THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000360

Case No. 2017-CP-40-04819

William R. Folks, individually and on behalf of all others similarly situated,.....Appellant,

v.

The South Carolina House of Representatives; The South Carolina Senate; The Honorable James H. Lucas, Speaker of the House of Representatives; The Honorable Harvey S. Peeler, Jr., President *Pro Tempore* of the South Carolina Senate; and the State of South Carolina, ...Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant filed this action against the South Carolina House of Representatives, the South Carolina Senate, their presiding officers, and the State of South Carolina on August 11, 2017 alleging that Act 40 of 2017 violates Article III § 17 of the South Carolina Constitution: "Every Act . . . shall relate to but one subject and that shall be expressed in the title".

The Respondents then made Motions to Dismiss pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure. The South Carolina House of Representatives and the Honorable James H. Lucas made their motion on September 21, 2017; the State of South Carolina on September 26, 2017; and by the South Carolina Senate and the Honorable Harvey S. Peeler, Jr. (substituted by Respondent pursuant to "Order Substituting Defendant and Reforming Caption" which was filed on January 18, 2019) on October 5, 2017. All parties filed Memoranda and Supplemental Memoranda.

A hearing on these motions was conducted at the Richland County Judicial Center on August 1, 2018. Plaintiff appeared along with his counsel and Respondents were represented by their respective attorneys.

On February 8, 2019, the Honorable Jocelyn Newman issued an Order Granting Defendants' Motions to Dismiss, ruling that Appellant lacked standing and that his claims were moot.

Appellant filed a Notice of Appeal on March 6, 2019 and Respondents were properly served on March 6, 2019. Appellant contends he possesses both public importance and taxpayer standing, that he states a valid claim in that the Act violates Article III § 17 of the South Carolina Constitution and that his claims are not moot.

STANDARD OF REVIEW

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Williams v. Condon,* 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence,* 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce,* 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham,* 292 S.C. 415, 357 S.E.2d 8 (1987).

Doe v. Marion, 373 S.C. 390, 395 645 S.E.2d 245, 247-48 (2007).

ARGUMENTS

I. CODIFICATION OF ACT 40 DOES NOT RENDER APPELANT'S CLAIMS MOOT

Respondents rely on five cases to support their contention that codification immunizes Act 40 from an active, ongoing, Constitutional challenge: *S.C. Tax Comm'n. v. York Elec. Coop.*, 275 S.C. 326, 270 S.E.2d 626 (1980); *Colonial Life and Accident Ins. Co. v. S. C. Tax Commission*, 233 S.C. 129, 103 S.E.2d 908 (1958); *State v. Freeland*, 106 S.C. 220, 91 S.E. 3 (1966); *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599 (1914); and *Parks v. Laurens Cotton Mills*, 75 S.C. 560, 56 S.E. 234 (1907). [Tr. p.14, l.8-10] None of the cases relied upon by Respondents involved an active, ongoing, constitutional challenge to an Act that was being codified. None involved the House and the Senate as litigants. None involved a codification as an apparent response to an active, ongoing, constitutional challenge. Finally, and most importantly, in each case relied upon by Respondents, the General Assembly was given ample time to review the report of the code commissioner before passage of the report.

Respondents argue that the codification of Act 40 remedies any constitutional defect in the Act and renders this action moot. [Tr. p.14, 6-11]. In support of their argument, they rely heavily upon the fact that the codification bill must follow all of the formalities for the passage of laws under the constitution (Memorandum in Support of Motion to Dismiss by the S.C. House of Representatives and the Hon. James H. "Jay" Lucas, as Speaker of the House p.7) Presumably the argument would be that, because it must be passed as a bill and under the formalities for the passage of laws under the Constitution, it cannot be abused but will instead be scrutinized and reviewed as any other bill.

However, a critical, distinguishing fact in all of the cases relied upon by Respondents is that, because of the importance of codification and the potential for abuse, the General Assembly in these cases was actually given **more time** to review the Report of the Code Commissioner.

Originally, Article VI, Section 5 of the South Carolina Constitution provided the authority and duty of the code commissioner to codify the general statutory law of the State. See *Nexsen v. Ward*, 96 S.C. 313, 318, 80 S.E.599, 600-601 (1914); *Park v. Laurens Cotton mills*, 75 S.C. 560, 568, 56 S.E. 234, 237 (1907). Subsequently, the Constitution was amended and some sections re-written, and those powers and duties are now provided for in Chapter 13 of Title 2 to the South Carolina Code of Laws (1976). The requirement of a codification of the entire Code every ten (10) years **and the requirement that there be a one (1) year waiting period from when the codification is introduced until it may be voted upon was eliminated**. The elimination of a one (1) year waiting period is a critical distinction the Respondents have not acknowledged.

Section 2-13-90 of the 1976 Code of Laws gives the Legislative Council and the Code Commissioner authority to revise volumes of the Code if, in its discretion, the supplement of any volume has become "too bulky for convenient use." S.C. Code § 2-13-90. The revised volumes must be submitted to the General Assembly as a bill and passed under the formalities for the passage of laws under the Constitution. After becoming an Act, it is "the only general permanent statutory law of the state. *Id.* And S.C. Code § 2-13-170.

The requirement of a codification of the entire Code every ten (10) years **and** the requirement that there be a one (1) year waiting period from when the codification is introduced until it may be voted upon was ruled upon. The elimination of a one (1) year waiting period is a critical distinction the Respondents have not acknowledged.

To understand the significance of the one (1) year waiting period, it is helpful to understand Article 6, Section 5. The Court has stated its purpose:

> The duty imposed upon the Code Commissioner to reduce into a systematic Code the general statutes with all the amendments thereto, and report the result of his labors to the General Assembly, shows that the framers of the Constitution contemplated that his report would embody, as far as possible, all the general statutory law of the state; but they realized that errors would be made, and that it would be necessary to make alterations and additions to the laws contained in the report of the commissioner. They, therefore, provided the manner in which the alterations or additions should be effected, towit: By bill passed under the formalities prescribed for the passage of other laws. The report is required to be placed upon the desks of the members of the Legislature, and **cannot be taken up for consideration until the next session thereafter.** The Constitution requires these things to be done, **in order that the members of the Legislature may have ample time** for ascertaining the necessary alterations and additions; and, in order that the alterations and additions may not then be made, without due consideration, it is provided that the report shall not be amended as an ordinary act, but that alterations or additions [233 S.C. 147] could only be made in the most formal manner for the passage of statutes.

Colonial Life and Accident Ins. Co. v. S.C. Tax Commission, 233 S.C. 129, 146-147, 103 S.E.2d 908, 916-917 (1958) (*emphasis added*).

In *Parks v. Laurens Cotton* Mills, 75 S.C. 560, 56 S.E. 234 (1907), in ruling that the codification of the Act remedied any constitutional defect, the Court quoted Article VI, Section 5 of the Constitution. The Constitution required the code commissioner's report be "laid upon the desk of each member of both houses of the General Assembly on the first day of the first session, but shall not be taken up for consideration until the next session of the General Assembly." *Id.* 237. A year had to pass between the introduction of the commissioner's report and the vote taken to pass the report.

In *Nexsen v. Ward*, 96 S.C. 313, 80 S.E. 599 (1914), the defendant sought to set aside a landlord's lien based on acts from 1866, 1869, 1878 and 1880. The Court also discussed the significance of the one (1) year waiting period and the potential for abuse.

> It is true that mischief may result from the omission of valid statutes, or the insertion of invalid ones, or of other matter not theretofore a part of the statute law, whether done inadvertently or designedly. But that is a matter for legislative, rather than judicial consideration. **The Constitution and statutes have guarded against such alterations by requiring the report of the Code commissioner to be printed and laid on the desks of the members of the General Assembly a year before it can be taken up for legislative action.** The intent necessarily to be implied is that each member shall have ample time and opportunity to consider it carefully, and see that it contains all that it should, and nothing that it should not.

Id. 601 (*emphasis added*).

The most recent case cited by Respondents involved a constitutional challenge to the General Appropriations Act of 1971. *S.C. Tax Comm'n v. York Elec. Coop.* 275 S.C. 326, 270 S.E.2d 626 (1980). Though the requirement that one (1) year must pass after introduction of a codification bill is not mentioned in York, it should be noted that the Act of 1971, not challenged until 1980, was codified as part of the 1976 Code. Therefore, a significant amount of time had passed before its codification. The Court also relied upon *Colonial Life* which, as discussed above, discussed the one (1) year waiting period.

In *Colonial Life*, the challenged provision was part of the 1951 Appropriations Act. The codification bill was signed into law in 1952, adopting the 1952 Code of Laws. The statute at issue was amended after the introduction of the codification bill which is allowed and the process to do so is articulated in Article IV, Section 5 of the South Carolina Constitution. See *Colonial Life*, at p. 916. However, the codification bill was still introduced one year before its passage. Therefore,

the General Assembly had ample time to review the codification bill and was aware that those code sections were being codified.

Section 2-13-90 of the 1976 Code of Laws does not contain language that a codification bill cannot be taken up within one (1) year of its introduction. Appellant can find no authority to suggest it was eliminated in order to expedite the passage of a codification bill or to shorten the time in which the General Assembly has to review a codification bill.

H.3515 (Act 40) was introduced in the House of Representatives on January 18, 2017. It was Ratified on May 9, 2017 and became Act 40 on May 25, 2017. Appellant filed this action during the interim on August 11, 2017. On the second day of the following legislative session, January 10, 2018, S.0082 (Act 129) was introduced in the Senate. Thirteen days later it was given third reading by the Senate and sent to the House of Representatives. On January 26, 2018, three days after receiving the bill, it received third reading in the House of Representatives. It was Ratified on February 1, 2018, less than one month after its introduction, and became Act 129 on February 12, 2018.

To agree with Respondents' position that codification remedies any constitutional defect, like in the instant case, would be giving the General Assembly license to pass unconstitutional legislation, whether inadvertently or intentionally, and codify it immediately thereby prohibiting anyone from challenging the constitutionality of the legislation. The potential for abuse is obvious. In the instant case, even though the constitutionality was challenged by Appellant filing suit on August 11, 2017, the Court has not even had a chance to hear Appellant's claim. Potentially, under this rationale, unconstitutional legislation could be codified before anyone can even object.

This is simply does not comport with the Court's prior rationale and justification for its previous holdings. Other than the requirement that the codification bill must receive three readings in each body, Respondents' argument makes no allowance for the General Assembly to review a code commissioner's report. So, conceivably, a piece of legislation could be introduced, given third reading in a matter of days and then, as soon as it becomes an Act, a codification bill could be voted upon and ratified merely a few days later. The implications are tremendous, and the codification of Act 40 by Act 129 is a perfect example.

II. IF APPELLANT'S CLAIMS ARE MOOT, APPELLANT HAS ESTABLISHED AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Respondents' argument is a variant of the doctrine of mootness. South Carolina courts have recognized three exceptions to the doctrine of mootness.

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. *E.g., id.; Sloan v. Department of Transp.*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996). "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis v. State*, 345 S.C. at 568, 549 S.E.2d at 596. Third, "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.; accord Sloan v. Department of Transp.*, 365 S.C. at 303, 618 S.E.2d at 878.

Sloan v. Dept. of Transportation, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) ("Ladson Road").

A. This Matter Is Capable of Repetition, Yet Evading Review.

This matter falls within the first exception to the doctrine of mootness: it is capable of repetition, but evades review. It is not difficult to see that this scenario is capable of repetition.

Acts of the General Assembly have been and will continue to be challenged as violative of the South Carolina Constitution.

Rather than conforming to the Constitution, the General Assembly could simply do again what it did in this case: codify the unconstitutional Act before any challenge can reach this Court, and then contend that their unconstitutional Act was thereby immunized from constitutional challenge.

The South Carolina Supreme Court applied this standard of "capable of repetition yet evading review" in the *Ravenel Bridge* case, which held that the manner of selection of the source of procurement of the Ravenel Bridge was unlawful, being by requests for proposals instead of by invitation for competitive sealed bids.

> The DOT contends this case should be dismissed as moot because the construction contracts have been awarded and fully performed. We disagree.
>
> "[A]n appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Curtis v. State*. 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

Sloan v. Dept. of Transportation, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005). In the *Ravenel Bridge* case, this Court ruled that use of the requests for proposal process was designed to accelerate the procurement process. The Court ruled, "Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits." *Id.*

The standard is *capable* of repetition, not *likelihood* of repetition.

> The party bringing the action need only show the issue raised is *capable* of repetition and **is not required to prove there is a "reasonable expectation" the issue will arise again**. *Byrd [v. Irmo High School]*, 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South

> Carolina has adopted the "lenient" approach to evading review analysis).

Sloan v. Greenville County, 356 S.C. 531, 554-555, 590 S.E.2d 338, 351 (2003) (italics in original; bold and underline added). As shown by past practices, the General Assembly is capable of continuing to violate the Constitution, and if this Court allowed it, capable of attempting to immunize its unconstitutional acts through codification, which would thereby allow their unconstitutional Acts to evade review.

In *Sloan v. Department of Transportation (Ladson Road)*, this Court explained its reasoning on the standard of capable of repetition, yet evading review.

> We find the issue of whether the DOT properly authorized the emergency procurement is one that is capable of repetition, yet will usually evade review. For example, here an emergency procurement came four years into the construction project, which was then **completed within about six months.** The project was completed only a few months after Sloan filed suit and well before the parties filed motions for summary judgment. Therefore, the "capable of repetition but evading review" exception to mootness applies here.

Id., 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) (footnote omitted, emphasis added).

This exception to the mootness doctrine should also apply here. In the case at bar, the codification took less than one month. In the course of a month, judicial review would be impossible.

B. This Matter is of Great Public Importance.

This case also falls within the second exception, an issue of great public importance. The analysis that supports public importance standing also supports a public importance exception to the doctrine of mootness.

> In our discussion of Sloan's **standing** to bring this action, this court has already found in an analogous case that the "expenditure of public funds pursuant to a competitive bidding statute is of **immense public importance**." *Sloan [v. School District]*, 342 S.C. at 524, 537 S.E.2d at 303. **The same rationale applies with respect to mootness**.

Sloan v. Greenville County, 356 S.C. 531, 554, 590 S.E.2d 338, 350 (2003) (emphasis added).

In *Sloan v. Department of Transportation (Ladson Road)*, this Court analyzed the great public importance exception to the doctrine of mootness:

> This Court has noted "the limited nature of the exception for questions of 'imperative and manifest urgency.'" *Sloan v. Greenville County*, 361 S.C. 568, 571, 606 S.E.2d 464, 466 (2004) (*Greenville County II*). In *Greenville County II*, we held that **where judicial guidance exists** on the legal issue presented, **there is no imperative and manifest urgency** for an advisory opinion.
>
> **In the instant case, however, there is no case law** specifically addressing the DOT's authorization of an emergency procurement. Because this is a matter of public importance which **could occur** at any time (given the inherent unpredictability of emergencies), we find there is an urgent nature to this issue.
>
> Accordingly, even though the Ladson Road Project was completed in 2005, we will address the other issues raised in the case.

Id., 379 S.C. 160, 169, 666 S.E.2d 236, 240 (2008) (*emphasis added*). To the knowledge of the undersigned, there is no case law on the subject of whether codification of an unconstitutional act terminates an ongoing, active Constitutional challenge, and this kind of activity "could occur at any time."

The Court made a similar ruling in the other *Sloan v. Department of Transportation* case. "**[D]espite the mootness in the present case**, we find Sloan has standing **to raise this issue**." *Id.*, 365 S.C. 299, 304-5, 618 S.E.2d 876, 879 (2005). This Court should address the issue, even though

it might be technically moot, as it did in the *Sloan v. Department of Transportation* cases.

C. This Matter May "Affect Future Events or Have Collateral Consequences."

Finally, the third exception to mootness applies. This ruling may "affect future events or have collateral consequences." This Court in *Sloan v. S.C. Department of Transportation* (*Ladson Road*), also found this third exception to the doctrine of mootness. "Moreover, a decision on the merits of this case certainly will affect future events, *to wit,* how the DOT decides to authorize emergency procurements in the future." *Id.*, 379 S.C. at 169, 666 S.E.2d at 240. Likewise, this Court in the other prior *Sloan v. S.C. Department of Transportation* case (*Ravenel Bridge*) ruled that its decision would affect future events. *Sloan v. S.C. Department of Transportation*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005).

Considering how this exception applies in this case, there is a potential for "mischief" that the General Assembly could create if it were permitted to immunize an unconstitutional act from challenge by a simple codification. All such legal challenges could be short-circuited. There are no cases that interpret and apply this constitutional provision, and this ruling will provide guidance to the entire State. Like the decisions in both of the *Sloan v. S.C. Department of Transportation* cases, a decision in this case will reiterate to the General Assembly and to the public at large that no man is above the law, and that the General Assembly is not free to violate the Constitution and immunize its unconstitutional behavior from legal challenge by a simple codification.

III. APPELLANT POSESSES STANDING PURSUANT TO THE PUBLIC IMPORTANCE EXCEPTION AND AS A CITIZEN, RESIDENT, TAXPAYER AND REGISTERED ELECTOR

A. Appellant Possesses Public Importance Standing

Respondents argue Appellant does not have standing under the public importance exception. [Tr. p.6, l.3-5] They argue the appellate courts have not provided future guidance to the General Assembly in a case involving a violation of the one subject rule. [Tr. p.8, L1-3]. Respondents further argue the Court cannot provide future guidance to the General Assembly because to do so would expand the Court's jurisdiction beyond the constitutional limits as provided in Article V, Section 11 of the South Carolina Constitution. [Tr. p.10, l. 22-24]. Both arguments are without merit.

"This Court has long 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. *ATC. S. Inc. v. Charleston Cnty.*, 380 S.C. 191, 669 SE.2d 337, 341 (2008).

The courts of South Carolina have addressed these matters many times. Illustrative cases include the following: *South Carolina Public Interest Foundation v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*,

365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). These authorities confirm that the Appellant possesses public importance standing and taxpayer standing.

"The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance." *ATC. S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 669 S.E.2d 337, 341 (2008).

Contrary to Respondents' argument, the Court has recognized the public importance of a case claiming that an Act violates the one subject rule. The case of *American Petroleum Institute v. S.C. Department of Revenue*, 382 S.C.572, 677 S.E.2d 16 (2009) supports this. Respondents argue the Court in *American Petroleum* did not discuss standing or the public importance or future guidance. The Court granted original jurisdiction in *American Petroleum*. [Tr. p.7, l.7-25 & p.8]. For the Court to take the case in its original jurisdiction, the Court had to find that the public interest was involved, or that special grounds of emergency or other good reasons existed. Rule 245(a), SCACR. Petitioners filed a complaint seeking declaratory judgment on the claim that section 3 of the Act was unconstitutional as violating the one subject provision of Article III, Section 17. The Court granted the Petitioners' request to hear the matter in its original jurisdiction pursuant to South Carolina Appellate Court Rules Rule 245. In doing so, the Court recognized the

case involved an issue of significant public interest. Therefore, the Court has recognized the public importance of a case claiming that an Act violates the one subject rule.

Respondents go on to argue that to give Appellant standing would be to conclude that the General Assembly is in need of future guidance and would be expanding the Court's limited constitutional function. [Tr. p.8, l.8-25. Tr. p.9, l.1-3]. That is simply not so.

Appellant asserts he has standing under the public importance exception because "this matter surpasses a purely private matter and is of such public importance that its resolution is required for future guidance and is needed to implement the legislation at issue." See Complaint, ¶ 4. Plaintiff further asserts, "there is confusion as to how to proceed with implementing the legislation given the uncertainty of its constitutionality, and the Court's guidance is needed immediately for the State to implement the legislation and its purported purpose." See Complaint ¶ 11.

The Court is the "ultimate interpreter of the Constitution." *South Carolina Public Interest Foundation vs. Judicial Merit Selection Commission*, 369 S.C. 139, 632 S.E.2d 277, 278 (2006). The Court goes on to say, "this Court can review the actions of the General Assembly when the actions are unconstitutional. Id at 279.

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

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

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

Just as the construction of a statute is a judicial function and responsibility, even more so is the construction of the South Carolina Constitution. Just as the Supreme Court ruled that the plaintiffs in *Anderson* properly possessed standing and the Court possessed jurisdiction to interpret and apply the statute to members of the General Assembly, so also in the case at bar, this Court has jurisdiction to interpret the sections of the Constitution at issue in this case, and to apply them to the Respondents.

The Court must determine the constitutionality of Act 40 and provide future guidance to the State to implement the legislation. It is the uncertainty of whether or not the legislation should be implemented by the State that requires future guidance.

The Court has been asked to determine the constitutionality of Act 40. It has also been asked to give future guidance in the implementation of the Act. The Court has no conflict here. This Court has the authority and duty to interpret the South Carolina Constitution. It is also within the Court's jurisdiction to determine whether a Plaintiff has standing.

B. Taxpayer Standing

Appellant pled: "Plaintiff possesses standing as a citizen, resident, taxpayer, and registered elector of the State of South Carolina." *See* Complaint, ¶ 5. The Court agrees that Plaintiff has taxpayer standing to challenge Act 40. Taxpayer standing has a long history in South Carolina, and an even longer history in other states and in federal courts. The Supreme Court of South Carolina has addressed taxpayer standing on many occasions. Taxpayers are a distinct subset of residents. In *Myers v. Patterson*, 350 S.C. 248, 433 S.E.2d 841 (1993), taxpayers sued the Treasurer, Commissioners and Executive Director of the South Carolina Highways and Public Transportation Commission. The Court acknowledged that a plaintiff ordinarily must allege damage to himself different from that sustained by the public generally, but also noted the exception to the rule: taxpayers objecting to an unlawful diversion of public funds.

> As a threshold matter, we address the State Treasurer's assertion that the plaintiffs, as mere taxpayers, do not have standing to bring this action.
>
> As a general 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. *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). An **exception** to this rule exists when the act sought to be enjoined is **an unlawful diversion of public funds**, such as the expenditure of public funds under an alleged unconstitutional statute. *Id.* at 22, 51 S.E.2d at 97. 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. *Id. See also Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that a **taxpayer** may maintain an action in equity, on behalf of himself and all other taxpayers, to **restrain public officers from paying out public money for purposes unauthorized by law**).

350 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added). Therefore, a taxpayer possesses standing if he has contributed to the sum at issue. In the case at bar, the jeopardized sum includes funds to which Appellant contributed. Accordingly, Appellant possesses taxpayer standing.

South Carolina case law does not support a *de minimis* limitation to taxpayer standing, and it is contrary to the reasoning of this State's decisions. *Myers v. Patterson* granted a taxpayer standing to challenge SCDOT expenditures when the taxpayer had "contributed to a sum jeopardized." *Id.* at 315 S.C. 248, 433 S.E.2d 841. The "unlawful diversion of public funds" creates "an exception to the rule" that generally requires plaintiffs "to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.*

Likewise, in *Shillito v. Spartanburg*, the Court ruled, "An apparent exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds." 214 S.C. 11, 51 S.E.2d 95, 99 (1948). The Court further ruled that if standing should be granted to enjoin these unlawful diversions of public funds, a citizen should also be granted standing "to contest the expenditure of public funds under an alleged unconstitutional statute." *Id.*

In *Shillito*, the Court also ruled that a taxpayer possessed standing to challenge an illegal expenditure even though his taxes contributed only $6.28 to the illegal fund. *Id.* Other cases in a long line of opinions addressing this issue have never applied to taxpayer standing the *de minimis* rule. See, e.g., *Mauldin v. City Council*, 33 S.C. 1, 11 S.E. 434 (1890); *Sligh v. Bowers, 62 S.C. 409*; *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939); *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985); *Sloan v. School Dist. of Greenville Cty.* 342 S.C. 515, 537 S.E.2d 299 (Ct.App.2000).

In *Brown v. Wingard*, although the amount of taxpayer funds was small (a few hundred dollars of travel expenses), the Court held that taxpayers "have an interest in seeing that city

officials disburse funds in a lawful manner." *Id.* at 480, 330 S.E.2d at 302. Likewise, in this case Appellant as a taxpayer possesses an interest in the funds at issue.

As a practical matter in every taxpayer action the individual taxpayer will possess only a minute personal financial interest in the portion of the illegal expenditure by any public body. Accordingly, a rule requiring more than a *de minimis* interest in any expenditure would disqualify almost every taxpayer from bringing a taxpayer action; it would eliminate all taxpayer actions except those brought by the absolute wealthiest of our citizens.

In *Sloan v. School District of Greenville County,* Mr. Sloan challenged the school district's unlawful expenditure of taxpayer funds to build three schools without competitive sealed bidding as the School District Procurement Code required. 342 S.C. 515, 537 S.E.2d 299 (Ct.App.2000). The Circuit Court dismissed the case for lack of standing. Mr. Sloan appealed, and the Court of Appeals reversed. The Court ruled that Mr. Sloan possessed taxpayer standing and discussed the nature of taxpayer standing at length.

> In the case at bar, Sloan is not maintaining this action as a "private person," nor is he maintaining it merely as a "member of the public." Sloan has pursued this action as a taxpayer of Greenville County.
>
> In *Mauldin v. City Council,* 33 S.C. 1, 11 S.E. 434 (1890), the South Carolina Supreme Court examined the issue of taxpayer standing. In *Mauldin,* taxpayers challenged the purchase of an electric plant by the city council as *ultra vires,* claiming the purchase increased their tax burden. *Id.* at 15, 11 S.E. at 434. The Court explained how taxpayers differ from other members of the general public and how taxpayers suffer harm from *ultra vires* acts. *Id.* at 18-21, 11 S.E. at 435-36. The *Mauldin* court stated:
>
> The injury charged as the result of the acts complained of is a private injury in which the tax-payers of the county . . . are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely the tax-payers of the county . . . .

> *Id.* at 20, 11 S.E. at 436 (quoting *Newmeyer v. Missouri & Miss. R.R. Co.*, 52 Mo. 81 (1873)). The Court held the taxpayers were "not the whole public, but comparatively a small part of it." *Id.* at 18, 11 S.E. at 435. The taxpayers "constitute a class specially damaged by the alleged unlawful act," and therefore have "a special interest in the subject-matter of the suit, distinct from that of the general public." *Id.* at 19, 11 S.E. at 436 (quoting *Mayor and City Council of Baltimore v. Gill*, 31 Md. 375, 394 (1869)).

Sloan v. School District of Greenville County, 342 S.C. 515, 518-21, 537 S.E.2d 299, 301-02 (Ct. App. 2000) (footnote omitted).

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

> 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). Appellant has contributed to the general tax funds of the State. Accordingly, he possesses standing as a taxpayer to contest expenditures of tax funds under illegal statutes.

CONCLUSION

Appellant prays the Court to reverse the judgement of the Circuit Court, and to grant Appellant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2019-000360

Case No. 2017-CP-40-04819

William R. Folks, individually and on behalf of all others similarly situated, ...Appellant,

v.

The South Carolina House of Representatives; The South Carolina Senate; The Honorable James H. Lucas, Speaker of the House of Representatives; The Honorable Harvey S. Peeler, Jr., President *Pro Tempore* of the South Carolina Senate; and the State of South Carolina, ...Respondents.

APPELLANT'S CERTIFICATE OF SERVICE

I, Helen Ann Siegling Thrower, do hereby certify that on September 4, 2019, I served a copy Appellant's initial brief and designation of the record upon the individuals named below, via United States Postal Service to the address below:

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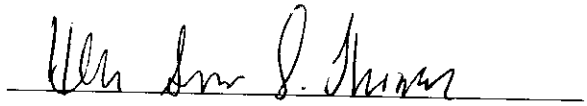

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