, 563 S.E.2d 660, 663 (Ct. App. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Because Plaintiff Howe did not plead any proper basis for statutory standing or standing under the public importance exception, his claim is barred as a matter of law.⁵

- b. **Plaintiff Howe cannot establish statutory standing.**

This Court holds that Plaintiff Howe cannot establish any statutory basis for standing. First, Plaintiff Howe failed to plead this basis for standing, and therefore, South Carolina law precludes him from establishing standing on this basis. *Preston*,

⁵ The Foundation failed to plead any basis for standing. Therefore, even if the Foundation was not barred to argue standing by collateral estoppel, this Court holds that summary judgment would be proper as to the Foundation on this basis as well. *See Preston*, 398 S.C. at 192, 728 S.E.2d at 43.

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398 S.C. at 192, 728 S.E.2d at 43; *Trask*, 349 S.C. at 529 n.1, 563 S.E.2d at 663 (holding that a plaintiff must *plead in the complaint* one of these grounds for standing in order to maintain his action).

Second, Act 130 contains no provision that would provide a basis for Plaintiff Howe to acquire the standing needed to maintain this action. Therefore, no statutory basis for standing exists as a matter of law.

Moreover, Plaintiff Howe's decision to bring this action pursuant to the South Carolina Uniform Declaratory Judgments Act, section 15-53-10, *et seq.*, is insufficient to give him statutory standing in this action. In *Trask*, a plaintiff taxpayer brought an action challenging governmental activity by a city. *Beaufort Cnty. v. Trask*, 349 S.C. 522, 523, 563 S.E.2d 660, 661 (Ct. App. 2002). The trial court held plaintiff could not acquire standing. *Id.* at 525, 563 S.E.2d at 662. On appeal, the plaintiff taxpayer argued she had standing to pursue the action by virtue of bringing her action under the South Carolina Uniform Declaratory Judgments Act. *Id.* at 529, 563 S.E.2d at 664. The Court of Appeals disagreed and held that "the presence of a justiciable controversy, however, does not by itself give a litigant standing to sue." *Id.* Thus, the Court of Appeal rejected Plaintiff Howe's argument that the Declaratory Judgments Act confers statutory standing on a plaintiff. Accordingly, this Court holds that Plaintiff Howe cannot acquire standing by seeking relief pursuant the South Carolina Uniform Declaratory Judgments Act.

c. **Plaintiff Howe cannot establish standing under the rubric of constitutional standing.**

This Court finds that Plaintiff Howe cannot establish any concrete or particularized injury in fact needed to establish constitutional standing. Instead, he claims that his status as a taxpayer gives him the standing to pursue this challenge to Act 130. Our Supreme Court has held, however, that such an allegation is insufficient to vest a plaintiff with constitutional standing.

To establish constitutional standing, the plaintiff must demonstrate two elements. First, the plaintiff must prove he suffered "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Second, a plaintiff must also show a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *ATC South*, 380 S.C. at 195, 669 S.E.2d at 339. This Court finds that Plaintiff Howe cannot establish this test. Plaintiff Howe has failed to articulate any legally protected interest that was injured by the passage of the Act.

Plaintiff Howe only claims his status as a taxpayer in Charleston County is sufficient to provide the constitutional standing needed to maintain this action. Plaintiff Howe's status as a taxpayer, standing alone, is insufficient to establish constitutional standing. In *Preston*, the Supreme Court addressed whether status as a taxpayer could satisfy the elements of constitutional standing. 398 S.C. at 192, 728 S.E.2d at 43. In that matter, the plaintiff argued his status as a taxpayer was sufficient to confer standing

to maintain the action. 398 S.C. at 192, 728 S.E.2d at 43. The Supreme Court rejected this contention. *Id.* The Court held:

In our judgment, the injury, if any, to Appellant as a taxpayer is common to all citizens and taxpayers of Anderson County. Thus, this feature of commonality defeats the constitutional requirement of a concrete and particularized injury. We therefore affirm the trial court in rejecting [plaintiff's] claim of taxpayer standing under constitutional standing principles.

Id. at 193, 728 S.E.2d at 44. Therefore, the Supreme Court unequivocally held that a plaintiff's status as a taxpayer cannot establish constitutional standing.

Preston reaffirmed the Supreme Court's previous holding in *ATC* on this issue. In that matter, the court rejected a plaintiff's contention that status as a taxpayer establishes constitutional standing. The court held:

[Plaintiff] further relies on its status as a taxpayer to acquire standing. The injury to [plaintiff], however, as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury. As the United States Supreme Court observed, a taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'

ATC, 380 S.C. at 198, 669 S.E.2d at 340-41 (citing *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). Thus, Plaintiff Howe's claim that his status as a taxpayer is sufficient to provide a basis for standing fails.

Moreover, Plaintiff Howe failed to provide any evidence that would create an issue of fact. His reliance on his subjective, personal beliefs to establish a basis for standing is insufficient. This Court finds that such a claim of a perceived difference in degree of interest claimed by Plaintiff Howe cannot be used to establish constitutional standing, regardless of his status as a taxpayer.

Our appellate courts have rejected this argument, noting that:

[T]axpayers are not authorized to maintain a suit . . . simply because they are taxpayers It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights. Nor does mere difference in degree of interest of one taxpayer from that of another in itself entitle the former to maintain a suit to test the validity of the ordinance.

Trask, 349 S.C. at 529 n.20, 563 S.E.2d at 664. It is undisputed that Plaintiff Howe's purported injury is common to all taxpayers in Charleston County. In his deposition, Plaintiff Howe testified as to his injury resulting from the passage of the Act. He testified that:

Q: How specifically were you injured or damaged by the passage of Act 130 of 2007?

A: It severely injures my sense of right and wrong, fairness, the concept of everybody going by the same rules, the proper reverence to something that would be denoted as a, quote, constitution. So yeah, in my life's desire to promote good government

He continued:

Q: How have you been harmed? Let me make sure.

A: The convictions I hold personally in terms of my views and ideals of right and wrong have been damaged.

It is undisputed that Plaintiff Howe's purported injury is common to all taxpayers in Charleston County:

Q: The individual harm to you, as I understand your answer, is you believe it's constitutionally suspect, and there are two members that are serving on there that shouldn't be. And that's your answer to how you've been harmed?

A: Yes, sir.

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This Court finds these claimed injuries are nothing more than an attempt to use this action to protect abstract rights and are insufficient to confer standing on Plaintiff Howe. *See Trask*, 349 S.C. at 529 ("It is not sufficient that they maintain the proceeding merely as a citizen to protect abstract rights."). These abstract claims of injuries are common to all taxpayers in Charleston County. Moreover, Plaintiff Howe's subjective heightened injury cannot form the basis for standing. The Supreme Court's established and well-reasoned precedent establishes that Plaintiff Howe cannot establish the rubric of constitutional standing on this basis.

Additionally, this Court finds that Plaintiff Howe is nothing more than a sham plaintiff named solely to remedy the fact that the Foundation lacked the standing needed to bring this action. Plaintiff Howe was aware the Supreme Court held in 2008 that the Foundation lacked standing to challenge the Act, testifying that:

Q: [D]id you also understand that the court reached a decision, denying - as part of their decision in that case, they denied standing to the Public Interest Foundation, that decision was in June - rendered in June of 2008?

A: I believe that was brought to my attention.

Notably, this Court finds that the Foundation sought an individual to rectify the "legal reasons" that the Foundation could not bring the action on its own. Plaintiff Howe admitted that he was brought into this action to alleviate this standing issue of the Foundation:

Q: How did you become involved in the lawsuit? How did you and Mr. Sloan get together on the same page, is what I am trying to ask.

A: It became known to me that his foundation was intending to bring this lawsuit, and it was desired that in addition to them as a plaintiff, that for certain legal

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reasons it perhaps would be helpful for a citizen of Charleston County also be a plaintiff in this lawsuit to possibly satisfy certain legal considerations.

Moreover, it is undisputed that Plaintiffs have admitted that the Foundation, and the Foundation alone, is paying the legal fees incurred by Plaintiff Howe in this action.

Based on the above, this Court finds that Plaintiff Howe has not suffered an individual injury from the passage of the Act and is merely in this lawsuit to circumvent the Foundation's lack of standing. No issues of fact exist, and summary judgment is proper.

d. Plaintiff Howe cannot establish standing under the public importance exception.

This Court finds that Plaintiff Howe cannot acquire standing under the public importance exception. He failed to plead or allege any overriding public interest or an extricable connection to the need for future guidance as required by our Supreme Court.

"The general rule is that a taxpayer may not maintain a suit based on the action of state officers when he has no special interest, and his only standing is the exceedingly small interest of a general taxpayer." *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 351 (1941). The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke a judicial determination of the issue. *Id.* Rather, the party must demonstrate some overriding public purpose or concern to confer standing to sue on behalf of his fellow taxpayers. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Our Supreme Court mandates that the public importance exception to these standing rules should apply

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"only where a resolution is needed for future guidance." *Preston*, 398 S.C. at 193, 728 S.E.2d at 44. "Thus, for a court to relax general standing rules, the matter of importance must, in the context of the case, be extricably connected to the public need for court resolution for future guidance." *Id.*; *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341 (internal quotations omitted). Plaintiff Howe cannot establish this rubric of standing in this action.

First, this Court finds that Plaintiff Howe failed to plead this basis for standing. The Complaint does not allege this is a matter of overriding public importance or that future guidance is needed from our courts. Therefore, this failure to plead the public importance exception precludes Plaintiff Howe from establishing standing on this basis. *See Preston*, 398 S.C. at 192, 728 S.E.2d at 43; *Trask*, 349 S.C. at 529 n.1, 563 S.E.2d at 663 (holding that a plaintiff must *plead in the complaint* one of these grounds for standing in order to maintain his action).

Second, this Court finds that Plaintiffs' actions establish that this matter contains no overriding public importance. It is undisputed that Plaintiffs were aware of the passage of Act 130, as well as the fact that the members of the Charleston Legislative Delegation were placed on the Charleston Aviation Authority, very shortly after Act 130 became effective. Plaintiff Howe testified that:

Q. ...When did you first learn that Representative Limehouse, in his capacity as chairman of the Charleston delegation, had been placed on the Aviation Commission?

A. You know, that's really hard. Probably very soon after the, what was it, '08 legislation was passed. And then, of course, he would have to get on there as being chairman of the Charleston County legislative delegation. So it would have been -I pay attention, and it would have

been not that long after he actually took that position that I would have been aware of it. Because again, I pay attention.

Q. So were you aware, given the fact that you pay attention that Act 130 of 2007, when it was passed?

A. When it was passed?

Q. Not specifically the date it was passed, but did you have awareness that they had passed Act 130 of 2007?

A. Yeah.

He continued:

Q: I think you answered that you became aware of the act . . . sometime after it was passed"

A: I don't know exactly.

Q: But soon thereafter?

A: I'm thinking it was probably soon thereafter just because my usual way of keeping abreast.

Moreover, the Foundation first challenged the constitutionality of Act 130 in 2008.

Despite this knowledge, Plaintiffs chose to not launch this second action contesting the constitutionality of Act 130 for nearly five years after the first challenge, noting that:

Q: So did you take any action from when the act was passed in 2007 before you became a good citizen of Charleston County and signed up in 2012?

A: Did I take any action?

Q: That's right.

A: No.

Q: Okay. Why not, if this issue bothered you?

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A: As I understood it these same issues were already being or just had been brought to the judicial system of South Carolina.

Also, Plaintiff Howe testified that:

Q. Okay. Is there any reason why you haven't challenged or brought a suit to challenge Act 130 of 2007 since that decision?

A. The opportunity didn't really present itself. I didn't receive the -- you know, the personal motivation until it was brought earlier this year. I'm a pretty busy guy, Mr. Hitchcock, and undertakings like this can only be done at certain times.

Q. Okay. But, I mean -- and that would be -- you were -- you were too busy to bring -- you're saying that you were too busy to bring the lawsuit for the past four years since that decision was rendered?

A. Among, I'm sure, other reason.

This Court finds that this rationale and delay in taking action establishes that Plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance or some immediate need for future guidance. Therefore, this Court finds that standing cannot be acquired on this basis, and summary judgment is proper.

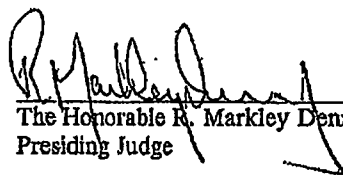
Conclusion

Based on the forgoing, the Plaintiffs lack the standing necessary to maintain this action. This Court declines to rule on any other issues presented in this action. Now, therefore, the Court hereby GRANTS Speaker Harrell's Motion for Summary Judgment, and Plaintiffs' complaint is DISMISSED with prejudice IN ITS ENTIRETY.

AND IT IS SO ORDERED.

Moncks Corner
Charleston, South Carolina

April 29, 2013


The Honorable R. Markley Dennis, Jr.
Presiding Judge

Certificate of Counsel

Appellant certifies that as required by SCACR 210(g), the Record on Appeal contains all proposal to be included by any of the parties and not any other material.

A handwritten signature in black ink, appearing to read "J. Miller", is written over a horizontal line.

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