

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC Court of Appeals

South Carolina Public Interest Foundation and John Crangle,
individually, and on behalf of all others similarly situated,

Petitioners,

v.

Alan Wilson, Attorney General for the State of South Carolina,
Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,

Respondents.

PETITION FOR ORIGINAL JURISDICTION

Petitioners move this Court to take original jurisdiction of this action for reasons set forth herein and in the Amended Complaint and supporting affidavit, attached hereto as Exhibit A.

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October 5, 2020

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I. FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2020, Respondent Wilson entered into a settlement agreement with the United States (the “Settlement Agreement”) regarding the failure by the United States Department of Energy (“DOE”) to comply with the terms of an earlier agreement brokered by former Governor James H. Hodges pertaining to the storage of weapons-grade plutonium at the Savannah River Site (“SRS”). Affidavit of James M. Griffin, Sept. 25, 2020 (attached as Exhibit A to the attached Amended Complaint and hereinafter referenced as “Griffin Aff.”), Ex. 1. Governor Hodges’s brokered settlement is codified at Title 50, United States Code, Section 2566 (“Section 2566”). Under Section 2566, the DOE must pay the State of South Carolina “economic impact and assistance payments” of \$100 million per year from appropriated funds starting in 2016 for each year it fails to comply with deadlines relating to the disposition of the plutonium. 50 U.S.C. § 2566.

The DOE has not met the deadlines set forth in Section 2566 and as of today is liable to the State of South Carolina for at least \$400 million in economic impact and assistance payments. Under the terms of the Settlement Agreement announced by Respondent Wilson, he has agreed on behalf of the Citizens of this State to refrain from instituting any action to collect economic impact and assistance payments for an additional 15 years. In exchange, the DOE has agreed to pay the State of South Carolina a significantly reduced economic impact and assistance payment of \$600 million. Significantly, under the terms of the Settlement Agreement, the DOE is required to make “immediate payment . . . to the State of South Carolina . . . with each party to bear its own costs, attorneys’ fees and expenses.” Griffin Aff., Ex. 1, ¶ 5(a).

Respondent Wilson announced at an August 31, 2020 press conference that he intended to pay two private law firms \$75 million from the proceeds of the DOE settlement. According to Wilson’s statement at the press conference, this payment was expected on or after October 1, 2020. Upon learning of the Respondent Wilson’s intent, Governor Henry McMaster wrote Respondent

Wilson a letter objecting to the attorneys' fee. The Governor stated that he had "concerns regarding the payment of attorneys' fees" because the settlement resulted from "the zealous advocacy and coordination with members of [the State's] Congressional delegation." *Id.*, Ex. 2. Governor McMaster concluded the letter by stating that he "could not endorse the payment of \$75 million in attorneys' fees under the circumstances." *Id.* First Circuit Solicitor David Pascoe likewise wrote to Respondent Wilson objecting to the use of these settlement proceeds for attorneys' fees on the grounds that the entire amount must be deposited into the State's General Fund. *Id.*, Ex. 3.

On Friday, September 25, 2020, Petitioners filed suit against Respondent Wilson. See Compl., Sept. 25, 2020 (Petitioners' "Initial Complaint" attached hereto as Exhibit B). On the same day, Petitioners filed their motion for a temporary restraining order and preliminary injunction against Respondent Wilson, seeking to enjoin Respondent Wilson's payment of \$75,000,000 to the law firms (Petitioners' "Initial Motion" attached hereto as Exhibit C). On the afternoon of September 25, 2020, Petitioners' counsel provided Respondent Wilson with copies of Petitioners' filings when requesting that the circuit court schedule a hearing on Petitioners' Initial Motion. See Griffin Aff., Ex. 14.

On the morning of Monday, September 28, 2020, The State newspaper ran an article on the pending lawsuit with links to relevant court filings. John Monk, *Should 2 law firms get \$75M of SC's \$600M plutonium Settlement? This lawsuit says no.*, The State, Sept. 28, 2020, attached hereto as Exhibit D. The same morning, counsel for Respondent Wilson emailed the circuit court requesting that the hearing on Petitioners' Initial Motion not be held until Thursday, October 1, 2020. See Griffin Aff., Ex. 15. The circuit court responded by stating that Petitioners' Initial Motion could be heard on Tuesday, September 29, 2020 at 3:00 p.m., ultimately setting that date and time for the hearing on Petitioners' Initial Motion over Respondent Wilson's objections. See

id. On the afternoon of September 28, 2020, Petitioners' counsel emailed counsel for Respondent Wilson asking that the Attorney General agree not to disburse the disputed funds until the case could be decided on the merits. Counsel for the Attorney General ultimately responded "I am checking w/ Bob Cook and this is what I am authorized to say. I have conveyed your request to him." *See id.*, Ex. 17.

Unbeknownst to Petitioners and the circuit court, Respondent Wilson had already received the \$600 million in settlement proceeds and initiated the process to transfer \$75 million to Respondent Willoughby & Hoefler, P.A. ("Willoughby & Hoefler") by Monday, September 28, 2020. Respondent Wilson was aware of this fact at the time that Respondent's counsel was emailing with the circuit court about the hearing to be held the next day. Respondent Wilson was aware of this fact when his counsel was emailing with Petitioners' counsel about Petitioners' request for an agreement not to distribute the funds until after the hearing. Instead of being candid with the circuit court and Petitioners' counsel about the status of the disputed funds, Respondent Wilson was actively engaging the Office of the State Treasurer to ensure the disputed \$75 million would be transferred to Willoughby & Hoefler ahead of the 3:00 p.m. hearing the next day, as shown by an email from the Finance Director for the Attorney General's Office. *See* Email K. Buckley to M. Simmons (Sept. 28, 2020), attached hereto as Exhibit E.

In fact, Attorney General Wilson's staff expedited payment to Willoughby & Hoefler via wire transfer on Monday afternoon, September 28, 2020, after the circuit court had set a hearing on Petitioners' Initial Motion for the following afternoon at 3:00 p.m. *See* Affidavit of Kimberly Buckley, Oct. 1, 2020, attached hereto as Exhibit F. Prior to the afternoon of September 28, 2020, the authorization request from the Attorney General to the Treasurer's Office was for payment to be made by check in the amount of \$75 Million. However, after the hearing was scheduled, Ms.

Buckley emailed her counterpart at the Treasurer's office requesting that the payment be made via wire transfer. The request for a wire transfer came from Willoughby & Hoefler on Monday as well. *See id.* As a result, the disputed funds were irrevocably deposited into the law firm's bank account mere hours before the hearing, depriving the circuit court of the opportunity to restrain the transfer of funds. If a check had been issued instead, the circuit court could have ordered that payment of the check be stopped before actual funds were transferred.

The circuit court and counsel for Petitioners first learned that the disputed \$75 million had been disbursed to Willoughby & Hoefler moments before the 3:00 p.m. hearing on Tuesday, September 29, 2020. In his memorandum in opposition to the Petitioners' request for a temporary restraining order circulated at 2:12 p.m., Respondent Wilson announced that the disputed funds had been transferred to Willoughby & Hoefler and argued that, therefore, Petitioners' entire case was moot. *See Mem. Att'y Gen. in Opp'n to Mot. TRO or Temp. Inj., Sept. 29, 2020, at 2-3, attached hereto as Exhibit G.*

Following the hearing, Plaintiff Crangle contacted the South Carolina Office of the State Treasurer and was informed that the funds have not been transferred to the law firms, and Plaintiffs' counsel informed the circuit court of this purported fact. *See Griffin Aff., Ex. 18.* Thereafter, the circuit court set a subsequent hearing for 7:00 p.m. on September 29, 2020. Prior to and during that hearing, counsel for Defendant Wilson conveyed that the Attorney General's office had confirmed that the law firm of Willoughby & Hoefler had received the disputed funds. *See id.* During the hearing, the circuit court explained its intent, in an abundance of caution in the event the funds had not been transferred, to enter a temporary restraining order preventing the transfer of any funds by the State of South Carolina to the law firms, and the circuit court entered such order following the hearing. Order Granting Temporary Injunction Pendente Lite, signed on

September 29, 2020 and entered on September 30, 2020, attached hereto as Exhibit H. That order expired at 5:00 p.m. on Friday, October 2, 2020.

On the morning of Wednesday, September 30, 2020, Plaintiffs received confirmation from the Treasurer that the proceeds were in fact wired to the law firm mere hours before the 3:00 p.m. hearing on September 29, 2020. According to Treasurer Loftis, “[t]he Treasurers office received a warrant for payment from the Comptrollers’ Office Monday night [September 28, 2020].” Therefore, the Treasurer’s Office “processed and wired the funds on Tuesday morning [September 29, 2020] to the law firm’s account.” *See id.*, Ex. 19.

Later in the morning of Wednesday, September 30, 2020, Petitioners filed their amended complaint (attached hereto as Exhibit A) naming the law firms Willoughby & Hoefler and Davidson, Wren & DeMasters, P.A. as additional defendants (collectively, the “Law Firms”). At the same time, Petitioners filed their second Motion for Temporary Restraining Order and Preliminary Injunction, attached hereto as Exhibit I. Thereafter, the circuit court entered its Ex Parte Temporary Restraining Order, attached hereto as Exhibit J. Pursuant to that order, the Law Firms “shall appear before [the circuit court] on October 7th, 2020 at 9:30am, . . . to show cause why Plaintiffs’ motion for a preliminary injunction should not be granted.” Ex. J at 2.

On Friday, October 2, 2020, Respondent Willoughby & Hoefler filed a Petition for Writ of Supersedeas with the South Carolina Court of Appeals, attached hereto as Exhibit K. Thereafter, the S.C. Court of Appeals set forth a briefing schedule: Petitioners are “requested to serve and file a return to the motion to stay / supersedeas no later than Monday, October 5, 2020 at 3:00 p.m.,” and “a reply to the return to the motion to stay / supersedeas is due to be served and filed no later than Tuesday, October 6, 2020 at 12:00 p.m.” Letter from V. Claire Allen to John S. Simmons and

J. Todd Rutherford, Oct. 2, 2020, attached hereto as Exhibit L. As far as the parties know, the hearing before the circuit court is still set for Wednesday, October 7, 2020 at 9:30 a.m.

II. PETITIONERS' CONTENTIONS AS TO MATTERS AT ISSUE IN THIS CASE

A. **Respondent Wilson Does Not Possess Authority to Use Proceeds from a U.S. DOE Settlement of Economic Impact and Assistance Payments Owed to the State of South Carolina to Pay Private Law Firms Because the DOE Disclaimed Liability for Attorneys' Fees in the Settlement Agreement.**

Petitioners contend that the payment of \$75 million to private law firms from a settlement of economic impact and assistance payments that the DOE owed to the State of South Carolina and intended solely for the benefit of the State is unconstitutional in violation of the Separation of Powers Clause of the South Carolina Constitution. When money under a settlement agreement is payable directly to the State, as in the case with the DOE Settlement Agreement, the proceeds must be deposited in the General Fund, and only the General Assembly controls its appropriation.

Section 1-7-150 of the South Carolina Code of Laws requires that all funds received by judgment or settlement be deposited into the State's General Fund, except for investigative costs and litigation costs awarded by court order or settlement. S.C. Code Ann. § 1-7-150 (1976). In this matter, neither exception applies because there was no order awarding attorneys' fees and the Settlement Agreement does not allocate any portion of the \$600 million to attorneys' fees. Rather, Section 5(a) the Settlement Agreement provides for the following: "*Immediate payment by the United States to the State of South Carolina in the amount of \$600 Million (Six Hundred Million), inclusive of interest, with each party to bear its own costs, attorneys fees and expenses.*" Griffin Aff., Ex. 1 (emphasis added). Accordingly, Section 5(a) clearly requires that payment of the entire \$600 million be made directly to the State of South Carolina. Nevertheless, Respondent Wilson paid private lawyers \$75 million, out of the \$600 million, which was required to be deposited into the State's General Fund pursuant to Section 1-7-150 of the South Carolina Code of Laws.

Executive officers possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State’s general fund. *See Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002) (“[T]here is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”). Expenditures of public funds cannot be controlled “by administration rather than by legislation.” *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 317, 295 S.E.2d 633, 638 (1982). Doing so would give the executive branch a “veto” over the General Assembly. *Id.* Respondent Wilson’s payment of \$75 million from the State’s \$600 million would amount to an appropriation of public funds by a member of the executive branch, rather than the General Assembly, in violation of the separation of powers. S.C. Constitution Art. I, § 8.

As acknowledged by the Respondent Wilson in the litigation pending in Barnwell County over the \$600 million in settlement proceeds, the General Assembly is the proper body to determine how the \$600 million is allocated, not the Attorney General:

The State of South Carolina is the only Plaintiff in that case and the agreement provides for the payment of the \$600 million in settlement money to the State of South Carolina. The statute under which settlement was reached provides for payment of funds to the State of South Carolina and not any counties. 50 U.S.C. 2566. None of the Plaintiffs to the instant suit are parties to the Court of Claims suit nor are they mentioned as recipients of these funds. **The Attorney General does not oppose a share of the settlement proceeds at issue being allocated to Barnwell, Allendale and Aiken Counties, but the General Assembly is the proper body to determine how the funds at issue in this action should be allocated**, rather than him or this Court.

Mem. Att’y Gen. in Opp’n to Mot. to TRO or Temp. Inj. 1-2, *Ex Parte Barnwell County et al. v. Wilson*, C/A No. 2020CP0600294 (Barnwell Cnty. Comm. Pleas Sept. 29, 2020) (emphasis added, citation to exhibit omitted) (attached hereto as Exhibit M).

Moreover, according to the Respondent Wilson, he has no authority as the Attorney General to appropriate money that is payable to the State of South Carolina:

The Attorney General has no authority to appropriate money. The money in the settlement was payable to the State of South Carolina pursuant to the suit and by federal statute. As such, the General Assembly has the control of the appropriation of those funds, not the Attorney General or this Court. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002).

The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.*, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation). This includes the duty to authorize and/or appropriate the use of all federal funds. S.C. Code Ann. § 11-11-160 (Supp. 2008). In the annual appropriations act, the General Assembly must appropriate all anticipated federal funds and must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C. Code Ann. § 2-65-20 (2005). Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8. An appropriation may be made by the General Assembly in the annual appropriations act or in a permanent continuing statute. *State v. Cooper*, 342 S.C. 389, 401, 536 S.E.2d 870, 877 (2000).

Edwards v. State, 383 S.C. 82, 90-91, 678 S.E.2d 412, 416-17 (2009).

Id. at 4-5.

In an attempt to circumvent Section 1-7-150 requirement that the full \$600 million be deposited in the general fund, Respondent Wilson purportedly relied on the South Carolina South Carolina Federal Funds Oversight Act, S.C. Code § 2-65-10 *et seq.* However, a close reading of this statute further supports the Plaintiffs' position that, absent an award of attorneys' fees, only the General Assembly can appropriate funds to pay the law firms from these settlement proceeds.

Section 2-65-20 provides that “the General Assembly shall appropriate all anticipated *federal funds* and *other funds*.” S.C. Code Ann. § 2-65-20 (emphasis added). Federal funds “means financial assistance made to a state agency by the United States Government in any form.” S.C. Code Ann. § 2-26-15(5). Examples of federal funds include “a grant, loan, subsidy, reimbursement, contract, donation, or shared federal revenues, or noncash federal assistance in the form of equipment, buildings, and land.” *Id.* The settlement proceeds, although provided by the federal government, do not fall within this definition.

The settlement proceeds were not intended as financial assistance for the South Carolina Attorney General’s Office or any other State agency. Instead, the settlement proceeds are payable to the “State of South Carolina” and thus may possibly qualify as “other funds.” The term “other funds” means “any revenues received by an agency which are not federal funds and are not general funds appropriated by the General Assembly in the appropriations act.” S.C. Code Ann. § 2-65-15(8).

Section 2-65-30 addresses the receipt and expenditure of unanticipated funds received after the passage of the appropriations act. S.C. Code Ann. § 2-65-30. This section provides a mechanism by which an agency can apply to the Executive Budget Office (“EBO”) for approval to spend unanticipated funds. *Id.* Under Section 2-65-30, the EBO’s authorization to approve expenditures of “other funds” is limited to “funds from private foundations or industries which are not included in the appropriations act.” *Id.* Thus, the EBO lacked authority to approve the expenditure of the settlement proceeds because these are not funds received from private foundations or industries. *Id.* Under Section 2-65-20, only the General Assembly can appropriate these settlement funds. S.C. Code Ann. § 2-65-20.

In addition, the EBO did not provide the fee request for review by the Joint Other Funds Oversight Committee as required by the statute. The EBO instructions for an application for an increase in other funds expenditures state that “the [EBO] will coordinate requests with the Other Funds Oversight Committee, who will review and make a recommendation relative to the request to the EBO.” See South Carolina Dept. of Admin. Request for Other Funds Auth. Form (available at <https://admin.sc.gov/budget/otherfundsauthorization>). The EBO Request submitted on behalf of Respondent Wilson requesting authorization for the \$75 Million fee also provides that approval is subject to review of the Joint Other Funds Oversight Committee. See Form BD-100, Exhibit G, Mem. Att’y Gen. in Opp’n to Mot. for TRO or Temp. Inj, Ex. 2.

More importantly, the statute dealing with litigation costs from settlements is specific and controls over the general “other funds” provisions. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Com.*, 814 S.E.2d 513, 518 (S.C. 2018), reh’g denied (June 26, 2018) (quoting *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citation omitted)). The EBO has no authority to authorize the payment of attorneys’ fees from this settlement unless and until the conditions in Section 1-7-150 are satisfied.

B. The Amount of the Fee Is Patently Unreasonable and Cannot Be Paid Until Approved by Court Order.

Even if the settlement was structured in a way that the United States agreed to pay the State’s litigation costs, attorneys’ fees totaling \$75 million for the amount of work performed in this case appears to be patently unreasonable. Rule 1.5 of the South Carolina Rules of Professional Conduct states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable

fee.” Rule 1.5, RPC, Rule 4.7, SCACR. Contingency fees are not exempt from this reasonableness standard. *Id.*, Cmt. 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. *See, e.g., Getzen v. Law Offices of James M. Russ, P.A.*, 323 S.C. 377, 475 S.E.2d 743 (2006).

In 2016,¹ the Law Firms first sued in federal court in South Carolina for an injunction to enforce the provisions of Section 2566 and to collect the \$100 million assistance payment owed for failing to comply with Section 2566. The federal court dismissed this claim for damages,² ruling that any such lawsuit must be filed in the U.S. Court of Federal Claims. Griffin Aff., Ex. 4. Subsequently, the Law Firms refiled the same suit before the Court of Federal Claims, this time seeking \$200 million in economic impact and assistance payments because the DOE had not complied with Section 2566 for 2017. Once again, the Law Firms lost the case. The Court of Federal Claims ruled with the DOE. *Id.*, Ex. 5. The Law Firms then appealed the ruling to the U.S. Court of Appeals for the Federal Circuit. While the appeal was pending, the State of South Carolina reached this settlement with the DOE. *Id.*, Ex. 1.

Upon information and belief, the lawyers for the Law Firms engaged in no discovery: no interrogatories, no depositions, no experts, no document requests. Instead, they drafted pleadings and wrote briefs arguing the DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. *See id.*, Ex. 6. Respondent Wilson had no need to hire private counsel to address a relatively straightforward issue that government political leaders ultimately negotiated. The Settlement Agreement was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. *See id.*, Ex. 2.

¹ Willoughby & Hofer is expected to attempt to justify the \$75 Million fee by providing a summary of work performed prior to January 2016. However, the earliest effective date of Willoughby & Hofer contingency fee agreement is February 8, 2016. Griffin Aff., Ex. 7.

² The District Court did not dismiss the State’s claim for injunctive relief.

In addition, the express terms of the fee agreement with the Law Firms states that “when possible, the attorneys’ fees and costs awarded to Special Counsel shall be approved by a court of competent jurisdiction.” *Id.*, Ex. 7. There is nothing prohibiting the Respondent Wilson from seeking judicial approval of the payment of \$75 million to the Law Firms through a declaratory judgment action requesting a South Carolina state court determine whether the fee amount is reasonable.³ However, Respondent Wilson seeks to avoid judicial review and pay the law firms \$75 million without making any showing of reasonableness.

Respondent Wilson entered into an amended fee agreement in June 2019 and agreed to provide Willoughby & Hoefler additional money from any proceeds recovered in the case pending before the Court of Federal Claims and as compensation for the firm’s representation of the State on its claim for injunctive relief that was litigated before the U.S. District Court for the District of South Carolina. *See id.*

The State prevailed on its claim for injunctive relief before United States District Court Judge Childs. However, on January 8, 2019 the Fourth Circuit Court of Appeals reversed Judge Child’s ruling in a published opinion, *South Carolina v. United States*, 912 F.3d 720 (2019). *Id.*, Ex. 9. On June 7, 2019 Willoughby & Hoefler along with Respondent Wilson filed a Petition for Writ of Certiorari to the United States Supreme Court (*id.*, Ex.10) and a Reply Brief on September 24, 2019 (*id.*, Ex. 11).

Under the terms of the amended fee agreement, Respondent Wilson agreed to pay Willoughby & Hoefler 2% of the ultimate recovery for representing the State in the U.S. District

³ Under South Carolina, the following factors are considered to determine whether an award of attorneys’ fees is reasonable: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Jackson v. Speed*, 26 S.C. 289, 308, 486 S.E.2d 750, 760 (S.C. 1997).

Court for the District of South Carolina, plus 1% for representing the State before the U.S. Court of Appeals for the Fourth Circuit, plus .05% for filing a Petition for Writ of Certiorari to the U.S. Supreme Court. *See id.*, Ex. 8. The amended fee agreement was executed on June 13, 2019 by Willoughby & Hoefler, after the State had lost in the Fourth Circuit and after the firm had filed the Petition for Writ of Certiorari with the Supreme Court. The Supreme Court denied that Petition on October 15, 2019, *South Carolina v. United States*, 140 S. Ct. 392 (2019). *Id.*, Ex. 12.

Under the terms of the amended contingency fee agreement, Willoughby & Hoefler is purported to be paid 3.5% of the \$600 million, or \$21 million, for ultimately losing the case before the U.S. District Court for the District of South Carolina. Defendant Wilson was fully aware that Willoughby & Hoefler had lost the State's case for injunctive relief before the Fourth Circuit when he entered into the amended fee agreement.

Moreover, as further evidence of the unreasonableness of this fee, Willoughby & Hoefler is receiving .5% of \$600 Million, or \$3 million, for writing a Petition for Writ of Certiorari and a Reply Brief filed with the Supreme Court. The Petition is 33 pages, and the Reply is only 13 pages, for a total of 46 pages. Thus, Defendant Wilson intends to pay Willoughby & Hoefler over \$65,000 per page for these filings.

The fee agreement was entered into by the Respondent Wilson as Attorney General on behalf of the Citizens of South Carolina, who are third party beneficiaries of the contract. Petitioners, individually and on behalf of the Citizens of this State, hereby demand that Respondent Wilson seek judicial approval of the amount of any fee awarded to counsel under the fee agreement if Respondent is permitted to use any portion of the settlement proceeds to pay litigation costs as required by the express terms of the fee agreement and South Carolina law.

C. Petitioners Have Standing to Assert the Claims in Their Amended Complaint.

Petitioners assert both constitutional and public interest standing. Petitioners have derivative standing to pursue the claims asserted under *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d 52 (1939), and Petitioners have standing based on the public importance of the matters at issue in the lawsuit.

1. Plaintiffs Have Adequately Alleged Their Standing to Pursue the Claims at Issue Derivatively on Behalf of the State of South Carolina.

This Court first addressed the ability of a citizen to assert claims on behalf of a governmental entity in the case of *Ex parte Hart*, stating as follows:

The question under discussion appears to be a novel one in this state, but it has been held in quite a number of jurisdictions, and correctly so, in our opinion, that if a county has a cause of action for an injury sustained, which should be enforced for the protection of its citizens or taxpayers, and its governing board unjustifiably refuses to assert such cause of action, any citizen, because of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. . . .

Generally it should be shown by allegation and proof that the corporate authorities have neglected or refused to proceed, after being requested so to do, or that a request to them to proceed by judicial remedies would be unavailing.

Ex parte Hart, 190 S.C. 473, 2 S.E.2d 52 at 53-54.

It is a logical extension of this precedent that Petitioners have standing to assert claims on behalf of the State of South Carolina under the facts and circumstances of this case, particularly because derivative lawsuits sound in equity. *See Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009) (explaining that shareholder derivative actions sound in equity); *see also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009) (“The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the

other.” (internal quotation marks omitted)); *Taff v. Smith*, 114 S.C. 306, 103 S.E. 551, 553 (1920) (describing as well-settled the equitable maxim that “[e]quity will not suffer a wrong without a remedy”). Indeed, “[t]he requirement of standing is not an inflexible one.” *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct. App. 2000) (internal quotation marks omitted).

As shown by proof submitted via affidavit, Respondent Wilson has refused repeated demands to assert the State of South Carolina’s rights vis-à-vis the Law Firms and has instead violated the South Carolina Constitution in an attempt to overpay the Law Firms for their services. First, Respondent Wilson refused to act in response to Governor McMaster’s August 30, 2020 letter questioning the amount of attorneys’ fees that Respondent Wilson intended to pay. *See Griffin Aff.*, Ex. 2. Next, Respondent Wilson refused to act in response to the September 10, 2020 letter of First Circuit Solicitor David Pascoe. *See id.*, Ex. 3. Then, Respondent Wilson refused to act in response to Petitioners’ Initial Complaint and Initial Motion, filed and provided to Respondent Wilson on September 25, 2020. Instead of acting accordingly in response to these demands to prevent payment to the Law Firms of the disputed \$75,000,000, Respondent Wilson instead expedited payment to Willoughby & Hoefler via wire transfer on the afternoon of September 28, 2020, after the circuit court had set a hearing on Petitioners’ Initial Motion for the following afternoon at 3:00 p.m. *See Affidavit of Kimberly Buckley*, Oct. 1, 2020, attached hereto as Exhibit F. Finally, Respondent Wilson then argued to the circuit court that Petitioners’ claims were now moot on the basis of this wire transfer.

Under these particular circumstances, where the Attorney General has repeatedly refused to assert the State’s claims against the Law Firms and instead has taken drastic unconstitutional and inequitable actions to make a patently unreasonable \$75,000,000 payment to them, Petitioners

have standing to assert the State of South Carolina's claims against the Law Firms. *See Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 53-54; *see also Berry v. McLeod*, 328 S.C. 435, 447-48, 492 S.E.2d 794, 800-01 (Ct. App. 1997) (citing and quoting *Ex parte Hart* with approval).

2. Plaintiffs Have Public Importance Standing.

Petitioners have public importance because a resolution of this dispute is needed for future guidance. *See S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). Upon information and belief, Respondent Wilson has issued several contingent fee contracts, similar to the one at issue in this matter, and plans to continue to issue them. *See Alan Wilson, South Carolina Attorney General, Contingency Fee Litigation Retention Agreements*, <http://www.scag.gov/litigation-retention-agreements>.

D. Respondents Are Entitled to Temporary and Preliminary Injunctive Relief Under Rule 65

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. *AJG Holdings LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009). When a court is requested to issue a temporary injunction it may consider the merits of a case to the extent necessary to determine whether a temporary injunction is appropriate. *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the

merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826.

1. Injunctive Relief Is a Proper Remedy in Taxpayer Public Interest Suits Challenging Unauthorized Expenditure of Public Funds

In *Sloan v. School District of Greenville County*, 342 S.C. 15, 537 S.E.2d 299 (2000), the Court of Appeals ruled that a taxpayer has standing to seek injunctive relief prohibiting the school board from entering into unlawful contracts. In that case, the Court of Appeals observed that “[t]he 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.” *Sloan*, 342 S.C. at 520, 537 S.E.2d at 302 (quoting *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13 (1939)). Also, in *South Carolina Department of Revenue v. Richland County*, 422 S.C. 292, 811 S.E.2d 758 (2018), the South Carolina Supreme Court reversed the trial court’s refusal to grant a temporary injunction prohibiting unauthorized expenditures of penny sales tax revenue. In so doing, the Supreme Court ruled that the taxpayers would suffer irreparable harm if the County is not required to follow the law. *South Carolina Dep’t of Rev. v. Richland Cnty.*, 422 S.C. at 311, 811 S.E.2d at 768.

2. Preliminary Injunctive Relief Freezing the Disputed Funds Is Proper

As noted above, Willoughby & Hoefler has received a disbursement of the very funds in dispute in this litigation, after the commencement of this lawsuit, and hours before a scheduled hearing on Respondents’ motion for a preliminary injunction. Petitioners allege that Respondent

Wilson did not have legal authority to pay the Law Firms from the proceeds of the settlement. In the Amended Complaint, Petitioners seek restitution on behalf of the State of South Carolina and the imposition of a constructive trust over these funds.

Preliminary injunctive relief has long been recognized as an appropriate remedy in equitable actions seeking restitution and the imposition of a constructive trust. For example, in *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005), the South Carolina Supreme Court reversed the circuit court's refusal to order an injunction on the grounds that plaintiffs had an adequate remedy at law. The Court held that a preliminary injunction to restrain \$2 million in financial accounts is the appropriate remedy in equitable actions. In *Grosshuesch*, the plaintiffs were seeking to set aside transfers on the grounds of fraud and undue influence.

In a very thoughtful and instructive opinion, the Fourth Circuit Court of Appeals in *U.S. ex rel Rahman v. Oncology Associates*, 198 F.3d 489 (4th Cir. 1999), held that courts have the inherent equitable authority to order a preliminary injunction restraining assets where there is a specific nexus between the assets and plaintiff's equitable claims.

In *Rahman*, the District Court entered a temporary restraining order in reliance upon the United States Supreme Court decision in *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), ruling that courts have the equitable authority to restrain the spending of specifically identified assets as an aid in granting the ultimate equitable relief of rescission. The District Court, in *Rahman*, ruled as follows:

The request has been made that the Court impose a constructive trust. Significant issues are therefore presented by the equitable aspects of this suit. Under these circumstances, the conditional freeze of assets imposed by the TRO is an appropriate exercise of this Court's equity jurisdiction.

Id. at 494.

On appeal, the defendant argued that the suit was “overwhelmingly a suit at law for money damages” and therefore equitable injunctive relief was not proper. The defendant relied upon another Supreme Court decision, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), where the Court held that an injunction freezing assets may not be entered in an action for damages where no lien or equitable interest in the assets is claimed.

The Fourth Circuit rejected the defendants’ assertion that a temporary restraining order is not appropriate in a lawsuit that alleges both legal and equitable claims. The Fourth Circuit relied upon a third Supreme Court decision, *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), where the Court ruled that “[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.” *De Beers*, 325 U.S. at 220.

Rahman distilled the principles guiding a court’s equitable authority to enter asset freezing injunctions:

From these controlling precedents, we draw several principles applicable to the case before us. First, where a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor’s use of his property before obtaining judgment. A debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor’s assets.

On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the *status quo* pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court’s ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets. Thus, the Court in *Deckert* entered an injunction freezing assets “in aid of the recovery” sought by the lawsuit. 311 U.S. at 289, 61 S. Ct. 229. In *De Beers*, the Court noted in a similar vein, “[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.” 325 U.S. at 220, 65 S. Ct. 1130. And finally, *Grupo Mexicano* held that because the plaintiff claimed no interest in the defendant’s assets (by way of

lien or an equitable interest), but rather claimed only a money judgment, the district court lacked authority to freeze or otherwise interfere with the defendant's assets. *See* 527 U.S. at —, 119 S. Ct. at 1975.

Rahman, 198 F.3d at 496-497.

Furthermore, the Fourth Circuit recognized that “when interim equitable relief is authorized and the public interest is involved, the doctrine applies that ‘[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved,’” *Id.* at 497 (quoting *United States v. First Nat’l City Bank*, 379 U.S. 378, 383, 85 S. Ct. 528, 13 L.Ed.2d 365 (1965)).

Rahman was a qui tam action brought by a “whistleblower” under the False Claims Act alleging that the defendant had been over-paid by the Medicare program. The Court stated “the justification for a preliminary injunction in this case is heightened by the fact that the public interest is at stake. In *First National*, the public interest was represented by \$19 million in taxes allegedly owed the United States by a foreign corporation. . . Here, it lies in the \$12 million allegedly diverted from the Medicare and CHAMPUS programs . . .”

The Amended Complaint in this action does not allege any legal claims. Rather Respondents allege only equitable claims for declaratory judgment (Count I, Am. Comp.), constructive trust (Count II, Am. Comp.), restitution (Count III, Am. Comp.) and injunctive relief (Count IV, Am. Comp.). The Amended Complaint specifically identifies the \$75 million wire transfer to Willoughby & Hoefler as the sole asset that Respondents request be restrained. For these reasons alone, Respondents are entitled to obtain a preliminary injunction.

However, when the public interest is considered, there should be no question of Respondents' right to obtain preliminary injunctive relief. In *First National*, the complaint sought to recover \$19 million of taxpayer funds. In *Rahman*, the complaint sought to recover \$12 million

in Medicare and CHAMPUS funds. Here, Respondents seek to restrain the spending of \$75 million of funds that should be deposited into the State’s General Fund for the benefit of all State taxpayers.

3. The Court Has Equity Authority to Order Injunctive Relief to Preserve Its Jurisdiction

Defendant Wilson argued before the circuit court that the Respondents’ lawsuit is moot because the fee had been wired before the circuit court could restrain the payment. Under these circumstances, the circuit court has authority to restrain further disbursements of these disputed funds in order to prevent this action from becoming moot.⁴ In *Seabrook v. Carolina Power & Light Company*, 159 S. C. 1, 156 S. E. 1, 3 (1930), the court held that the circuit court erred by refusing to grant a temporary injunction when that was the only relief sought in the complaint. The court explained, “the plaintiffs’ action was brought solely for obtaining an injunction, and the refusal to grant the temporary injunction practically disposed of the case without a hearing upon the merits.” *Seabrook*, 159 S.C. 1, 156 S.E. at 3.

III. ARGUMENT FOR THE COURT’S EXERCISING ITS ORIGINAL JURISDICTION

A. This Case Involves Important Matters of Public Interest.

These issues are matters of great public importance in the purest sense and justify the use of the original jurisdiction in this Court. Rule 245, SCACR, contemplates the exercise of this Court’s original jurisdiction under these circumstances. *See* Rule 245, SCACR (providing that “[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition.”).

⁴ Petitioners disagree that this case will become moot if the Law Firms are not restrained from spending all or a portion of the disputed funds.

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

It may well be as stated in plaintiff's brief that the framers of the Constitution, by adding the embracing words, "and other original and remedial writs," intended to grant to the Supreme Court the right to take original jurisdiction of such matters as might in emergencies and in protection of the public interest be more properly determined in the original jurisdiction than relegated to the equity calendars of lower courts with the attendant delay before final determination.

Daniel v. Conestee Mills, 183 S.C. 337, 191 S.E. 76, 78 (1937) (citing *King v. Aetna Ins. Co.*, 168 S.C. 84, 1 S.E.12 (1932)). Thus, this case addresses matters of great public importance, requiring the immediate attention of this Court.

To the knowledge of the undersigned attorneys for the Petitioners, no court in South Carolina has addressed this issue of whether the Attorney General may use settlement proceeds to pay a contingency fee when no portion of the proceeds is designated for the payment of attorneys' fees without court approval.⁵ As noted above, the Respondent Attorney General has issued multiple contingent fee contracts, similar to the one at issue in this matter, and plans to continue to issue them.

⁵ In *Cephalon, Inc. v. Alan Wilson*, C/A No. 12-CP-40-07371 (Richland Cnty. Ct. Comm. Pleas June 6, 2014) (*See*, Ex. G, Mem. Att'y Gen. in Opp'n to Mot. for TRO or Temp. Inj, Ex. 3) the Honorable G. Thomas Cooper, Jr. ruled that the Attorney General has authority to retain private counsel pursuant to a contingency fee arrangement. In the Order, Judge Cooper held that the Attorney General has authority to seek an award of attorneys' fees in every case he litigates on behalf of the State. Judge Cooper further explained that the "fee calculation agreed to by the Attorney General and outside counsel operates as a ceiling to the fees the Attorney General can ultimately seek." *Id.* at 13. "The Litigation Retention Agreement simply puts the Attorney General's intention to seek those funds in writing, serves to notify outside counsel of the manner in which the Attorney General will calculate the attorneys' fees he will ultimately seek the court approve, and provides notice that *any fees approved by the court will be paid from outside counsel's contingent fee rather than the State's recovery.*" *Id.* at 14 (emphasis added).

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

Rule 245(a), SCACR, provides that “[t]he Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.” Rule 245(a), SCACR. Here, the Citizens of the State of South Carolina are being deprived of the immediate use of \$75 million of economic impact and assistance funds paid by the U.S. DOE. *Id.* at Ex. 3. This amount of money is almost 13 times the total amount of every Solicitor’s Office in the State receives in annual state judicial support. *Id.* This is more than the State funding received by all 32 of the Solicitor’s Offices and Public Defenders offices combined. *Id.* It is more than the State provides the entire Judiciary in annual funding and approximately five times more than the annual base budget for the Attorney General’s Office. *Id.*

Petitioners respectfully submit that these matters require immediate consideration by this Court because of the gravity of the Constitutional violations and immediate budgetary needs of the State caused by the worldwide pandemic. Any delay required by appeals of a lower court decision would prolong the Constitutional violation and unnecessarily deprive the State access to these much-needed funds. Accordingly, Petitioners suing on behalf of the Citizens of the State of South Carolina will suffer prejudice if this Court does not grant original jurisdiction. For the foregoing reasons, Petitioners move this Court to take original jurisdiction of this matter.

IV. CONCLUSION

WHEREFORE, Petitioners move this Court to take this matter in its original jurisdiction.

Respectfully submitted,

s/ Badge Humphries

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October 5, 2020

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I have am herewith serving the foregoing Petition for Original Jurisdiction upon the Respondents via email as permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, on this the 5th day of October 2020:

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SC Court of Appeals

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