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.

APPELLANT'S BRIEF

March 13, 2014

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STATEMENT OF THE CASE

In 1970, the General Assembly enacted Act 1235, which established the Charleston County Airport District ("District") (Howe Affidavit, Ex. A). "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." *Id.*, § 3. Thirty-seven years later, Act 130 of 2007 added two members to the Charleston County Aviation Authority ("CCAA" or the "Authority"): the Chairman and Vice-Chairman of the Charleston County Legislative Delegation, or their designees (Howe Affidavit, Ex. D; R. pp. 143-177).

Act 130 applies only to Charleston County and the CCAA. The Governor vetoed Act 130 because the South Carolina Constitution Article III, § 34 and Article VIII, § 7 prohibit special legislation or legislation that applies to only one county (Howe Affidavit, Ex. E; R. p. 167). The General Assembly voted to override the Governor's veto of Act 130, but the vote to override did not carry two-thirds of a quorum in the House, as the Constitution requires (Howe Affidavit, Ex. F, G; R. pp. 168-172).

In 2008, the South Carolina Public Interest Foundation ("SCPIF" or "Foundation") and Edward D. Sloan, Jr. brought an action in the Original Jurisdiction of the Supreme Court challenging eight new Acts, three bobtailed and five single county or special acts (one of which was Act 130). *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E. 2d 52 (2008). SCPIF 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 (Complaint, par. 1; R. p. 68).

The Supreme Court initially granted the Petition for Original Jurisdiction as to all eight acts, and the parties briefed and argued the constitutionality of all eight acts, but in its written opinion, the Court declined to rule as to the five alleged single county or special acts. In a footnote, the Court announced its decision declining to extend public importance standing to the Petitioners as to the five single county or special acts, and ruled that Petitioners did not otherwise possess standing as to those 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).

In 2011, Appellants Waring S. Howe, Jr. ("Howe") (a taxpayer) and SCPIF petitioned the Supreme Court to take this action in its original jurisdiction (Petition for Original Jurisdiction; R. pp. 464-503). Howe served as a member of the CCAA 1989-2001, and as Chairman 1996-1999. He is a citizen, resident, taxpayer, and registered elector of Charleston County, who has used the Charleston County International Airport. Howe has paid fees and taxes to the District. (Howe Affidavit, par. 1).

Plaintiffs alleged that Act 130 of 2007 was unconstitutional on five grounds:

(1) The vote to override the veto lacked two-thirds of a quorum in the House as required by the South Carolina Constitution, Art. IV, § 21.

(2) Act 130 was unconstitutional special legislation because it applies only to the CCAA.

(3) Act 130 was unconstitutional single county legislation because it applies only to Charleston County.

(4) Act 130 violates the Constitutional dual office holding prohibitions because it allows legislators to serve in a second "office."

(5) Act 130 violates the Constitutional separation of powers requirement because it allows legislators to serve in an executive agency.

The Supreme Court denied the Petition for Original Jurisdiction without comment (Order dated February 14, 2012; R. pp. 32). Appellants filed this action in Circuit Court in Richland County February 27, 2012 (Complaint; R. pp. 68-74). Appellants moved for summary judgment on all five causes of action (Motion for Summary Judgment filed July 18, 2012; R. p. 113). Respondents moved for and received a change of venue to Charleston County (Order Granting Change of Venue entered July 26, 2012; R. pp. 2-6). Upon the request of the Clerk of Court in Charleston County, Plaintiffs refiled their Motion for Summary Judgment in Charleston (Motion for Summary Judgment filed on or about August 14, 2012; R. p. 114).

Respondents Moved to Dismiss or for Summary Judgment, arguing that Appellants lack standing. The Circuit Court in Charleston County granted summary judgment to the Respondents on the sole grounds that Appellants lacked standing. The Circuit Court ruled that *Harrell* collaterally estops Appellants from asserting public importance standing (Order filed May 13, 2013; R. pp. 14-31).

Appellants gave Notice of Appeal May 24, 2013 (Notice of Appeal; R. pp. 535-556).

STATEMENT OF FACTS

Respondent Harrell is the Speaker of the South Carolina House of Representatives. Respondent McConnell is now the Lieutenant Governor. For many years, McConnell was vice-chairman of the Charleston County legislative delegation.

When he became Lieutenant Governor, Respondent Campsen became Vice-Chairman of the Charleston County Legislative Delegation. Respondents McConnell and Campsen have used "designees" rather than serve personally on the CCAA.

For many years, Respondent Limehouse has served in the General Assembly. Also for several years, Limehouse was Chairman of the Charleston County Legislative Delegation, a member of the CCAA, and in recent years, its Chairman (Howe Affidavit, par. 15; R. pp. 147-148). The District owns and operates three airports in Charleston County, including the Charleston County International Airport. The District spends millions of dollars of public funds annually.

In *Harrell*, the Attorney General agreed with the Petitioners that Act 130 violated S.C. Constitution Article III § 34 and Article VIII, § 7. The Attorney General continues to hold that opinion (Transcript of Oral Argument dated February 14, 2013, "Transcript" p. 32, ll. 12-22; R. p. 63) Defendants McConnell and Campsen agreed that service by a legislator on the CCAA violates the Dual Office Holding and Separation of Powers provisions of the South Carolina Constitution (Transcript, p. 34, ll. 7-18; R. p. 65). On the issue of the validity of the veto override, the Attorney General did not take a position, and the Senators maintained that the Senate properly overrode the veto with a vote of 40 to 1. The Senators said the Defendant House members could address that issue, without the Senators' help (Transcript, p. 32, ll. 7-14; R. p. 63).

Defendants Harrell and Limehouse contend that the House properly overrode the veto (with only 12 votes), that Act 130 was not unconstitutional special legislation or single county legislation, that members of the General Assembly serving on the CCAA

do not violate the Separation of Powers or Dual Office Holding provisions of the Constitution.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RULING THAT THE APPELLANTS LACKED STANDING.

The Circuit Court ruled that Appellants possessed neither taxpayer standing nor public importance standing in this case. Appellants contend that this was error. The South Carolina Supreme Court "has often recognized the 'public importance' exception to the general standing requirements. '[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.'" *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012).

A. Each of Appellants' Five Claims Deserves Public Importance Standing.

The Supreme Court granted public importance standing to Petitioners in *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank,* 403 S.C. 640, 744 S.E.2d 521 (2013). The statute creating the Infrastructure Bank Board allowed legislators to sit on the Board, an executive body. Petitioners alleged that the statute violated the Separation of Powers and Dual Office Holding provisions of the Constitution. In granting Mr. Sloan and the Foundation public importance standing the Court reasoned as follows:

> Sloan presents a colorable claim that the Board is ***unconstitutionally comprised, casting a cloud of illegitimacy which could marginalize the important decisions of the Board.*** We find resolution of this question is certainly of importance and concern to the public and therefore hold ***Sloan has standing to bring this challenge.***

Id. 744 S.E.2d at 524 (emphasis added). Pursuant to this most recent statement of the standard for public importance standing, the Circuit Court erred in failing to grant the Appellants public importance standing. (The Supreme Court issued the *Transportation Infrastructure Bank* opinion after the ruling below.) Appellants have presented five "claim[s] that cast[] a cloud of illegitimacy which could marginalize the important decisions of the [Authority]." *Id.*, 403 S.C. 640, 744 S.E.2d 521, 524 (2013).

1. Only 12 members of the House voted to override the veto of Act 130.

The first claim challenges the constitutionally insufficient vote to override the veto of Act 130 of 2007. The Governor vetoed Act 130 on June 4, 2007 (Howe Affidavit, Ex. E; R. p. 167). On June 5, 2001, the House voted to override the veto 12 to 0 (Howe Affidavit, Ex. F; R. p. 169). The Constitution requires a vote of two-thirds of a quorum in each house. South Carolina Constitution, Art. IV, § 21. *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 Court ruled:

> 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. The public policy embodied by South Carolina Constitution Art. IV, § 21 is vital to the balance of power required by the Constitution. This habitual violation is of great public importance and justifies standing of a citizen taxpayer who is willing to enforce it.

On January 10, 2012, on the floor of the House, Speaker Harrell lamented that he did not understand the Supreme Court's *Fairfield County* decision requiring a two-thirds of a quorum in each house (Journal of the House of Representatives of the State of South

Carolina, Regular Session Beginning Tuesday, January 10, 2012 (Statewide Session); R. pp. 372-373). He said he had asked many lawyers what the *Fairfield County* decision means, and they did not know either. *Id.* Finally, he said that he had asked the Supreme Court for clarification, but the Supreme Court had refused his request. *Id.* This action is an opportunity to provide the guidance that the Speaker requested.

Although a ruling on this issue would be dispositive, when the Supreme Court faced a similar circumstance in *Ashmore v. Greater Greenville Sewer District,* the Court chose to address matters of great public importance, reasoning as follows:

> If this were an ordinary case, our opinion might well stop here. The Board of Trustees of the projected Auditorium District has been held invalid in toto. The district is a headless body and cannot function under the present legislation. But the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by an intended governmental agency which the legislature undertook to create by their enactments; and ***raised on the record are earnestly argued public questions of importance.*** The last stated factor brings into play the principle, now generally established, that ***questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.*** 3 Am.Jur. 310, Annotation, 132 A.L.R. 1185.

Id., 211 S.C. 77, 96, 44 S.E.2d 88, 96-97 (1947) (emphasis added). Similarly, this Court should decide in this case these additional "earnestly argued public questions of importance." *Id.*

2. Act 130 is unconstitutional single county legislation.

Appellants' second claim challenges the unconstitutionality of Act 130, because it addresses a single county. "***No laws for a specific county shall be enacted,***" S.C. Constitution, Art. VIII, § 7. *See also, Knight v. Salisbury*, 262 S.C. 565, 206 S.E.2d 875 (1974); *Pickens County v. Pickens County Water and Sewer Authority*, 312 S.C. 218, 439

S.E.2d 840, 842 (1994). The public policy embodied in Art. VIII, § 7 prohibits laws enacted by representatives, unaccountable and unconnected to a particular county.

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.

> 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. . . .
>
> Article VIII, § 7, prohibits legislation by the General Assembly for a specific county. ***Involved here is a matter which the county governing authority can and should deal with instead of the General Assembly.***

267 S.C. 558, 562-63, 230 S.E.2d 228, 229-30 (1976). The boundaries of the District are the same as those of Charleston County. "***The territory embraced by the County of Charleston*** is hereby constituted as an airport district." Act 1235 of 1970 § 2 (Howe Affidavit, Ex. A; R. pp. 152-157) (emphasis added).

Several times, the General Assembly has 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. This constitutional violation is a matter of great public importance, sufficient to grant public importance standing.[1]

3. Act 130 is unconstitutional special legislation.

[1] *See*, "A Long Way from Home: Slow Progress Toward 'Home Rule' in South Carolina and a Path to Full Implementation," 64 S.C.L.Rev. 781 (Summer, 2013), section II.C., addressing single county legislation.

"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 . . . ." S.C. Constitution Article III § 34. The Supreme Court has ruled that legislation related solely to ***this District*** also violates the Constitutional prohibition on special legislation. *Torgerson v. Craver,* 267 S.C. 558, 562, 230 S.E.2d 228, 229 (1976). Likewise, Act 130 violates Art. III, § 34's restriction on special legislation. This section promotes the important public policy of uniformity, and consistency in state law.

The Supreme Court has discussed the evils of special legislation.

> Article III, § 34(IX) prohibits the enactment of a special law "where a general law can be made applicable." This provision not only limits special legislation where existing general law is already applicable, but also where it is possible to create general law which would be applicable. *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985); *Seaborne v. Hartsville Rescue Squad*, 269 S.C. 386, 237 S.E.2d 496 (1977).
>
> Article III, § 34 (IX), however, does not prohibit all special legislation.
>
> The language of the Constitution which prohibits a special law where a general law can be made applicable, plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those ***evils which result from a general and indiscriminate resort to local and special legislation***. There must, however, be a substantial distinction having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction upon which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.
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> *Duke Power Co.*, 284 S.C. at 90, 326 S.E.2d at 400-401 (1985) [quoting *Shillito v. City of Spartanburg*, 214 S.C. 11, 20, 51 S.E.2d 95, 98 (1948)]. In other words, the General Assembly must have a "logical basis and sound reason" for resorting to special legislation. *Gillespie v. Pickens County*, 197 S.C. 217, 14 S.E.2d 900 (1941).

Horry County v. Horry County Higher Educ. Com 'n, 306 S.C. 416, 418-19, 412 S.E.2d 421, 423 (1991).

S.C. Code Ann. § 55-1-80 governs county aviation commissions in general.[2] Act 130 addresses ***only*** the CCAA (Howe Affidavit, Ex. D; R. pp. 164-165). "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." S.C. Code § 55-1-80 sets out a general, standard method for appointing additional members to county aviation commissions, but Act 130 makes a special exception for Charleston County.[3] Act 130 fails to state any reason why a general law could not address those matters. Because Act 130 applies ***only*** to the CCAA, it is an unconstitutional "special law."

Art. III, § 34 addresses significant evils associated with local meddling by non-local members: piecemeal legislation, hodge-podge legislation, and lack of uniformity and predictability to laws, statewide. *Horry County v. Horry County Higher Educ. Com 'n*, 306 S.C. 416, 418-19, 412 S.E.2d 421, 423 (1991). Such general laws should be made on a statewide and not on a county-by-county, piecemeal basis. *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). Specific local issues are best left to the counties themselves. Enforcing the prohibition of the evils of piecemeal and hodge-podge legislation is of utmost public importance, sufficient to grant public importance standing.

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[2] For any county aviation authority in the State, that section authorized the following:

1. Any county aviation authority may be increased by two members:
2. One appointed by the county House Delegation.
3. One appointed by the county Senate Delegation.
4. Any County governing body may add two members to the Authority.
5. In Counties having two cities with populations in excess of 50,000, the mayors of such cities may serve *ex officio*.

(Howe Affidavit, Ex. C). This statute is the "general law."

[3] The Attorney General agreed that Act 130 violates the S.C. Constitution, Art. III, § 34, and Art. VIII, § 7 (*South Carolina Public Interest Foundation v. Harrell,* Brief of Respondent State of South Carolina, pp. 7, 14-17; Transcript, p. 32, ll. 12-22.)

4. The simultaneous holding of offices both in the General Assembly and on the CCAA violates the Dual Office Holding provisions of the South Carolina Constitution.

Appellants' fourth claim challenges Act 130's violation of the Dual Office Holding provisions of the South Carolina Constitution (Art. III, § 24, Art. VI, § 3, and Art. XVII, § 1A).

> No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them, or under any other power, except officers in the militia, members of lawfully and regularly organized fire departments, constables, and notaries public. If any member accepts or exercises any of the disqualifying offices or positions ***he shall vacate his seat.***

S.C. Constitution, Art. III, § 24 (emphasis added). *See also*, S.C. Constitution, Art. VI, § 3 ("No person may hold two offices of honor or profit at the same time"), and S.C. Constitution, Art. XVII, § 1A ("No person may hold two offices of honor or profit at the same time"). The public policies prohibiting dual office holding address evils resulting from overlapping legislative and executive functions. These policies are of great public importance. The repetition of this provision in the Constitution emphasizes its public importance.

(a) A director of CCAA holds "an office or position of profit or trust."

There is no question that a member of the General Assembly holds an "office." A director of the CCAA also holds an "office." The Supreme Court explained the criteria for determining whether the additional position is an "office in the Constitutional sense."

> "One who is charged by law with duties involving ***an exercise of some part of the sovereign power***, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer." *Sanders v. Belue,* 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that "[t]he ***power of appointment comes from the state***, the authority is

> derived from the law, and the ***duties are exercised for the benefit of the public***." *Willis v. Aiken County,* 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). "***The powers*** conferred and the duties to be discharged with regard to a public office ***must be defined***, directly or impliedly, by the legislature or ***through legislative authority***. The ***duties must be performed independently*** and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer of body." 63C Am Jur.2d *Public Officers and Employees* § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Com'n., 387 S.C. 109, 124, 691 S.E.2d 453, 461 (2010) Segars-Andrews was a judicial candidate for reelection who had been found not qualified by the Judicial Merit Selection Commission ("JMSC").

CCAA membership involves the exercise of the sovereign power of the State. As in *Segars-Andrews*, "the power of appointment comes from the State" and "the duties are exercised for the benefit of the public." *See* Act 1235 of 1970, § 5 (Howe Affidavit Ex. A; R. pp. 152-157). Furthermore, the powers of the Authority are "defined, directly or impliedly, by the legislature or through legislative authority." *Id.* Finally, the powers of the CCAA are "performed independently and without control of a superior officer." The CCAA meets all the criteria established in *Segars-Andrews* for application of the dual office holding prohibition.

(b) Membership in the General Assembly does not have a Constitutional nexus with membership on the CCAA to qualify under the *ex officio* exception to the dual office holding prohibition.

The Supreme Court has recognized a limited exception to the dual office holding prohibition: when an office holder also serves *ex officio* in an office arising out of and related to the main office. The Court discussed this rule in *Ashmore*.

> The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties ***relating to their respective offices*** are placed by law. 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. *State ex rel. Ray v. Blease*, 95 S.C. 403, 79 S.E. 247, 249, 46 C.J. 934, 42 Am.Jur. 929. ....
>
> ***Ex officio means 'by virtue of his office.'*** 1 Bouv., Law Dict. Rawles' Third Revision, page 1103. Similar observation may be made with respect to ex officio membership 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.***

Ashmore, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947).

Ashmore shares significant similarities with this case. The General Assembly had established a board to oversee the construction and operation of the Greenville Memorial Auditorium. The Board included members of the General Assembly, the Mayor of Greenville, and the Chairman of County Council. A taxpayer challenged the composition of the Board. The Supreme Court explained the Constitutional basis for its ruling:

> 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) (emphasis added).

In *Segars-Andrews,* the Supreme Court recently reaffirmed its holdings from *Ashmore*. Segars-Andrews argued that a legislator's service on the JMSC violated the dual office holding provisions of the Constitution. The Court disagreed, finding that the *ex officio* exception applied.

> Our jurisprudence has a narrow, yet firmly established, exception which provides that "double or dual office holding in violation of the constitution is ***not applicable to those officers upon whom other duties relating to their respective offices are placed by law.***" *Ashmore v. Greater Greenville Sewer District,* 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) (emphasis added). This exception is commonly referred to as the "ex officio" or "incidental duties" exception.
>
> As applied here, service on the JMSC by members of the General Assembly is properly characterized as incidental to their legislative duties. This is so because the ***Legislature*** is impressed by our constitution with sole responsibility for the election and re-election of judges. ***Conversely, service on the JMSC by one who holds an office in the executive or judicial branch would violate the constitutional ban on dual-office holding***.

Segars-Andrews, 387 S.C. 109, 125, 691 S.E.2d 453, 462 (2010) (second emphasis added). The situation in *Segars-Andrews* above is the converse of the circumstances in the case at bar. A member of the ***legislative*** department violates the dual office holding ban by serving as a member of CCAA, a part of the ***executive*** department.

The Court further explained the *ex officio* exception.

> "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 in original).

Recently the South Carolina Supreme Court issued a ruling on dual office holding and separation of powers. *SCPIF v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013). The Foundation and Mr. Sloan challenged the constitutionality of an Act that allowed two members of the General Assembly to serve as directors of the South Carolina Transportation Infrastructure Bank Board. The Court said,

> The South Carolina Constitution prohibits members of the General Assembly from holding another office during their service in the legislature, both expressly and by virtue of the repeated general prohibitions against dual office holding. *See* S.C. Const. Art. III, § 24 ("No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State...."); S.C. Const. art. VI, § 3 ("No person may hold two offices of honor or profit at the same time."); S.C. Const. art. XVII, § 1A ("No person may hold two offices of honor or profit at the same time...."). This Court, however, has recognized an "ex officio" or "incidental duties" exception where "there is a ***constitutional nexus*** in terms of power and responsibilities between the first office and the 'ex officio' office." *Segars–Andrews,* 387 S.C. at 126, 691 S.E.2d at 462. Ex officio is defined as "[b]y virtue or because of an office; by virtue of the authority implied by office." *Black's Law Dictionary* 267 (3d pocket ed.2006).

Id. 744 S.E.2d at 524 (emphasis added).

Although the Court upheld the service of the legislators on the Bank Board as constitutional, the Court also distinguished the Bank Board from the Memorial Auditorium Board in *Ashmore*.

> Moreover, this case is also ***distinguishable from Ashmore*** because like service on the JMSC in *Segars–Andrews,* service by legislators on the [Bank] Board is "reasonably incidental to the full and effective exercise of their legislative powers." *Segars–Andrews,* 387 at 127, 691 S.E.2d at 463.

Id. 744 S.E.2d at 525 (emphasis added). In other words, the service in *Ashmore* involved ***no constitutional nexus*** because it was service on a local auditorium board, rather than a statewide board. Similarly, there is no constitutional nexus between the General Assembly and the CCAA, a local airport commission.

A legislator's service on the CCAA fails to qualify for an "ex officio" or "incidental duties" exception to the dual office holding prohibition. *Id.*

> ***The "ex officio" or "incidental duties" exception may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the "ex officio" office.*** This narrow construction of the "ex officio" or "incidental duties" exception preserves inviolate the central feature of separation of powers in our constitution. S.C. Const. Art. I, § 8.

Segars-Andrews, 387 S.C. 109, 126, 691 S.E.2d 453, 462 (2010).

In this case, there is no Constitutional nexus between the service in the legislative department and service on the CCAA to justify *ex officio* status. ***Unlike*** the JMSC in *Segars-Andrews*, the duties of the CCAA are ***not*** "relating to" or "reasonably incidental" to the duties of the members of the legislative department. There is no "constitutional nexus." The General Assembly does not have the "sole responsibility" of operating the CCAA, as it did the election of judges in *Segars-Andrews*. Service on the CCAA does not "arise out of" service as a legislator. Accordingly, members of the legislative department who serve on the CCAA violate the dual office holding provisions of the South Carolina Constitution, Article III, § 24, Article VI, § 3, and Article XVII, § 1A. (Pursuant to *Ashmore*, they also violate the Separation of Powers provision of Article I, § 8 of the South Carolina Constitution.)

The General Assembly is not "impressed by our Constitution with sole responsibility for the" administration of CCAA and its oversight of selection of and management of construction projects. *Segars-Andrews.* Service as members of CCAA does not meet the criteria that the Supreme Court has established for *ex officio* service. In this action, two members of the General Assembly have charged themselves to execute a law they passed, Act 130.

Ashmore acknowledged the plainly worded remedy set out in the Constitution for a legislator serving in a second office.

> 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) (emphasis added). Under the Supreme Court's rule in *Ashmore*, the members of the legislative department who serve on the CCAA must vacate their seats in the General Assembly, or they must not serve on the CCAA. The members of the legislative department who serve as members of the Authority are violating all three sections of the S.C. Constitution that prohibit dual office holding. The public policy against dual office holding is of significant public importance, sufficient to warrant public importance standing.

5. Act 130 allows members of the General Assembly to serve in executive functions on the CCAA, in violation of the Separation of Powers provision of the South Carolina Constitution, which is an issue of great public importance.

Appellants' fifth claim challenges Act 130's violation of S.C. Constitution, Art. I, § 8, which requires separation of powers in South Carolina State government:

> 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.***

Id. (emphasis added). The Supreme Court has explained the public policies for the Separation of Powers rule recently in *SCPIF v. State Transportation Infrastructure Bank.*

> The preservation of a separation of powers has been a basic tenet of democratic societies at least since Baron de Montesquieu warned that "[t]here would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." *See* Montesquieu, *The Spirit of Laws* 152 (Thomas Nugent trans.1949). Consistent with this notion, the South Carolina Constitution requires the branches of government be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. Const. art. I, § 8. "One of the prime reasons for

> separation of powers is the ***desirability of spreading out the authority for the operation of the government.***" *State ex rel. McLeod v. Yonce,* 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979). "The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *Id.* at 84, 261 S.E.2d at 305. This delineation of powers amongst the branches "***prevents the concentration of power in the hands of too few, and provides a system of checks and balances.***" *State ex rel. McLeod v. McInnis,* 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

Id. 403 S.C. 640, 744 S.E.2d 521, 525-26 (2013) (emphasis added).

Instead of "spreading out the Authority for the operation of government," by placing legislators and legislative appointees on the CCAA, authority is further "concentrate[ed] . . . in the hands of too few." *Id.* The prevention of this concentration of power is of great public importance and justifies a grant of standing

Respondent Limehouse has served in the General Assembly since 1995. Since 2007, he has simultaneously served as a member of the CCAA, and recently as Chairman (Howe Affidavit, par. 15; R. pp. 5-6). Simultaneous service in the General Assembly and the CCAA violates the separation of powers provision of S.C. Constitution Article I, § 8.

(a) Legislators may not serve on this local executive board.

Article I, § 8 prohibits the General Assembly from both passing laws to achieve certain purposes and assigning its own members to the commissions discharging those duties. In *Ashmore v. Greater Greenville Sewer District,* the Supreme 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). The Court ruled that the Constitution's dual office holding provisions prohibited members of the General Assembly from serving on that Board.

> "As a general rule the ***Legislature of the state may not, consistently with the constitutional requirement here involved, 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 offices as legislators, would seem to be self-evident.*** The principle, as we apprehend, upon the correct application of which depends the solution of any such problem as to the exercise by the Legislature of nonlegislative functions, is that ***the Legislature may properly engage in the discharge of such 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.***" .... The members of the Legislature from Greenville County were elected for the purpose of making laws, not administering them.

Ashmore, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947) *quoting Spartanburg County v. Miller*, 135 S.C. 348, 132 S.E. 673, 677 (emphasis added).

"[T]he Legislature does not have the power to create a law then execute it. The power to execute a law is not incidental to the power to appropriate, but is a separate executive power." *Knotts v. SCDNR,* 348 S.C. 1, 8, 558 S.E.2d 511, 515 (2002). CCAA executes this law by approving contracts, selecting construction projects, and selecting and administering methods of project delivery. The public policy served by separating the execution of the law from its enactment (including the selection of who will be paid to perform the services) is of great public importance It prevents legislators from selecting who will receive the funds they approved for the agencies they established to be paid to perform the services and is of great public importance.

Members of the legislative department may legislate ***only in that body***. In *Knotts*, the Supreme Court "ruled the statute could not 'authorize the members of the delegation to participate in this determination as legislators, for they may exercise legislative power ***only as members of the General Assembly***." *Knotts*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002) (emphasis added) (*analyzing Gunter v. Blanton,* 259 S.C. 436, 192 S.E.2d 473, 475 (1972). In *Blanton*, the Supreme Court ruled that the legislative delegation's power

of approval over the expenditures of DNR "undermines the doctrine of separation of powers." *Id.*

Act 130 of 2007 unconstitutionally allows members of the legislative department to serve as members of CCAA, a local executive body. It allows a "person or persons exercising the functions of [the legislative department] . . . [to] assume or discharge the duties of [the executive department]," in violation of the South Carolina Constitution, Article I, § 8. Members of the legislative department were elected for the purpose of enacting laws, not administering them. *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 89-90, 44 S.E.2d 88, 93-94 (1947). In *Ashmore*, a Board of Trustees composed of legislators and their appointees was to oversee the financing of the construction of Greenville Memorial Auditorium by overseeing the issuance of bonds. The Court found this task to be executive, and not legislative.

> The case of *Ashmore v. Greater Greenville Sewer District* is instructive. In *Ashmore,* the General Assembly passed legislation calling for the building of an "Auditorium." The legislation provided for a "Board of Trustees" to ***oversee the issuance of bonds to finance the project.*** . . . Membership on the Board by legislators was successfully challenged as a violation of ***separation of powers and dual-office holding***.

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 125-26, 691 S.E.2d 453, 462 (2010) (emphasis added). Likewise the power of the CCAA to "issue general obligation bonds" and the power to "issue revenue bonds" is an executive function.

Other cases have likewise held that a statute violates the Separation of Powers doctrine when the powers that legislators attempted to exercise were executive or administrative activities related to the issuance of bonds and selection of roads for

improvement. *Knotts v. SCDNR,* 348 S.C. 1, 6, 558 S.E.2d 511, 514 (2002) (citing *Bramlette v. Stringer,* 186 S.C. 134, 195 S.E. 257 (1938)).

The CCAA's minutes demonstrate that the CCAA exercises executive and administrative powers when it selects the sources of procurement of goods and services, approves contracts, approves work orders for projects, and the modifications of the contracts. Similar activities by the defendants in *Bramlett,* were deemed to be executive branch activities, forbidden to legislators. The CCAA also selects the construction projects, as demonstrated in the Airport Authority's Minutes, just as the defendants in *Bramlette*. Pursuant to *Knotts v. SCDNR* and *Bramlette v. Stringer*, these functions are executive functions.

Furthermore, entering into contracts is an executive activity, prohibited for members of the legislative department.

> In *Tucker [v. South Carolina Dep't. of Highways & Pub. Transp.,* 309 S.C. 395, 424 S.E.2d 468 (1992)], this Court held ***a legislative delegation could not approve highway fund expenditures or enter into contracts*** for highway improvements on behalf of the county. We adopted the *Gunter* and *Aiken* rationale that ***separation of powers*** mandates the Legislature "may not undertake both to pass laws and to execute them by bestowing upon its own members ***functions that belong to other branches*** of government." *Tucker I,* 309 S.C. at 396, 424 S.E.2d at 469.
>
> . . . The Legislature is constitutionally forbidden from undertaking to pass laws and then to execute them by bestowing upon its own members powers belonging to the executive branch.

See Knotts, 348 S.C. 1, 8-9, 558 S.E.2d 511, 514 (2002) (emphasis added). The Court reasoned that adopting or executing contracts was executive activity.

> In *Knotts*, the Supreme Court reasoned:
>
> ***Separation of powers*** is not predicated on differentiating between who actually spends the money, but on ***whether the legislative branch assumes powers belonging to another branch of government.*** Once the legislature enacts a law all that remains is the efficient enforcement and execution of

> that law. *Bramlette,* 186 S.C. at 134, 195 S.E. at 258. Regardless of who spends the money, § 12-28-2730 is unconstitutional because a legislative delegation may not execute or enforce a law.

Id. The Court held the statute unconstitutional.

Building and overseeing the Greenville Memorial Auditorium was executive in nature in *Ashmore.* Therefore, the oversight and construction management of the $150 million renovation of the Charleston International Airport, and the oversight of two other Charleston County airports is executive in nature, and a legislator who serves on the CCAA violates S.C. Constitution Article I, § 8.

In conclusion, Appellants have alleged five "colorable claims" of Constitutional violations that call in to question the validity of the membership of the CCAA. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank,* 403 S.C. 640, 744 S.E.2d 521 (2013). These issues are of significant public importance. They "require its resolution for future guidance." *Freemantle v. Preston,* 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012). They warrant the granting of public importance standing to the Appellants.

B. The Appellants Properly Pled and Petitioned for Public Importance Standing.

The Circuit Court also ruled that Appellants lack public importance standing for failure to plead standing with specificity in the Complaint (Order, p. 8; R. p. 21). This ruling is clear error. The Complaint cites a long list of cases recognizing public importance standing and alleges that this Court possesses jurisdiction as established in those cases (Complaint, par. 6; R. p. 70). The issue of jurisdiction of the Court includes the granting of public importance standing to the Appellants. Accordingly, the Appellants did specifically plead public importance standing in this case.

C. The Supreme Court Has Granted Public Importance Standing to SCPIF for Cases When Joined with a Local Co-Plaintiff.

On several occasions, the South Carolina Supreme Court has granted public importance standing to SCPIF when it brought an action with 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); *South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n.*, 369 S.C. 139, 632 S.E.2d 277 (2006); *Colleton County Taxpayers Ass'n. v. School Dist. of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006). Similarly, in this case, SCPIF filed suit along with Mr. Howe, a Charleston County citizen, resident, taxpayer, and registered elector, in order to address the issues of great public importance in this case. Just as the Supreme Court has granted public importance standing in the similar cases, the Circuit Court should have granted public importance standing to the Appellants in this action.

D. Howe Possesses Taxpayer Standing.

The Circuit Court ruled that Howe did not possess taxpayer standing. 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; R. p. 68). 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 has used taxpayer money to support many expenditures of the CCAA. Furthermore, Howe's affidavit establishes that on many occasions he has paid user fees, which the CCAA spends to support 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 Circuit Court's ruling is directly contrary to a finding of the South Carolina Supreme Court regarding ***this very airport district.***

> ***Taxes*** for operation and/or to repay bonds ***are raised by a levy on the district, which*** for all practical purposes ***is 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). Just as Howe does here, the appellant in *Torgerson* brought the action as a ***county 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 *Torgerson* was granted taxpayer standing "on behalf of herself and all taxpayers," 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; R. p. 68).

Taxpayers are a distinct subset of residents. In *Myers v. Patterson*, the Court ruled that a taxpayer had standing different from the public generally. *Id.* at 350 S.C. 248, 433 S.E.2d 841 (1993).

> 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).

Id. (emphasis added). In the case at bar, Howe has contributed to the general tax funds of the County. Accordingly, 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 possess standing to bring such actions and request such judicial relief.

E. Howe Possesses Individual Standing as a Former Member of the CCAA.

The Circuit Court also ruled that Howe does not possess standing to address the Respondents' unconstitutional actions related to the CCAA. "This Court holds that Plaintiff Howe also fails to establish the necessary standing to maintain this action." (Order, p. 5; R. p. 18). However, South Carolina courts have long recognized the right of a former member of a government body to bring an action against that entity for illegal actions. Howe alleged many personal and taxpayer connections to the CCAA. He served as a member of the CCAA 1989-2001, and as Chairman 1996-1999" (Complaint, par. 2; R. p. 68). He alleged that he "has used the Charleston County Airport and paid fees and taxes to the District. These facts as alleged in the Complaint provide a sound, legal basis

for Mr. Howe's standing to bring this action. The Court's finding that the Appellants failed to plead a basis for standing is clear error.

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 an unconstitutional 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 commissioners at that time, 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. Accordingly, 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,* 372 S.C. 497, 642 S.E.2d 740 (2007); *Newman v. Richland County Historic Preservation Comm'n.*, 325 S.C. 79, 480 S.E.2d 72 (1997). Accordingly, Mr. Howe, a former member of the CCAA, possesses a personal standing, as well as taxpayer and public importance standing.

F. *Freemantle v. Preston* Does not Preclude Public Importance Standing.

The Circuit Court ruled that the Appellants lack public importance standing and relied upon *Freemantle v. Preston*, 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. *Id.* at 193, 728 S.E.2d at 43 (2012). The Supreme Court affirmed the Circuit Court's refusal to grant public importance standing.

This case is distinguishable from *Freemantle.* First, in *Freemantle,* the citizen sought ***monetary damages for himself***. The Supreme Court ruled, "That Appellant ***sought monetary damages*** for himself . . . , 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). The Foundation and 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." *Id.*

Second, the citizen in *Freemantle* sued current and former members of the County Council in their ***individual*** capacities, as well as their official capacities. *Id.,* 398 S.C. 186, 190, 728 S.E.2d 40, 42 (2012). An action against council members in their individual capacities would not support injunctive relief, the traditional remedy for cases in which courts have granted Appellants public importance standing. In contrast, in this case, Appellants name Respondents only in their official capacities (Complaint, p. 1; R. p. 68).

Third, the plaintiff in *Freemantle* brought his action under the common law, 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 present for a grant of 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).* SCPIF and Howe allege five independent Constitutional violations.

Fourth, the Court in *Freemantle* ruled that the personnel decisions of the county did not raise issues of great public importance and did not require judicial guidance. "[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).

As Appellants have demonstrated, each claim in this case in its own right is of much greater public importance than a county's termination of an employment contract.

Furthermore, generally ensuring that State government abides by the Constitution is a matter of utmost public importance.

II. THE CIRCUIT COURT ERRED IN RULING THAT *HARRELL* COLLATERALLY ESTOPS APPELLANTS FROM ASSERTING PUBLIC IMPORTANCE STANDING.

The Circuit Court granted summary judgment to the respondents based in part on the doctrine of collateral estoppel. The court stated:

> First this Court holds that the Foundation is collaterally estopped from asserting that it has standing to maintain this current challenge Act 130 [sic]." bringing this action, due to collateral estoppel.
>
> * * *
>
> 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 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.

Order, p. 5; R. p. 18.

However, properly understood, the *Harrell* decision does not collaterally estop either the Foundation or Howe from bringing this action.

A. The Supreme Court's Discretionary Denial of Original Jurisdiction Does Not Collaterally Estop Another Court from Granting Public Importance Standing.

In a footnote, the *Harrell* Court ***"decline[d] to address"*** the five single county or special acts. *Id.*, 378 S.C. 441, n.1, 663 S.E.2d 52 (2008). In *Harrell*, the Court found that the Petitioners did not possess a ***right*** to ***personal*** standing, but that finding does not preclude a different court from granting ***public importance*** standing, based upon the considerations that govern public importance standing, especially in a different action,

brought by different Plaintiffs, raising different legal theories, and when the legal context has changed. Although the Court declined to address the five single county or special acts in 2008 when neither Petitioner was a resident of any of the five counties affected by the five single county acts, the present action is distinguishable because the plaintiff Howe is a citizen, resident, taxpayer, and registered elector of Charleston County, and therefore this case requires a different resolution.

The discretionary granting of original jurisdiction is limited to those extraordinary writs, "when the matter [cannot] be determined in a lower court in the first instance, without material prejudice to the rights of the parties." SCACR 245(a). It is granted in the discretion of the Court, "if the public interest is involved, or if special grounds of emergency or other good reasons exist." *Id.* Like the granting of original jurisdiction, the Supreme Court's denial of original jurisdiction was also discretionary. That discretionary denial does not, however, preclude another court from granting public importance standing when there is a resident Plaintiff.

Unlike Sloan or SCPIF in *Harrell*, Howe is a citizen, resident, taxpayer, and registered elector of Charleston County. He is also a former member of and Chairman of the CCAA. He has paid user fees to the CCAA (Howe Affidavit, par. 1; R. p. 144). Howe's involvement with Charleston County and the CCAA distinguishes this case from *Harrell*.

Furthermore, in *Harrell*, Petitioners challenged ***eight separate Acts*** of the General Assembly. The Supreme Court ruled on three Acts with bobtailed provisions. In contrast, this action focuses exclusively on Act 130 and the actions of only ***one body***: the CCAA. This action does not challenge a multitude of Acts, relating to multiple counties.

Finally, 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, and collateral estoppel does not preclude it.

B. Respondents' Constitutional Violations Should not be "Immune from Review."

The Circuit Court ruled that the Supreme Court's decision in *Harrell* collaterally estops SCPIF and Howe from ***even asserting*** standing based on the important public issues that this case raises (Order, p. 5; R. p. 18). The Circuit Court also reasoned that Howe lacked standing. Under the Circuit's Court's reasoning, no citizen-taxpayer will ever be able to challenge Act 130 in any circumstance on any basis whatsoever. Such a ruling effectively grants the Respondents a prescriptive right to violate the Constitution, without answering for it. This ruling overstates collateral estoppel, and fails to recognize the exceptions to collateral estoppel that apply.

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).

Appellants respectfully propose that the Supreme Court has since adopted the rule set out in Justice Toal's dissent in *Newman v. Richland County Historic Preservation Commission. See Evins v. Richland County Historic District*, ("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 (2000). Similarly in *Baird v. Charleston County,* the Court granted public importance standing based on the County's *ultra vires* act.

> In this case, Doctors have specifically alleged that ***County committed an ultra vires act*** by exceeding its statutory authority to issue the hospital bonds. Moreover, the issuance of the hospital bonds clearly impacts a profound public interest--the public health and welfare. In fact, the express purpose of the Act is to promote the public health and welfare. *See* S.C. Code Ann. § 44-7-1420 (1985). It is hard to conceive of any greater societal interest than this one. Thus, as citizens of Charleston County, Doctors have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development. Thus, ***by virtue of the immense public interest at stake here, Doctors have standing*** to bring the present action, and any further determination of imminent prejudice is unnecessary.

Id., 333 S.C. 519, 531, 511 S.E.2d 69, 75-76 (1999) (emphasis added). 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." *Newman v. Richland County Historic Preservation Commission,* 325 S.C. 79, 480 S.E.2d 72, 75 (1997) (Toal, J., dissenting).

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

Even if collateral estoppel were otherwise applicable, intervening changes in the legal context create an exception to the doctrine of collateral estoppel. 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 has recognized these exceptions to the doctrine of collateral estoppel by quoting this section in *Pye v. Aycock.* *Id.* at 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). The claims in the current case meet both of the exceptions quoted above. Since the ruling in *Harrell* in 2008, the legal context has

changed. The Supreme Court has issued two significant decisions that the Circuit Court should have applied.

The first decision that changed the legal context is *Board of Trustees of School District of Fairfield County v. State. Id. at* 395 S.C. 276, 718 S.E.2d 210 (2011). 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* reinstated and reemphasized the General Assembly practice from years earlier, constitutionally requiring the two-thirds vote of a quorum of each house.

The second decision that changed the legal context is *Charleston County School District v. Harrell. Id. at* 393 S.C. 552, 713 S.E.2d 604 (2011). The Plaintiffs alleged that an act that dealt only with the Charleston County School District was a special law. Like the CCAA, the geographic boundaries of the School District were coterminous with those of Charleston County. The Circuit Court dismissed the claim, but the Supreme Court reversed and ruled that the Plaintiffs had stated a valid claim when they asserted that the act was a single county act and therefore unconstitutional. *Id.* These cases created an "intervening change in the applicable legal context," because they pointed to clear violations of the Constitution in the facts of this case.

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

The United States Supreme Court found an exception to the doctrine of collateral estoppel for ***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."*** *Montana v. United States* 440 U.S. 147, 162-163, 99 S.Ct. 970, 978, 59

L.Ed.2d 210 (1979) (citations omitted) (emphasis added). Similarly, the Constitutional issues in this case require adjudication. Allowing governmental entities, including the General Assembly, to ignore or violate their Constitutional limits inflicts an "adverse impact . . . on the public interest." Restatement (2nd) of Judgments, § 28. 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.

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 *Montana v. United States* and acknowledge this exception for Constitutional claims and issues of great public importance.

E. *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; it "declined to address" them. Collateral estoppel requires that the particular issue must have been actually determined on the merits. Having issued no 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.

III. THE CIRCUIT COURT ERRED IN RULING THAT THE DOCTRINE OF LACHES PREVENTS THE APPELLANTS FROM ASSERTING PUBLIC IMPORTANCE STANDING.

The Circuit Court implies that *laches* or undue delay bars the Appellants from bringing this action (Order, p. 16-17; R. pp. 29-30). The Circuit Court did not find a violation of any statute of limitations for constitutional violations. The public interest runs counter to such a statute of limitations, or the application of *laches*.

Laches is an equitable doctrine and applicable to actions in equity. 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 Constitution is an action at law, not equity. Accordingly, all of Appellants' causes of action are legal. Therefore, the doctrine of *laches* does not apply to bar these actions.

> Second, Respondents have failed to establish the elements of *laches*.
>
> 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). The Circuit Court did not articulate any unreasonable delay. The Foundation initially brought an action challenging Act 130 within a few months of the Governor's

veto in 2007. Ultimately, the Supreme Court in *Harrell* 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. Respondents failed to cite any authority that protects the constitutionality of an Act from a challenge after the passage of time.

In 2011, the Supreme Court issued two decisions that significantly encouraged Appellants' decision to challenge Act 130 again. In *Board of Trustees of School District of Fairfield County v. State,* the Supreme Court ruled that a veto override requires a two-thirds vote of a quorum of each house of the General Assembly. *Id. at* 395 S.C. 276, 718 S.E.2d 210 (2011). Appellants realized that the ruling on the veto override violation from *Fairfield County* should apply to Act 130, and petitioned the Supreme Court on October 31, 2011, just 11 days after the Supreme Court denied rehearing in *Fairfield County.* Appellants respectfully suggest that 11 days is not an ***unreasonable*** delay.

The Supreme Court issued a second influential opinion in *Charleston County School District v. Harrell. Id.* at 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. The plaintiffs alleged that the act was an unconstitutional special or single county law. The Circuit Court dismissed the claim, but the Supreme Court reversed and ruled that the plaintiffs had stated a valid claim. Accordingly, the passing of three months between July 25, 2011, when the new *Harrell* ruling on special legislation was entered, and October 31, 2011, following the decision in *Harrell*, when Appellants petitioned, was not an unreasonable delay.

Second, the Circuit Court did not articulate any prejudice to the Respondents due to the alleged delay. Respondents have no prescriptive right to violate the Constitution. All Respondents took an oath to support and defend the Constitution, but they have violated the Constitution five different ways. Addressing their Constitutional violations does not produce legal prejudice.

Third, the Circuit Court erred in ruling that the "delay in taking action establishes that the plaintiffs cannot reasonably assert that this matter presents a matter of overriding public importance." A slight delay in calling public officials to account does not diminish the public importance of their constitutional violations.

Finally, when Respondents 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 inequitableness 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). Respondents have violated five provisions of the South Carolina Constitution. Their Constitutional violations, their persistence in defending this action, and their seeking to avoid accountability demonstrate their unclean hands. Accordingly, the doctrine of *laches* should not enable them to continue to violate the Constitution.

CONCLUSION

Appellants possess both public importance and taxpayer standing. They have presented five claims of great public importance demonstrating that Act 130 of 2007 is unconstitutional. The override of the veto of Act 130 failed for lack of sufficient votes. Act 130 is single county, special legislation. Act 130 violates the dual office holding and separation of powers provisions of the South Carolina Constitution.

Appellants pray the Court to reverse the judgment of the Circuit Court, and rule that Appellants should be granted public importance standing, and Howe possesses standing as a taxpayer and former member and chairman of the CCAA.

Respectfully submitted,
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The undersigned attorney hereby certifies that Appellant's Brief complies with SCACR 211(b).

March 12, 2014

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