

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Judge

Case No. 2020-CP-40-02636

RECEIVED

Aug 20 2020

S.C. SUPREME COURT

JONATHON HILL and JONATHON
HILL FOR SC HOUSE DISTRICT 8;

Appellants,

v.

THE SOUTH CAROLINA REPUBLICAN
PARTY and VAUGHN PARFITT

Respondents.

**APPELLANTS' RETURN TO RESPONDENTS' MOTION TO
DISMISS**

This appeal concerns matters of great public importance, well set up for the Court to address. The Court should deny the Motion to Dismiss and reach the merits.

This appeal concerns the integrity of elections, which is foundational. “Integrity in elections is foundational.” *Anderson v. S.C. Election Comm’n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706 (2012) (*per curiam*). The question is whether—despite the limitations on contributions to political campaigns established in the South Carolina Ethics, Government Accountability, and Campaign Reform Act—the chairpersons of political parties may direct unlimited funds to chosen candidates, and whether the chosen candidates may accept such unlimited contributions.

The appeal poses two issues of pure statutory interpretation. Does the Ethics Act mean what it says when it defines “person” to include “an individual, a proprietorship, firm,

partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert,” and then prohibits any “person” from contributing more than \$1,000 to a candidate for the State Legislature (and other amounts for candidates for other offices)?¹

Does the Ethics Act mean what it says when it allows a \$5,000 cap on contributions from a political party, but requires that these higher amounts from a party come “through its party committees or legislative caucus committees”?²

Depending on the answers to those questions, the Court may reach a question of federal constitutional law: Does the first amendment, as the lower court held, invalidate all of South Carolina’s restrictions on campaign contributions funneled through political parties? (“[T]he SC Ethics Act contains no valid provisions which restrict the giving or receiving of the political contribution[s from a party to a candidate].”) (Ex. 2, Order of 6/05/20, p. 3).

Because there are no limits on donations to a political party, the lower court’s order frees all corporations, individuals, and the like to funnel unlimited funds to a candidate, as long as they channel it through a political party. All the donor need do is state which candidate it wants the funds to go to. The order also allows party chairpersons to play king-maker, by granting the non-earmarked funds to whichever candidate he or she likes.

These are pure questions of law. Section 8-13-1314 of the Ethics Act limits a

¹ See S.C. Code Ann. § 8-13-1300(25) (defining “person”); § 8-13-1314(A)(1) (limiting the amounts a “person” may legally contribute).

² See S.C. Code Ann. § 8-13-1300(21) (defining “Legislative caucus committee”); *id.* ¶ (24) (defining “Party committee”); § 8-13-1316(A) (“Notwithstanding Section 8-13-1314(A)(1),” allowing higher limits for contributions “from a political party through its party committees or legislative caucus committees”).

For State House races, the limit is \$5,000. (*Id.* subparagraph (2)).

contribution by “any person” to a candidate for the State House to \$1,000. Section 8-13-1316 limits political parties, acting through their party committees and caucus committees, to \$5,000. Here, the parties stipulated that the contributions exceeded \$5,000. “It is stipulated by all parties that the value of the contributions accepted by candidate Parfitt and given by South Carolina Republican Party exceed \$5,000.00.” (Ex. 2, 06/05/20 Order, p. 2.)

These questions are clearly laid out for the Court. The relevant facts have been stipulated to. All that remains are matters of statutory interpretation and potentially of constitutional law, matters well-suited to appellate resolution.

In denying Appellants’³ motion for reconsideration, Acting Circuit Court Judge Jean H. Toal stated her view that “This is an issue of novel impression for the South Carolina Supreme Court. It is there that this matter should be resolved.” (Ex. 3, 06/08/20 Order, p. 2).

Movants here, Respondents in the present appeal, disagree. They ask the Court to dismiss this case. That, the Court should not do.

Organization

| | |
|-----------------------------------------------------------------------------------------|----|
| Procedural Background | 4 |
| Argument..... | 7 |
| Going to the Ethics Commission would be futile | 9 |
| The case is ripe | 14 |
| The case is not moot..... | 15 |
| If this case is otherwise moot, the case is an exception to the mootness doctrine | 17 |
| The Court should resolve this case on the merits, not on a motion to dismiss | 22 |

³ Because Defendants in the lower court case are Respondents in this Appeal, and Plaintiffs in the lower court case are Respondents to the current motion, use of the term “Respondents” in this document could lead to confusion. This Return will therefore endeavor to address Defendants below as “Movants” and Plaintiffs below as “Appellants.”

BACKGROUND

A. The Procedural Facts

This case began after Appellant Representative Jonathon Hill discovered three sets of mailers that had been sent to likely voters in the then-upcoming Republican primary. (Complaint, Ex. 4, ¶ 20; Exs. 5-7). Hill is running for re-election to his House District 8 seat. These mailers supported his opponent, Vaughn D. Parfitt. Each mailer stated that it was “PAID FOR BY SCGOP AND AUTHORIZED BY VAUGHN D. PARFITT FOR SC HOUSE.” Hill and his campaign organization filed suit on June 3, 2020. The Chief Administrative Judge for Richland County issued an order setting a hearing for June 5, 2020, before the Honorable Jean H. Toal, and ordering Movant Republican Party to bring all documents indicating payments made in the District 8 race. (Ex. 1, Administrative Judge’s Order, pp. 1, 3; *see* Complaint, ¶ 55).

By the date of the hearing, two days later, three more sets of such mailers had appeared in mailboxes throughout his District. (Exs. 8-10). At the hearing, Defendants, the current Movants, presented an invoice showing eight such mailers. (Ex. 11).

The mailers state such things as, “Vote Vaughn Parfitt on June 9th” (Ex. 6, p. 2); “That’s why I’m asking you to elect Vaughn Parfitt in the Republican primary for state representative on June 9th” (Ex. 8, p. 2); “Call Jonathon Hill at ***-***-****. Ask him why he chose to support liberal Allison [*sic*] Lee” (Ex. 9, p. 2).

The parties stipulated that the contributions by the South Carolina Republican Party to Mr. Parfitt’s campaign exceeded five thousand dollars. (Ex. 2, 6//05/20 Order, p. 2).

The contributions were thus concededly in excess of the one thousand dollar limit allowed by Section -1314, and of the alternative five thousand dollar limit allowed by Section -1316. The lower court held, as a matter of law, that neither limit applied.

The lower court held, as to Section 8-13-1314,

Definitional sections of the Ethics Act, specifically Sections 8-13-1300(25),(26) contain the definition of “persons” and the definition of “political party.” It is clear that the legislature intended to regulate persons and political parties separately. Thus, the restrictions of §8-13-1314 on personal contributions do not apply to the South Carolina Republican Party.

(Ex. 2, Order, p. 2) (emphasis added).

As to Section 8-13-1316, the court held,

The constitutionality of the SC Ethics Act’s regulation of “committee” as defined in Section 8-13-1300(6) was challenged in *SC Citizens for Life v. Krawcheck*, 759 F.Supp.2d 708 (D.S.C. 2010). In this case and subsequent cases, the federal district court concluded that the definition of “committee” is overbroad and facially unconstitutional.

....

If the definition of “committee” is struck from the SC Ethics Act, then the regulations and restrictions of Section 8-13-1316 on the accepting or giving of candidate contributions of more than \$5,000.00 are invalidated. I therefore deny the petition for a preliminary injunction on the grounds that the SC Ethics Act contains no valid provisions which restrict the giving or receiving of the political contribution at issue in this matter.

(*Id.* pp. 2-3) (emphasis added).

The order then stated, “Plaintiffs cannot succeed on the merits of this litigation.” (*Id.* p. 3).

The Court further stated,

And I say to you, Mr. Fudenberg, and to your client, Representative Hill: Had the legislature done a job of dealing with this matter after the ruling in 2010 and stuck with the intention that they have, you would be completely right about saying that these contributions exceed what is permitted.

(Ex. 12, Tr. Hr’g, page 116, lines 9-14).

Appellants moved to reconsider; Movants filed a return; and the court denied the motion

on June 8, 2020. Appellants filed and served a notice of appeal on the same day. The Court of Appeals then transferred the appeal to this Court because it concerns election law.

B. Movants’ Misconception of the Procedural Facts

The Motion’s “Background” section invents a holding, invents the opposing parties’ arguments, and rejects the statute’s definition of its own terms.

The lower court did not hold that “the SCGOP was a ‘committee’ as that term is defined in subsection 8-13-1300(6) of the South Carolina Code.” *Contra* Motion, page 2. Nor have Appellants ever argued that the term “party committee” should apply to the South Carolina Republican party. *Contra* Motion, page 3. Rather, Appellants have argued the reverse: That the defined terms “Political party” and “party committee” refer to distinct entities, as the Act clearly intends.⁴ (E.g. Ex 4, Compl., ¶ 32; Ex. 13, Motion to Reconsider, pages 2-4). Rather, the argument that the two are one and the same is an argument Movants have put forth. They may be engaged in wishful thinking. They may wish the Circuit Court had so ruled; they may wish Appellants had so argued; but neither the Court nor Appellants did so.

Movants find it “curious” that Appellants would want to read the statute as written. Motion, at 3 (stating that, “In their motion, Appellants again curiously argued that the SCGOP is a ‘person’ under the State Ethics Act.”) That’s what the statute says.⁵ The Legislature obviously

⁴ “‘Political party’ means an association, a committee, or an organization which nominates a candidate whose name appears on the election ballot as the candidate of that association, committee, or organization.” 8-13-1300(26). In contrast, “‘Party committee’ means a committee established by a political party.” *Id.* ¶ 24. The two cannot be the same. One establishes the other. When Great Britain established a colony in South Carolina, one would not say that the term “colony” applied to Britain. It applied to South Carolina, not to Britain.

⁵ S.C. Code Ann. Section 8-13-1300, entitled “Definitions,” states,

As used in this article:

desired to prevent people from evading the limits on contributions by utilizing associations, partnerships, etc. A proper way to do that is to prohibit any “person” from so acting, and stating, “What we mean by ‘person’ is an individual or any group of people or legal entity.”

Thus, the Motion invents a holding; it invents the opposing parties’ argument; and it rejects the statute’s definition of its own terms.

ARGUMENT

OVERVIEW OF APPELLANTS’ ARGUMENT

Movants’ arguments each boils down to one of two⁶ claims, (1) that Appellants need to go to the State Ethics Commission or (2) that intervening events have made the case moot. The Motion should be denied.

(1) Requiring Appellants to proceed to the State Ethics Committee would be irrational and futile. There is nothing for the State Ethics Commission to rule on. The facts have been stipulated. The Circuit Court made holdings of constitutional and statutory law. The Ethics Commission cannot “overrule” the Circuit Court on matters of statutory or constitutional interpretation. All that remains are pure questions of law, which cannot be altered or overruled except by this Court.

(2) Moreover, the appeal is not moot. But even were it moot, the doctrine of “capable of

....

(25) “Person” means an individual, a proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert.

Does the SCGOP truly find it “curious” that Appellants consider them to be an “organization,” an “association,” or “a group of persons acting in concert?”

⁶ Other than claiming the case is not “ripe” for review, which is incredible given that allegedly wrongful acts have been committed; harms have occurred; and suit was properly filed.

repetition, yet evading review,” and the doctrine of “questions of public interest” make resolution of the issues by this Court appropriate.

OVERVIEW OF MOVANTS’ ARGUMENT

Many of Movants’ authorities do not stand for the proposition for which Movants cite them. Movants have ripped language out of context and applied it where it does not belong. There seems insufficient gain to justify the burden on the reader were Appellants to dissect these quotations and citations, because—even assuming Movants’ authorities stand for the propositions for which Movants cite them—Movants never discuss the doctrine of futility, and never discuss the doctrine of capable of repetition, yet evading review, nor similar doctrines. These doctrines trump all of Movants’ authorities and would do so even if Movants’ authorities stood for the propositions Movants suggest.

With one possible exception: Movants write, “And the relevant statutes mandate that ‘[a] violation other than an inadvertent or unintentional violation must be considered by the appropriate supervisory office for appropriate action.’” Motion, page 4 (quoting S.C. Code Ann. § 8-13-1372(B) (emphasis is Movants’). Section 8-13-1372, however, is entitled, “Technical violations of rules on campaign reports.” (Emphasis is Appellants’). The full section states (emphasis added),

(A) The appropriate supervisory office, in its discretion, may determine that errors or omissions on campaign reports are inadvertent and unintentional and not an effort to violate a requirement of this chapter and may be handled as technical violations which are not subject to the provisions of this chapter pertaining to ethical violations. Technical violations must remain confidential unless requested to be made public by the candidate filing the report. In lieu of all other penalties, the appropriate supervisory office may assess a technical violations penalty not to exceed fifty dollars.

(B) A violation other than an inadvertent or unintentional violation must be considered by the appropriate supervisory office for appropriate action.

Campaign reports have never been an issue in this case. This case is about contributions, not reports. (Exs. 1-3, Orders of 6/3/2020, 6/5/2020, and 6/8/202; Ex, 4, Compl. (*passim*)). The section affords Movants no support.

I. THE COURT SHOULD NOT DISMISS THE CASE ON THE SUPPOSED GROUNDS OF AN ADMINISTRATIVE AVENUE TO RESOLVE THE QUESTIONS, THE PURSUIT OF WHICH WOULD CONSTITUTE AN ACT OF FUTILITY.

There is nothing for the Ethics Commission to decide. The facts are stipulated to. All that remain are matters of statutory and constitutional analysis. Neither the Ethics Commission nor any other executive branch body can overrule a circuit court judge on such matters. Because there is nothing for the Ethics Commission to rule on, to go before the Commission would therefore be futile. It would be a circular detour that would ultimately bring this case back before this Court with nothing changed. South Carolina law exempts one from otherwise-necessary procedural steps when pursuing them would be futile. The Court should not dismiss the appeal in favor of a futile process before the Ethics Committee.

A. South Carolina Law Does Not Require One to Plead His Case to an Executive Branch Agency When Doing So Would Be Futile. Here, It Would Be Futile.

1. South Carolina Law Does Not Require One to Engage in Futile Acts.

South Carolina law exempts one from requirements that would be futile to pursue. *See, e.g., McClurg v. Deaton*, 395 S.C. 85, 92, 716 S.E.2d 887, 891 (2011) (noting “the policy that courts do not engage in acts of futility”). South Carolina courts have done so in a wide variety of contexts. Preservation rules do not require one to make additional arguments after the trial judge has made his position clear; as such additional arguments would be futile. *Allegro, Inc. v. Scully*, 418 S.C. 24, 33, 791 S.E.2d 140, 145 (2016). One is not required to raise to a trial court one’s opposition to a Court of Appeals decision; to do so would be “futile . . . , as the circuit court had

no authority to alter the decision of the Court of Appeals.” *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 170 n.5, 763 S.E.2d 426, 430 (2014). “Because Petitioner's attorney had valid reasons for not calling Marshall to testify, it would be futile and unreasonable to also require defense counsel to interview him to satisfy the Sixth Amendment.” *Edwards v. State*, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (post-conviction relief action).

2. More Specifically, South Carolina Does Not Require One to Go Before an Executive Branch Adjudicatory Entity When Doing So Would Be Futile.⁷

In line with the cases cited immediately above, the Court has repeatedly ruled that one is not required to exhaust administrative remedies when doing so would be vain or futile. “A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act.” *Storm M. H. v. Charleston Cty. Bd. of Trs.*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (quoting *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010)). “[P]ractically speaking, requiring a party to raise an issue which cannot be ruled upon by an ALJ makes little sense.” *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 342 S.C. 34, 39, 535 S.E.2d 642, 645 (2000) (emphasis in original). “In our opinion, a remand to the ALC for further factual development would be futile in light of the [stipulations].” *Alltel Communs. Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 (2012). All that remained in *Alltel Communs. Ins.* were questions of law, and “questions of statutory interpretation are questions of law for the court to decide.” *Id.* (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 73, 716 S.E.2d 877, 881 (2011)).

So, too, here. The necessary facts have been stipulated. All that remains are questions of

⁷ “[T]he doctrine of exhaustion of administrative remedies [] is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional.” *Wardlaw v. S.C. Dep't of Soc. Servs.*, 427 S.C. 197, 205, 829 S.E.2d 718, 722 (Ct. App. 2019).

law on which the circuit court has already ruled.

The *Harpootlian* order on which Movants rely is obviously distinguishable. (Motion at 7-8, 11-12) (citing Order, *Harpootlian v. S.C. Senate Republican Caucus*, Case No. 2019-001404 (S.C. Sup. Ct. filed Dec. 12, 2019)). There, proceeding in the Ethics Commission would not have been futile. The issues were not solely issues of law. The parties were still wrangling over discovery disputes and a motion to compel more than a year after the case was filed. (*Harpootlian* order, first paragraph). The questions there involved questions of fact, or more precisely, of what facts could be discovered. It would thus not have been futile to proceed in the administrative agency.⁸

As explained immediately below, no entity other than this Court may pass judgment on the issues in this case. They are for this Court to decide.

Therefore, Movants' Motion to Dismiss should be denied.

- 3. Because there Is Nothing for the Ethics Commission to Rule on, Taking the Case to the Ethics Commission Would Be a Futile Exercise.**
 - a. Because the Ethics Commission may not “overrule” the statutory and constitutional interpretations of the judicial branch, there is nothing for the Ethics Commission to rule on.**

The Ethics Commission is not a court of law. Ethics Commissioners are not judges. The Ethics Commission cannot overrule Judge Toal's statutory or constitutional interpretations, nor those any other court. “The construction of a statute is a judicial function and responsibility.

⁸ Moreover, in *Harpootlian*, the merits of case were not on appeal to this Court. There had been an appeal, which was dismissed by stipulation approved by this Court, but no one suggested that there had subsequently been an appealable final determination. Rather, the matter arose on a petition for a writ of prohibition to stop the lower court from issuing discovery orders.

Further, regulation of discovery, as in *Harpootlian*, is quintessentially a task for inferior tribunals; stating what the law is, as required in the present appeal, is quintessentially a task for appellate Courts.

Accordingly, we reject the argument that this Court lacks subject matter jurisdiction in this case.” *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012) (citation omitted) (*per curiam*) (election law issue). *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 170 n.5, 763 S.E.2d 426, 430 (2014) (“[T]he circuit court had no authority to alter the decision of the Court of Appeal.”). So too here: The Ethics Commission has no authority to overrule the statutory and constitutional interpretations of the circuit court. Even a circuit judge may not overrule another circuit judge. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (citing *Charleston Cnty. Dep't of Soc. Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995)) (so holding); *Tisdale v. Am. Life Ins. Co.*, 216 S.C. 10, 13, 56 S.E.2d 580, 581 (1949) (similar). It makes no sense to say that an agency outside of the judicial branch may overrule a circuit judge’s statutory or constitutional interpretations. Just as executive agencies may not effectively “overrule” statutes enacted by the Legislature, *U.S. Outdoor Advert. v. S.C. DOT*, 324 S.C. 1, 4, 481 S.E.2d 112, 113 (1997); *Soc’y of Prof’l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984), nor may they properly “overrule,” alter, or amend judicial determinations of what statutes mean and the Constitution requires.

The facts are stipulated. Because only questions remaining concern matters on which the Ethics Commission may not overrule a court, the Ethics Commission has nothing to rule on.

b. For entirely independent reasons, the Ethics Commission would be unable to rule on the propriety of the injunction or the Movants’ constitutional defense.

Only a court may enjoin a party to dispute. The Commission is not authorized to issue injunctions. *See generally* S.C. Code Ann. § 8-13-320 (stating the powers and duties of the Commission, and not granting the Commission authority regarding injunctions); *see esp. id.* ¶

(10)(k) (stating its powers upon finding a violation). In contrast, ¶ 9(b)(1) of the same statute explicitly provides courts—and only courts—with the power to issue injunctions.⁹ It follows that the Commission would be without power to rule on the propriety of an injunction. *See Rainey v. Haley*, 404 S.C. 320, 325 n.5, 745 S.E.2d 81, 84 n. 5 (2013).¹⁰

Nor may the Commission opine on the constitutionality of the statute. “[A]n agency has no authority to pass on the constitutionality of a statute.” *Beaufort Cty. Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 241, 516 S.E.2d 655, 660-61 (1999).

Thus, quite apart from the fact that the issues have been ruled on by a circuit court, the Commission would be unable to rule on the propriety of an injunction and on the constitutional question.

Because the Ethics Commission is without authority to rule on the issues, and would be unable to disturb the circuit court’s rulings even if it had authority, there is nothing for the Ethics Commission to rule on.

Therefore, from the Ethics Commission, the case would go, unchanged, to the Court of Appeals, S.C. Code Ann. § 8-13-320(10)(m), which would then transfer the case, unchanged, to this Court, pursuant to Rule 203(d)(1)(A)(iv), SCACR.

The result would be to put the case back before this Court, with nothing gained after significant work has been caused and most likely significant time having passed. It would be

⁹ *Sanford v. S.C. State Ethics Comm’n*, 385 S.C. 483, 492 n.2, 685 S.E.2d 600, 605 (2009), is not greatly to the contrary. There, the investigatee requested that the Commission “enjoin itself.” The question of whether the Commission had the power to enjoin itself was not directly raised to the Court. The Court stated, in effect, that if the Commission wanted to “enjoin” itself, it may do so.

¹⁰ The present Appellants seek only civil remedies. The provisions under which they sued do not provide for either criminal or civil penalties.

futile.¹¹ Because dismissing the appeal to allow the Ethics Commission to rule on the issues would be futile, the appeal should not be dismissed in order to allow the Ethics Commission to rule.

II. MOVANTS MISCONSTRUE THE RIPENESS DOCTRINE.

In urging this Court to dismiss this case on ripeness grounds, Movants misconstrue the doctrine of ripeness. Allegedly wrongful actions have been taken. Real harms have occurred. A complaint has been filed alleging the wrongful acts and harms. The case is ripe.

Movants' authorities undermine their argument. *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970), concerned what would happen if town police officers were to become state constables. But they had not become state constables; the Governor had even said he would not appoint them as state constables. Therefore, any declaratory judgment would be "purely advisory." In *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957), the Court wrote, "It should be further stated that no contest has arisen between the holders of [one set of] bonds and the holders of the [other set of] bonds." *Id.* (emphasis added). Here, in contrast, a contest has arisen. The case is ripe for review. In *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 365, 815 S.E.2d 446, 458 (2018), several claims were alleged, each of the following type: "The 'alleged injustice' the plaintiffs seek to address in this case is that at some point in the future the State may fail to protect against currently nonexistent unreasonable uses of surface water[.]" These claims were not ripe because no allegedly wrongful acts had occurred and no harms had been suffered. Here, in contrast, wrongful acts have occurred, and harms have resulted.

¹¹ Thus, Movants' argument that sending the case to the Ethics Commission would "promote judicial economy" and avoid the "mess" that arose in *Harpoottian* is backwards. It overlooks that the necessary facts have been stipulated to, and that the remaining questions are ones of law.

The case is ripe for review.

III. THE CASE IS NOT MOOT.

A. The Case Is Not Moot, Because Appellants Seek a Permanent Injunction.¹²

The Complaint in this case sought a preliminary injunction. It also sought a “permanent injunction enjoining the South Carolina Republican Party from any further violation of South Carolina Code Ann. § 8-13-1314, and any such further relief necessary to conform Defendant’s conduct to the law and effectuate the orders and judgment of this Court.” (Compl., ¶ 53). While the request for a preliminary injunction may be moot, the request for a permanent injunction is not.

Movant Republican Party and its associated Senate Republican caucus have made campaign contributions well above the statutory contribution limits to candidates, as in the instant case and in the *Harpoottlian* case to which Movants refer. Movant Republican Party vehemently maintains its actions are legal. On the Record before the Court, it strains credibility to suggest that Movant Republican Party will not continue to make contributions in excess of the statutory limits and it is to be expected that Movant Republican Party will do so again as it attempts to defeat Representative Hill in the 2020 election cycle.

Movants thus want to go well beyond the record. After citing two cases concerning *preliminary* injunctions, which do not speak to the permanent injunction requested here (Mot. at 8, citing *Allegro, Inc. v. Scully*, 400 S.C. 33, 45, 733 S.E.2d 114, 121 (Ct. App. 2012) and *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010)), Movants write, “Respondents [i.e., Movants here] stopped spending money on the race

¹² Given that the circuit court held, “[T]he SC Ethics Act contains no valid provisions which restrict the giving or receiving of the political contribution at issue in this matter. Therefore, Plaintiffs cannot succeed on the merits of this litigation” (Ex. 2, page 3) (emphasis added), the lower court effectively ruled on the request for a permanent injunction.

before Appellants filed their complaint, and they certainly are not spending any money on the general election.” Movants’ assertion is (a) irrelevant to the question of the permanent injunction; (b) unsworn “testimony” of counsel; (c) a matter best directed to the lower court on remand, if this Court agrees with any or all of the arguments in Appellants’ brief on the merits; and (d) for complicated reasons explained in the attached note, would mean, if true, that the Movants violated a direct court order or yet another statute.¹³ It is more reasonable to conclude that Movants’ counsel are reporting as “facts” what they wish were facts. At any rate, the time to resolve all this is after it is established that their acts violated or did not violate the law, as the appeal asks this Court to decide.

B. Additionally, the Case Is Not Moot, Because a Decision (1) May Affect Future Events, or (2) May Have Collateral Consequences for the Parties.

Even were the case confined to the issue of a preliminary injunction, the case would not be moot, because a decision here may affect future events, or have collateral consequences for the parties. “[I]f a decision by the trial court may affect future events, or have collateral

¹³ 1) Judge Lee’s Order directed Movants to bring all checks, receipts and other documents indicating relevant payments. (Lee Order, Ex . 1, p. 3) (ordering “the Defendants to bring the documents requested by Plaintiff’s motion to expedite discovery to the temporary injunction hearing.”); Complaint, ¶ 55 (stating that Movants should be required to bring (a) “All invoices for all expenditures made this election cycle relating to State House District 8,” and (b) “All receipts, checks, and other documents indicating payments made this election cycle relating to State House District 8.”)) (emphasis added).

2) Defendants brought no documents to the hearing showing any payments.

3) If Movants had started and stopped spending money on the race before the Complaint was filed, they should have brought documents to the hearing showing the payment.

4) If Movants paid the debts incurred for these mailings after the hearing, then Counsels’ representation of the facts is wrong. If Movants have not yet begun paying, but intend to begin paying, Counsel’s representation would be effectively false. If Movants have not paid and do not intend to pay these debts, a host of problems arrive, under, e.g., S.C. Code Ann. § 8-13-1354 (requiring the name and address of the paying party to be on the mailers).

More reasonable to conclude that Movants’ counsel erred in the factual statement that payments stopped even before the Complaint was filed.

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.” *Sloan v. DOT*, 379 S.C. 160, 168, 666 S.E.2d 236, 240 (2008) (quoting *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)). See also *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) (same); *Cooper v. S.C. Dep't of Soc. Servs.*, 428 S.C. 402, 415 n.4, 835 S.E.2d 516, 523 (2019).

“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.” *Sloan*, 379 S.C. at 169, 666 S.E.2d at 240. So too here: A decision on the merits of this case certainly will affect future events, to wit, how the South Carolina Republican Party decides to authorize campaign contributions in the future. A decision on the merits may also have collateral consequences for the parties, such as Movant Republican Party’s ability to contribute unlimited amounts to Appellant Hill’s next opponent.

Therefore, the matter is not moot.

IV. EVEN WERE THE APPEAL OTHERWISE MOOT, THIS CASE IS DOUBLY AN EXCEPTION TO THE MOOTNESS DOCTRINE.

This case comes within two exceptions to the mootness doctrine: (1) it is capable of repetition, yet evading review; and (2) it concerns a matter of public interest.¹⁴

¹⁴ To the extent Movants may rely on *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), to argue that the courts are without power to issue declaratory relief, Movants err. There, the Plaintiff had filed his complaint in the Circuit Court outside the 50-day window when circuit court jurisdiction can attach. Jurisdiction in the circuit court never attached. Further, the complaint asked for only declaratory relief, not for an injunction. The circuit court thus was apparently without power to entertain plaintiff’s claim. Here, in contrast, the Complaint was timely filed and requested an injunction. Thus, jurisdiction to consider an injunction attached. And with the power to issue an injunction, all the necessary steps leading up to the issuance or denial of an injunction attached. A circuit court must declare the parties’ rights in issuing an injunction. The power to declare rights is a constituent part of the power to issue injunctions. “[A] greater power includes every constituent part of it.” *Moultrie v. Rockingham Ten-Cent Sav. Bank*, 92 U.S. 631, 632 (1875). “The principle that the grant of a greater power includes the

A. The Controversies Here Are Capable of Repetition, Yet Evading Review, and Therefore Come Within an Exception to the Mootness Doctrine.

Controversies that are capable of repetition and yet evading review are an exception to the mootness doctrine. All that is required is a showing that the controversy is capable of being repeated. A showing that there is a reasonable expectation that the issue will arise again is not required. Even were the controversies here otherwise moot, because they are capable of repetition and evading review, the appeal should not be dismissed on grounds of mootness.

1. Controversies that Are Capable of Repetition, Yet Evading Review, Are an Exception to the Mootness Doctrine.

We acknowledge that the controversy that gave rise to this appeal is moot because SCDOT has already inspected the bridges. Thus, any ruling from this Court will have no practical effect on the controversy. Nevertheless, we conclude this controversy should be addressed because it is one which is capable of repetition yet will evade review.

S.C. Pub. Interest Found. v. S.C. DOT, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017). *See also* *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996) (similar) (collecting cases); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 554-55, 590 S.E.2d 338, 351 (Ct. App. 2003) (similar).

2. It Suffices to Come within this Exception that the Issue is Capable of Being Repeated and Evading Review.

South Carolina takes a “less restrictive approach” to determining which controversies qualify as capable of restriction, yet evading review. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 431-32, 468 S.E.2d 861, 864 (1996). Under South Carolina law, Appellants need not show a

grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial.” *United States v. O’Neil*, 11 F.3d 292, 296 (1st Cir. 1993); *see also* Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers*, 43 UCLA L. REV. 371 (1995) (*passim*); *id.* at 519-20 (concluding that “The argument makes perfect sense. A greater power necessarily includes its lessers” and that questions arise only when a lesser power is separated along questionable fault lines) (which are not present here).

reasonable expectation that the issue will arise again. It suffices that the issue be capable of repetition. “In effect, this latter approach differs from the former in that it does not require a reasonable expectation that the same complaining party be subjected to the action again.” *Id.* at 431, 468 S.E.2d at 864. “When asserting the controversy falls under this exception, ‘[t]he 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.’” *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) (underscoring added) (italicizing in original) (quoting *Sloan v. Greenville Cnty.*, 356 S.C. 531, 554-55, 590 S.E.2d 338, 351 (Ct. App. 2003) (in turn citing this Court’s opinion in *Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864).

To state what may be obvious, it is not required that the issue be capable of repetition between the same parties. It suffices that the issue is capable of rising again and avoiding review, regardless of whom those parties might be. “[P]etitioner was released from SCDC in August, 2010, making his underlying claim moot. . . . If, however, an issue raised is capable of repetition but generally will evade review, the Court can address the issue.” *Nelson v. Ozmint*, 390 S.C. 432, 434-35, 702 S.E.2d 369, 370 (2010) (emphasis added). (The Court then proceeded to address the issue. *Id.* at 435-37, 702 S.E.2d at 370-71).

“Accordingly, while we find the question of Simpson’s own sentence moot due to his completion of the determinate home detention portion of the sentence, we find this home detention sentencing issue is capable of repetition yet generally evades review. Thus, we will address the merits.” *State v. Simpson*, 429 S.C. 83, 89, 837 S.E.2d 669, 672 (Ct. App. 2020) (emphasis added) (following *Ozmint*). The Court of Appeals therefore addressed the merits.

3. The Issues Here Are Capable of Repetition, Yet Evading Review.

The issues here—campaign contributions in excess of the statutory limits, the meaning of

the statutes, and the constitutionality of the limits—are capable of repetition. They are even likely to be repeated, given the South Carolina Republican Party’s view that it is entitled to donate without limit to campaigns, and its apparent intention to continue to do so in excess of the amounts allowed by statute.¹⁵

It should be obvious that such actions would be capable of evading review. Election races in South Carolina are not long, especially for State House seats, and the largest contributions in South Carolina election races tend to come in the weeks immediately preceding an election. By the time the appellate case is briefed, heard, and decided, the election is likely to be months behind.

Because the issues here are capable of repetition, yet evading review, the Court should reach the merits.

B. The Mootness Doctrine Does Not Apply, Because the Questions Are Matters of Public Interest.

Questions of public interest are to be decided on appeal, no matter how moot.

If this were an ordinary case, our opinion might well stop here. . . . But the case is not an ordinary one; it is not a private controversy between individuals, as such. . . . [T]he principle, [is] 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.

Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 96, 44 S.E.2d 88, 96-97 (1947) (citing 3 Am. Jur. 310, Annotation, 132 A.L.R. 1185) (emphasis added). So too here. This is not simply

¹⁵Even were Appellants required to show there is a reasonable expectation of the same issues arising between these parties, *contra S.C. Pub. Interest Found., Byrd, and Sloan*, Appellants can do so. It is entirely possible that Candidate Vaughn will again run against Representative Hill, and that the South Carolina Republican Party will again provide contributions in excess of the statutory limits within 45 days of the election. It is even more likely that the South Carolina Republican Party will again contribute in excess of the statutory limits in support of ANY Republican candidate who chooses to run against Representative Hill in future elections.

a private controversy, between individuals, regarding how much is owed on a contract, or a dispute as to the terms of a divorce. The questions here are of great public interest. They concern the integrity of elections. They concern whether the limits the Legislature imposed on contributions by political parties to campaigns are unconstitutional. They concern whether the view of the law on which one of the two major political parties is repeatedly acting—that one section is inapplicable and the other is unconstitutional—is accurate. They concern whether there are any limits at all on contributions from political parties.

As stated in the case of *Sloan v. Greenville Cty.*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), on which Movants rely, “Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.” 356 S.C. at 553, 590 S.E.2d at 350 (citation omitted) (internal quotation marks omitted). Here, the questions are public; an authoritative determination for the future guidance of those involved in public campaigns is highly desirable; and the likelihood of future recurrence of the question is extreme.

Movants’ *Sloan* case further states, “Courts may decide moot issues or cases where such a decision would be in the public interest” *Id.* at 553-54, 590 S.E.2d at 350 (quoting 20 Am. Jur. 2d *Courts* § 47 (2003)). And, “There is a keen public interest in the stewardship of public funds and a strong need to provide guidance for future procurement decisions. Our inability to provide any effective relief in this case should not be a barrier to the court's consideration of this question of exceptional public interest.” *Id.* at 554, 590 S.E.2d at 350. So too here. There is a keen public interest in the conduct of elections and a strong need to provide guidance for future decisions. If there is any inability to provide effective relief in this case, it should not be a

barrier to the Court's consideration of these questions of exceptional public interest.

Because the questions here concern matters of public interest, they should be decided, no matter how moot they might be. *Ashmore*. Therefore, Movants' motion to dismiss should again be denied.

Conclusion

Only this Court can rule on the issues here. The Ethics Commission is devoid of authority to issue injunctions, and without authority to overrule the circuit court's statutory interpretation and holdings regarding the constitutionality of the contribution limits. Nor may the Court of Appeals rule on the issues. Rule 203(d)(1)(A)(iv), SCACR. Only this Court may do so.

The Court should do so. "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

The South Carolina Ethics Act was enacted in the wake of "Operation Lost Trust," which exposed widespread corruption in the highest reaches of the Legislative Branch. *See, e.g., State v. Thrift*, 312 S.C. 282, 306 n.17, 440 S.E.2d 341, 354 n.17 (1994). Recently, more corruption has been exposed. The last thing South Carolina needs is an unsettled state of the law, in which those who want to evade the restrictions can point to the decision below as authorizing their evasions. A resolution by the Court is needed.

If the Court desires to bring any clarity to the Ethics Act, it will not find a better time than now to do so. It should deny Movants' motion.

In accord with *Storm M.H., Video Gaming Consultants, Inc., and Alltel Communs. Inc.*, the Court should hold that it, not the Ethics Commission, is the proper body to pass judgment on

the circuit court's legal conclusions. In accord with this Court's decisions in *Sloan v. DOT, S.C. Pub. Interest Found., Byrd, Ozmint, and Ashmore*, and the Court of Appeals' decisions in *Sloan v. Greenville Cty.* and *Simpson*, the Court should state what the law is.

Respectfully Submitted,

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August 20, 2020

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