

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Sep 03 2021**

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
R. Kirk Griffin, Circuit Court Judge

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Supreme Court Case No. 2021-000472  
Court of Appeals Case No. 2021-000343  
Lower Court Case No. 2020-CP-40-04063

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

v.

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

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**INITIAL BRIEF OF RESPONDENT  
DAVIDSON, WREN & DEMASTERS, P.A.**

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## ARGUMENT

Respondent Davidson, Wren & DeMasters, P.A. (DW&D) joins in, and incorporates by reference, the Brief of Respondent Willoughby & Hoefler, P.A., as it applies to this Respondent. This Respondent would add only the following brief discussion of the underlying federal litigation and the results it produced on behalf of the State of South Carolina. Simply summarized, if that litigation had not occurred, South Carolina would be over half a billion dollars poorer, and there would have been no enforceable schedule for the removal of highly radioactive plutonium stored at the Savannah River Site.

As the Court is doubtless aware, the Governors of South Carolina have been trying for over forty years to get the Department of Energy (DOE) to do something about the radioactive materials that have been in *de facto* storage at the Savannah River Site. Until the 2016 federal litigation was filed, however, the federal government not only did not remove nuclear material from SRS, it added still more such material in the early 2000s. At that time, however, and in response to efforts by Governor Hodges and others, Congress in 2002 enacted 50 U.S.C.A. § 2566, which provided for supposedly-firm deadlines for the removal of certain plutonium from South Carolina, along with significant monetary penalties (\$100 million per year to be paid to South Carolina) if certain actions relating to the removal or other disposition of plutonium did not occur by certain annual deadlines.

By January 1, 2016, though, and despite having obtained several extensions of time from Congress, the Department of Energy had not met, and did not even have a plan to meet, its statutory obligations as imposed by 50 U.S.C.A. § 2566. The Law Firms were retained, and the State sued the federal government on February 9, 2016. It soon became apparent that the federal government intended to follow its usual practice of delay and inaction when, in response to the State's lawsuit, the federal government resisted all efforts to move the plutonium and also denied that it should be required to pay even the first \$100 million, despite the undisputed fact that nothing had happened by the first annual deadline, January 1, 2016.

In the litigation, the federal government responded with every procedural and substantive defense it could muster. The State, represented by the Law Firms, pressed on, seeking both an injunction with regard to moving plutonium out of the State, and the monetary relief contemplated by 50 U.S.C.A. § 2566. W&H also pressed on in other related litigation, sending the signal that South Carolina would join battle with the federal government (or with other states) in any other litigation that might have made it easier for the federal government to avoid its responsibilities to South Carolina.

In late 2017, Judge Michelle Childs granted the State's request for an injunction, ordering that by January 1, 2020 at the latest, DOE was required to "remove from the State of South Carolina, for storage or disposal elsewhere, not less

than one metric ton of defense plutonium or defense plutonium materials. . . .” *South Carolina v. United States*, No. 1:16-CV-00391-JMC, 2017 WL 7691885, at \*5 (D.S.C. Dec. 20, 2017). Although the federal government appealed that Order, claiming that such removal would be “impossible,” the Fourth Circuit affirmed the Order by published opinion dated October 26, 2018. *South Carolina v. United States*, 907 F.3d 742 (4th Cir. 2018). DOE thereafter managed to accomplish the action it claimed was “impossible,” removing the one metric ton by August 2019 (Docket No. 130-1 filed 8/7/19 in *South Carolina v. United States*, No. 1:16-CV-00391-JMC.)

However, DOE was still left with another 9.5 metric tons of plutonium that need to be removed, and it had no firm plans for how to accomplish that move, much less accomplish it in accordance within the statutory deadlines. This absence of a plan was another example of DOE’s established practice of evading and ignoring supposedly-firm deadlines, even those set by Congress, regarding the disposition of nuclear material, including the removal of nuclear material from South Carolina. It can be deduced that the injunction obtained by the State requiring the removal of the first metric ton of plutonium by January 1, 2020, created quite an emergency for the federal government, which lacked a plan to dispose of the other 9.5 metric tons with any alacrity. Suddenly it was no longer “business as usual” for DOE.

At the time of the settlement of the case in August 2020 (more than four years after the litigation began), the monetary aspect of the case had not been finally resolved by a court. Oral argument regarding the overdue annual payments of \$100 million had occurred in the U.S. Court of Appeals for the Federal Circuit in May 2020. That Court's questions to counsel for the federal government suggested that the outcome might not favor the federal government. That case was then stayed by agreement not long after the oral argument, in order to permit the discussions that led to the August 2020 settlement of the federal litigation.

The end result of the August 2020 settlement was that the federal government obtained a much-needed grace period to remove additional weapons-grade plutonium from the State, while the State obtained not only a payment of \$600 million in 2020, but also an enforceable agreement that the federal government would make additional payments of up to \$1.5 billion if the federal government did not comply with the grace period deadline. That latter \$1.5 billion would not be subject to fees to be paid to the Law Firms.

The attorney's fee paid by the State was computed pursuant to the terms of the contingency contract entered with the Attorney General. The amount of fee was based on the amount of the recovery for the State, which was unprecedented in its size. Again, had the State never filed the federal litigation, the State would be over half a billion dollars poorer, all the plutonium would still be at the SRS, and the

prospects for ever having the plutonium removed would be as unenforceable and illusory as those prospects had previously been, so many times in the past. This Respondent accordingly joins the other Respondents in their contentions that the State lawfully complied with its contractual obligations with the Law Firms. The Court should therefore affirm the dismissal of Appellant's claims that the State's contractual obligation should be abrogated, especially at the insistence of parties with no standing, and essentially for no reason other than that the litigation resulted in a financial recovery for the State that was of historic size.

### CONCLUSION

For the reasons set forth above and in the filings of the other Respondents, this Court should deny the appeal of Appellants and affirm the order of the circuit court dismissing this case.

Respectfully submitted,

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