THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000794
Trial Court Case No. 2016-CP-40-02875

South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ... Appellants,

v.

Richland County, ... Respondent,

And

Central Midlands Regional Transit Authority.....Intervenor/Respondent

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APPELLANTS RESPONSE TO AMICUS BRIEF

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269 (telephone)
(864) 331-3083 (facsimile)
Jim@CarpenterLawFirm.net
Attorney for Appellants

Other Counsel of Record:
Andrew Lindemann
Lindemann, Davis & Hughes, P.A.
Post Office Box 6923
Columbia, South Carolina 29260

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

Wm. Grayson Lambert
Burr & Foreman LLP
PO Box 11 390
Columbia, SC 29211

James K. Gilliam
Henrietta U. Golding
Burr & Foreman LLP
2411 Oak St., Suite 206
Myrtle Beach, SC 29577

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STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation, Edward D. Sloan, Jr., and William B. DePass, Jr. ("Taxpayers") filed suit against Richland County (R. pp. 69-79, 106-115) alleging seven causes of action arising from the Penny Tax program:

1. Ordinance Number 039-12HR exceeds the scope of S.C. Code Ann. § 4-37-30.
2. Violation of S.C. Code Ann. § 11-35-50.
3. Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30.
4. No Annual, Independent, Public Audit.
5. No Annual Budget.
6. No Annual, Independent Audits of Agencies Receiving Appropriations.
7. Violation of S.C. Code Ann. § 4-37-25

The Supreme Court ruled the Penny Tax statute limits the use of Penny Tax revenues to "capital costs." *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018). The biggest difference between this case and *Richland County* is that these Appellants contend that the "continued operation of mass transit services" is neither "capital costs," nor an authorized use of Penny Tax funds.

STATEMENT OF THE ISSUE

Amicus Curiae, Transportation Association of South Carolina, is "an organization comprised of [sic] numerous entities involving the business of providing quality transportation services." *Amicus* Brief, p. 1. *Amicus* argues that the Appellants lack standing. Rather than address the statutory issue head-on, the *amicus* seems to want to avoid the substantive issue, focus on Appellants' standing, and use Penny Tax funds for "continued operation of mass transit services" in **other** counties.

ARGUMENT

I. THE AMICUS BRIEF VIOLATES SOUTH CAROLINA APPELLATE COURT RULE 213.

"A brief of an amicus curiae . . . **shall be limited** to argument of issues on appeal as presented by the parties." SCACR 213 (emphasis added). In this appeal, no party has raised or argued the issue of standing, either taxpayer standing, or public importance standing. Accordingly, the *amicus* brief violates Rule 213.

Nevertheless, the Supreme Court has "considered arguments raised only by an amicus when they concern a 'matter of significant public interest.'" *Ex parte Brown,* 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011). *State v. Langford*, 400 S.C. 421, 432-33 735 S.E.2d 471, 477 (2012). In *Brown*, the Court accepted an *amicus* brief on the issue of whether "a court-appointed attorney's service on behalf of an indigent litigant is property for purposes of the Takings Clause of the Fifth Amendment." *Id.,* 393 S.C. 214, 226-27, 711 S.E.2d 899, 905 (2011). In *Langford*, the issue of great public importance was "who decides when criminal defendants in this State should be tried." *Id.,* 400 S.C. 433 735 S.E.2d 471, 477 (2012).

The *amicus* fails to acknowledge that the parties did not raise the standing issue, fails to acknowledge the limits of Rule 213, and fails to argue that standing is an issue of great public importance.

Nevertheless, Appellants will demonstrate that Appellants do possess standing: taxpayer standing, public importance standing, and standing based on the *ultra vires* act of the Respondents.

II. APPELLANTS POSSESS COUNTY TAXPAYER STANDING.

The individual Appellants have paid County taxes. Respondents' unlawful conduct has caused and will cause these individual Appellants to be liable for unlawful expenditures of County taxes. Accordingly, each individual Appellant possesses taxpayer standing to contest the unlawful acts.

The *amicus* argues that the Supreme Court has overruled taxpayer standing in its entirety. They rely on *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d. 854 (2017) (bridge inspection). The Supreme Court did rule that it would not grant taxpayer standing to a **state** taxpayer to challenge a **state** expenditure. However, the Court in that opinion did not address the issue of **city** or **county** taxpayer standing, which the Court had more strongly established and continues to recognize. (*See* Section II. A., below.)

Political subdivisions and agencies are vulnerable to overstepping state statutory and Constitutional limits and encroaching illegally on their citizens lives and property. The Constitution established judicial review to protect citizens from such abuses. A litigant must possess standing to initiate judicial review. If standing is restricted, judicial review is restricted. If judicial review is restricted, Constitutional and statutory protections lose their relevance and purpose.

A. South Carolina Has Long Recognized City and County Taxpayer Standing.

More than 125 years ago, South Carolina recognized city taxpayers' standing to contest allegedly illegal or *ultra vires* actions of a city. *Mauldin v City Council of Greenville*, 33 S.C. 1, 11 S.E. 434 (1890). The city argued: "The individual tax-payer, as such merely, can obtain a standing in court only by alleging and proving that the illegal act

complained of will inflict damage special and peculiar to himself." *Id.*, 33 S.C. 1, 11 S.E. 434, 435 (1890). The Supreme Court rejected the city's argument:

> Can it be that, in such case, a number of citizens, **tax-payers of a city**, cannot be heard against the corporate authorities in a court of equity **asking for an injunction** against the consummation of the contemplated wrongs, without alleging special damages to themselves individually? There is a certain relation in the nature of agency between the municipal authorities and all tax-payers of the corporation.
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> * * *
>
> Here **the tax-paying citizens of Greenville are not the whole public**, but comparatively a small part of it. They are not strangers to the municipality. **They, and they alone, are affected by their acts**. As to them this is more in the nature of "a private" than "public" matter.

Id. 33 S.C. 1, 11 S.E. 434, 435 (emphasis added). The Supreme Court ruled, "We think the plaintiffs had a standing in court and were entitled to have their case heard on its merits." Id. 11 S.E. at 436.

Other states and federal courts have recognized city and county taxpayer standing even before *Mauldin*. In *Mauldin*, the Supreme Court cited older South Carolina cases, and cases from Maryland, Connecticut, New Hampshire, Iowa, and Missouri, all acknowledging taxpayer standing. Finally, the Court cited Dillon on Municipal Corporations in support of taxpayer standing. The *Mauldin* Court, quoting a case from Maryland, stated,

> [T]he plaintiffs "as **tax-payers of the city**, and others similarly situated, *** **constitute a class especially damaged** by the alleged unlawful act of the corporation, in the alleged **increase of the burden of taxation** upon their property situated within the city. The complainants have therefore a **special interest** in the subject-matter of the suit, **distinct from that of the general public**;"

Id., *quoting Mayor, etc., v. Gill*, 31 Md. 375-394 (emphasis added).

The United States Supreme Court has also recognized municipal taxpayer standing:

> [R]esident **taxpayers** may sue to enjoin an illegal use of the moneys of a **municipal corporation**. *Roberts v. Bradfield*, 12 App. D. C. 453, 459, 460. **The interest of a taxpayer of a municipality** in the application of its moneys **is direct and immediate** and the remedy by injunction to prevent their misuse is not inappropriate. **It is upheld by a large number of state cases and is the rule of this court.** *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070. Nevertheless, there are decisions to the contrary. See, for example, *Miller v. Grandy*, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the **peculiar relation of the corporate taxpayer to the corporation**, which is not without some resemblance to that subsisting between stockholder and private corporation. 4 Dillon, Municipal Corporations (5th Ed.) § 1580 et seq.

Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 486-87, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923) (emphasis added).

Nearly 50 years before *Mellon*, the U.S. Supreme Court recognized **county** taxpayer standing as a question so settled that there was "no serious question:"

> Of the **right of resident tax-payers** to invoke the interposition of a court of equity **to prevent an illegal disposition of the moneys of the county** or the illegal creation of a debt which they in common with other property-holders of the **county** may otherwise be compelled to pay, **there is at this day no serious question**. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by **municipal corporations**, the great danger of their abuse and the **necessity of prompt action to prevent irremediable injuries**, it would seem eminently proper for courts of equity to interfere upon the application of the **tax-payers of a county** to prevent the consummation of a wrong, when the officers of those corporations assume, in **excess of their powers**, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or **on behalf of individual tax-payers** should not be entertained to prevent the **misuse of corporate powers**. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations.

Crampton v. Zabriskie, 101 S.Ct. 601, 609, 11 Otto 601, 25 L.Ed. 1070 (1879) (emphasis added). For more than 135 years, there has been "no serious question" concerning a county or municipal taxpayer's standing to bring a civil action to prevent unlawful use of taxpayer funds.

Accordingly, Appellants possess county taxpayer standing to seek an injunction against illegal acts affecting public funds and public assets.

> 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**. *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885; *Mauldin v. City Council of Greenville*, 33 S.C. 1, 11 S.E. 434, 8 L.R.A. 291; *McCullough v. Brown*, 41 S.C. 220, 19 S.E. 458, 23 L.R.A. 410; Pom.Eq.Jur., Page 277, Sec. 260; 2 Dill.Mun.Corp., Sec. 736.

Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13, 15 (1939).

The court in *Kirk v. Clark* also noted:

> "Perhaps the most frequent ground of application for relief by injunction against **municipal corporations** is for the prevention of an illegal or unlawful diversion of public funds. . . . **[Courts] will . . . relieve in behalf of citizens and taxpayers** against such official acts on the part of such bodies, **when they move without authority or warrant of law** and in excess of the corporate powers. High on Injunctions, Vol. 2, Sec. 1237."

Id. (emphasis added).

The Supreme Court has repeatedly acknowledged that a private citizen has standing to contest an illegal action by a city or county. *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). In *Shillito*, the plaintiff sued the City for declaratory and injunctive relief when a city tax was illegally collected. Shillito's action was aimed "(a) against the illegality of the tax; (b) against the levying of subsequent assessments under the alleged unlawful tax; and (c) against the disbursement of funds collected from such tax." The Court found that the plaintiff had city taxpayer standing for all three purposes.

> As a rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. An apparent exception to this rule exists when the Act sought to be enjoined is an **unlawful diversion of public funds**. 52 Am. Jur., Sec. 3, Page 3. 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**. The decided preponderance of authority holds that **a taxpayer** singly or in a class suit, may maintain a suit in equity to **restrain unlawful municipal action** which leads, directly or indirectly, to taxation, and that **a taxpayer**, as specially damaged by the increase of the burden of taxation on his property, **has a special interest, distinct from the general public**, in the subject matter of such a suit **which entitles him to relief**. 52 Am. Jur., Sec. 3, Page 3.
>
> **A citizen and taxpayer has standing as such to contest the expenditure of public funds** under an alleged unconstitutional statute. 52 Am. Jur., Sec. 15, Page 11. Under the foregoing authorities, we are satisfied that the action as brought can be maintained to challenge the validity of this special law **and the alleged unlawful diversion of public funds** to the designated beneficiary.

Id. at 22. (Emphasis added.) Thus, in *Shillito*, the **city** taxpayers, had standing to seek declaratory and injunctive relief against an illegal collection and expenditure of public funds.

In *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985), **city** taxpayers sued the Mayor and the City Council of Greenwood because they had spent public money for expenses incurred by spouses of the Council members on a trip to the National League of Cities Convention. The taxpayers sought declaratory relief. Council members argued that the taxpayers lacked standing. The Court found that the city taxpayers had standing to contest the unlawful expenditure. "As in *Lee* [*v. Clark*, 224 S.C. 138, 77 S.E.2d 485 (1953)], respondents, as **taxpayers**, have an interest in seeing that **city officials** disburse funds **in a lawful manner.** They have presented a justiciable controversy under the [Declaratory Judgment] Act, and the demurrer was properly overruled." 285 S.C. at 480.

These cases finding city and county taxpayer standing were not limited to acts and disbursements which violate the Constitution. These rulings dealt in broad terms with the illegality of the actions, or the unlawful way the funds were spent. "A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina." *Sloan v. School District of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000). (The School District is co-extensive with the County.)

Not only does such a city or county taxpayer have standing; such civil actions are commended by the courts: "It is very commendable that public-spirited citizens should endeavor to protect the **taxpayers of a county** from the efforts of an accommodating fiscal court to make unauthorized and unlawful appropriations of public funds." *Shillito v. City of Spartanburg*, 214 S.C. 11, 26, 51 S.E.2d 95 (1948), *quoting Fox v. Lantrip*, 169 Ky. 759, 185 S.W. 136, 139.

Appellants' city and county taxpayer standing does not originate in a statute; it arises from the equitable principles of the common law. *Shillito v. City of Spartanburg* ruled that the action was equitable, and analogous to a shareholders' derivative action. *Id.* at 214 S.C. 11, 51 S.E.2d 95 (1948),

> **Suits by tax-payers against towns and their officers** to prevent or remedy **misapplication of town funds**, are not only allowed by statute, but it is the prevailing doctrine in America that **tax-payers may maintain them in the absence of a statute**. Their relations to the municipality are analogous to those of stockholders to a private corporation

Id. at 28, quoting *Russell v. Tate,* 52 Ark. 541, 13 S.W. 130, 132, 7 R.L.A. 180, 20 Am. St. Rep. 193 (emphasis added). Appellants need not assert a statutory right of action; they may rely on the foregoing cases, and they should be granted standing.

B. The Taxpayer Standing Cases on Which Amici Rely Are Distinguishable.

Amici contend the Circuit Court had simply not kept up with recent taxpayer standing decisions of the Supreme Court. Amici rely primarily on three Supreme Court opinions that denied taxpayer standing. The three case on which Amici rely are readily distinguishable. None sought declaratory and injunctive relief as to a specific expenditure of taxpayer funds.

In *ATC South v. Charleston County*, the plaintiff attempted to assert taxpayer standing to object to a zoning ruling granting a favorable decision to a competitor. *Id.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). The Supreme Court ruled he did not have statutory standing to challenge the zoning ruling because he was not a neighboring landowner. *Id.* The Court further rejected his claim to standing as a competitor. *Id.*, 380 S.C. 191, 196, 669 S.E.2d 337, 339 (2008). Finally, the Court ruled he lacked taxpayer standing. *Id.*, 380 S.C. 191, 198, 669 S.E.2d 337, 340-41 (2008). In *ATC South*, the plaintiff did not allege unlawful taxation or a specific unlawful expenditure of public funds. The failure to allege a claim of unlawful taxation or unlawful spending of taxpayer funds distinguishes *ATC South* from the case at bar.

In *Bodeman v. State*, the Supreme Court ruled that a taxpayer who challenged the sheer number of myriad exemptions to the State tax code would not be granted taxpayer standing. *Id.* at 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013). *Bodeman* is distinguishable from the case at bar. First, the plaintiff claimed standing as a State taxpayer, not a City or County taxpayer. Second, the taxpayer failed to allege a particular unlawful expenditure of taxpayer funds. 403 S.C. 60, 742 S.E.2d 363, (2013). Accordingly, *Bodeman* does not control the outcome of this case.

Third, the *Amici* rely on *Freemantle v. Preston*, *Id.* at 398 S.C. 186, 728 S.E.2d 40 (2012). The plaintiff sued Anderson County and County Council challenging the legality of a severance agreement with a former county administrator. The plaintiff sought **damages for himself**, instead of only declaratory and injunctive relief. The Court found this incompatible with its previous cases.

> This nexus between the public importance exception and the need for future guidance from the Court is invariably linked to a need for and entitlement to **injunctive relief**. 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**. Moreover, the personnel choices of Anderson County, even in the face of a seemingly excessive severance package, do not necessitate further guidance. Thus, we affirm the circuit court's finding that this action does not warrant invocation of the public importance exception.

Id., 398 S.C. 186, 194, 728 S.E.2d 40, 44 (emphasis added).

Amici also assert that *Freemantle* followed *Frothingham v. Mellon*. *Id.* at 262 U.S. 447(1923). They argued that *Frothingham* required a particularized injury for standing. However, *Frothingham* explicitly affirmed municipal taxpayer standing:

> **[R]esident taxpayers may sue to enjoin an illegal use of the moneys** of a **municipal corporation**. *Roberts v. Bradfield*, 12 App. D. C. 453, 459, 460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy **by injunction to prevent their misuse** is not inappropriate. It is upheld by a large number of state cases and **is the rule of this court**. *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070.

262 U.S. 447, 486.

None of the cases on which the Amici rely alleged claims seeking purely injunctive relief to prevent unlawful expenditures of specific taxpayer funds. Accordingly, those cases do not address the particular matter before this Court, and they allow taxpayer standing.

III. APPELLANTS POSSESS PUBLIC IMPORTANCE STANDING.

When a plaintiff has challenged unlawful or unconstitutional state action, South Carolina courts have often granted public importance standing, and often to Appellant South Carolina Public Interest Foundation and its founder Mr. Edward D. "Ned" Sloan, Jr. *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004) (public importance standing to challenge the Governor's unconstitutional possession of a commission from another power); *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005) (public importance standing to challenge the constitutionality of the Life Sciences Act); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (*Ravenel Bridge*—public importance standing to challenge DOT's statutory violation, failure to use competitive sealed bidding); *Sloan v. Hardee*, 371 S.C. 495, 640 S.E.2d 457 (2007) (public importance standing when DOT commissioners violated statute limiting them to no more than "one consecutive term"); *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008) (original jurisdiction or public importance to address legislative violations of the Constitutional "one subject" rule); *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008) (*Ladson Road*, public importance standing to address DOT's violation of emergency procurement statute), *American Petroleum Institute v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009) (original jurisdiction or public importance to address violations of the Constitutional "one subject" rule); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013) (original jurisdiction and public importance standing to challenge the constitutionality of the Infrastructure Bank board), *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016) (original jurisdiction or public importance to address legislative violations of the Constitutional "one subject" rule); *South*

Carolina Public Interest Foundation v. South Carolina Department of Transportation, 421 S.C. 110, 804 S.E.2d. 854 (2017) (public importance standing to challenge DOT's unconstitutional inspection of private bridges at public expense). In the case at bar, Appellants allege that county officials have violated the authorizing statute in spending county tax revenues. These violations support the granting Appellants public importance standing.

The doctrine of public importance standing has a long history in South Carolina. In 1873, the Supreme Court addressed an indictment for practicing law without a license. The Court ruled that defects in the indictment disposed of the case, but then reasoned:

> This view is sufficient to dispose of the whole case, but as both the defendant and the Attorney General have pressed this Court for a decision on the question whether the Legislature had constitutional authority to enact a tax law imposing taxes of the character imposed by the license law, and **as the question is of public importance, we will consider and decide it**.

State v. Hayne, 4 S.C. 403, 411, 4 Rich. 403 (1873) (emphasis added). The Court addressed the question and found several aspects of the statute unconstitutional.

Similarly, in *Ashmore v Greater Greenville Sewer District*, the Supreme Court ruled that the board established to govern the Greenville Memorial Auditorium District was unconstitutionally composed. That ruling was sufficient to dispose of the case, but the Supreme Court continued:

> 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, 95, 44 S.E.2d 88, 96-97 (1947) (emphasis added).

The Supreme Court ruled similarly in *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957). *Sanders* was a declaratory judgment action addressing the municipal merger of Columbia and Eau Claire and their water systems. The case raised questions about Columbia's revenue bonds issued to fund further expansion of the water system. At the conclusion of the opinion, the Supreme Court stated:

> We have been in considerable doubt as to whether the pleadings present a proper case for any kind of declaratory relief. But since **the rule requiring the existence of a justiciable controversy is somewhat relaxed where the public interest is involved**, Anderson, Declaratory Judgments, Second Edition, Volume I, Section 63, and Volume II, Sections 686, 707, 709 and 714, we have decided to make the foregoing limited declaration with respect to the issuance of further revenue bonds.

97 S.E.2d 213 (emphasis added).

The Supreme Court repeated this holding in *State ex rel McLeod v. McGinnis*, 278 S.C. 307, 311, 295 S.E.2d 633, 635 (1982): "We held that where the public interest is involved, the rule requiring the existence of a justiciable controversy is somewhat relaxed." See also, *Palmer v. Dunn,* 216 S.C. 558, 559, 59 S.E.2d 158, 159 (1950) ("This Court took original jurisdiction of the controversy because of its urgency and public importance"); *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719, 85 A.L.R.3d 692 (1976) ("the rule [of standing] is not an inflexible one, and we are of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action"); *Gilstrap v. South Carolina Budget & Control Bd.,*

310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) ("[T]he questions involved here are of such wide concern that the rules on standing will not be inflexibly applied").

The doctrine that courts should decide questions of public importance has been recognized at least as far back as 1873. By 1947 the principle was "generally established," and since 1947, South Carolina courts have repeatedly applied the doctrine. *See* pp. 10-11, *supra*.

Recently, the South Carolina Public Interest Foundation and Mr. Sloan filed suit to contest the DOT's unconstitutional use of public funds to inspect bridges on private property. *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) ("bridge inspection"). The Court granted the plaintiffs public importance standing, finding that the case raised issues of great public importance, which called for judicial guidance. *Id.*, 421 S.C. at 119, 804 S.E.2d at 859 (2017).

In addition, two other cases more recent than the ones on which Amici rely also granted public importance standing to the South Carolina Public Interest Foundation: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013) (public importance standing for a Constitutional challenge to the composition of the Bank board), and *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016) (public importance standing to contest a violation of the Constitutional "one subject" rule). All three of these cases granted public importance standing, and they demonstrate that public importance standing has not been overruled or limited, as Amici suggest.

IV. APPELLANTS POSSESS STANDING TO CHALLENGE *ULTRA VIRES* ACTS.

Appellants possess standing as citizens and taxpayers to seek declaratory and injunctive relief for an *ultra vires* or unlawful act. One clear statement of this rule of standing is Justice Toal's dissenting opinion in *Newman v. Richland County Historic Preservation Comm'n.*, 325 S.C. 79, 480 S.E.2d 72 (1997). The majority ruled that because the plaintiff was a member of the Commission whose actions she was attacking in court, she had no standing. If she had not been a member of the Commission whose decision she was attacking, the Supreme Court would likely have found that she had standing.

The majority reasoned that other citizens' right to sue would protect the public and denied standing to Ms. Newman. The court quoted from *Control Data Corporation v. Controlling Board,* 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). "Sufficient representation of the public's interest could be provided by a citizen affected by the decision of the Controlling Board and not by allowing a member of the Board to take a partisan position and challenge the outcome." *Newman,* at 83. In other words, according to the majority opinion, a citizen, not a member of the Commission, would possess standing to contest the *ultra vires* acts of the Commission.

The dissent would have granted plaintiff standing even though she was a member of the Commission.

Apart from this issue of Commission membership, Justice Toal's dissent provides a clarifying discussion of the history of citizen standing to seek declaratory and injunctive relief for *ultra vires* acts:

> Generally, a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. *Florence Morning News, Inc. v. Building Comm'n,* 265 S.C. 389, 218 S.E.2d 881 (1975). . . . **However,**

> **an exception to this rule exists for *ultra vires* acts by government officials**. For example, we have said that a court will not . . . interfere, by means of a taxpayer suit, to restrain the authorities of a county board from the exercise of their discretionary power . . . in the absence of illegality, fraud, or clear abuse of authority. *Owens v. Magill*, 308 S.C. 556, 419 S.E.2d 786 (1992) (emphasis added); *see also Ex Parte Hart*, 190 S.C. 473, 477, 2 S.E.2d 52, 53-54.
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> As with most things, moderation is required. 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. Thus, I would find that an individual has standing to contest a governmental action if he alleges particularized *ultra vires* acts by the governmental entity. The complaint cannot be a general assertion of *ultra vires* action on the part of the governmental actor, but must identify (1) the specific act or acts that have exceeded the actor's authority, and (2) the specific constitutional, statutory, or other law that has been exceeded.

Newman v. Richland County Historic Preservation Comm'n., 325 S.C. 79, 84-85, 480 S.E.2d 72, 75-76 (1997) (emphasis added).

The Court addressed the issue again in *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Several doctors alleged that the way Charleston County had voted to fund the acquisition and renovation of a hospital for the Medical University of South Carolina was *ultra vires*. The doctors alleged that to use tax exempt bonds for this purpose would violate the authorizing statutes. Charleston County moved to dismiss, arguing among other things, that the doctors lacked standing to bring the action. The trial court granted the County's motion, and the doctors appealed.

The Supreme Court, in a unanimous decision, reversed the ruling on standing. Justice Toal, writing for the court, ruled that when an issue was "of such public importance as to require its resolution for **future guidance**," then "a court may confer standing upon a party." 333 S.C. 519, 531, 511 S.E.2d 69, 75 (emphasis added).

> 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 [*16] 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.

333 S.C. 519, 531, 511 S.E.2d 69, 75-76 (emphasis added).

The issues Appellants raise in this case—allegations of unlawful acts (ultra vires acts) in excess of the authorizing statutes—are also important public issues, which call for judicial intervention.

In *Baird v. Charleston County*, the doctors were granted standing, not because they were physicians in competition with the clinic, but rather because they were citizens of Charleston County, they challenged an *ultra vires* act in excess of the authorizing statute, and the matter was of profound public interest that required judicial guidance. "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" *Id.* (emphasis added).

In the language cited by the Court's opinion in *Newman*, each individual Appellant is "a citizen affected by the decision of the [Respondent]." Lawsuits by such "citizens" provide "sufficient representation of the public's interest." *Newman, quoting Control Data Corporation v. Controlling Board,* 16 Ohio App. 3d 30, 16 Ohio B. Rep. 32, 474 N.E.2d 336 (Oh. App. 1983). *See also, Mauldin v City Council of Greenville*, 33 S.C. 1, 11 S.E.

434 (1890) (standing was granted to contest a city's purchase of an electric plant alleged to be *ultra vires*).

The most recent case to justify a citizen or taxpayer's standing to challenge an *ultra vires* act is *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d. 854 (2017). The Court ruled the inspection of private bridges was *ultra vires* **in addition to being unconstitutional**: "Further, even if we did not find SCDOT's actions were unconstitutional, we would nevertheless find the inspection *ultra vires* because it was not performed upon the request of a municipality as required under section 57-3-110(7) of the South Carolina Code." *Id.* 421 S.C. 110, 123, 804 S.E.2d. 854, 861.

Each Appellant has standing as a citizen to represent the public's interest and to contest the *ultra vires* acts alleged in the Complaint. They allege standing as citizens and taxpayers. They allege that the Respondents engaged in *ultra vires* acts. A judicial decision is necessary for future guidance, "and any further determination of imminent prejudice is unnecessary." *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75-76 (1999).

Just as the doctors in Charleston possessed standing to argue that the funding of the hospital acquisition was *ultra vires*, because of the profound public interest involved, these Appellants should be granted standing to contest the *ultra vires* acts in this case. The challenged acts are in excess of the authorizing statutes, and there is a profound public interest involved.

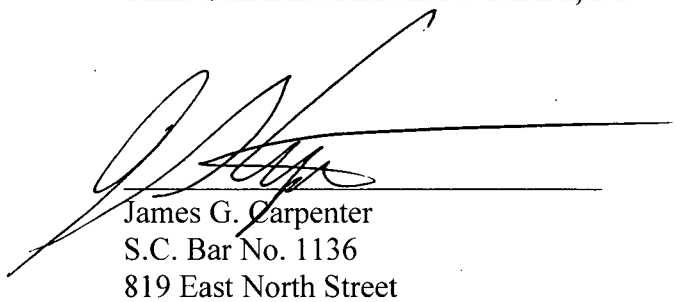
CONCLUSION

Amici attempt to argue issues not raised and argued by the parties. Accordingly, their brief violates SCACR 213.

Furthermore, Appellants have met the Supreme Court standard for taxpayer and public importance standing. They have identified specific acts that are unlawful; and the nature of the violation that requires judicial guidance. They have stated a valid case. They possess standing to bring these claims.

WHEREFORE, Taxpayers pray the Court to rule that the Appellants possess taxpayer standing, grant Appellants public importance standing to enable them to contest unlawful and *ultra vires* acts of governmental officials, and to reverse the judgment of the Circuit Court on the merits.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for Appellants