THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04063

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 & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., Respondents.

FINAL REPLY BRIEF OF APPELLANTS

November 15, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

Appellants South Carolina Public Interest Foundation and John Crangle challenged the legality of the Attorney General's $75 million payment, allegedly for attorneys' fees. Appellants asserted public importance standing to pursue their claims for declaratory judgment and equitable relief seeking the imposition of a constructive trust over the $75 million unlawfully paid to Willoughby & Hoefer, P.A. (WH) and Davidson, Wren & DeMasters (DWD) (WH and DWD, collectively, the "Law Firms") by Attorney General Alan Wilson (collectively, with WH and DWD, "Respondents").

The Circuit Court granted Respondents' Motion to Dismiss for lack of standing. Appellants appealed and filed their Initial Brief.

Respondents make two main arguments in their Brief and assert several "additional sustaining grounds" for the dismissal of Appellants' Complaint. First, they argue Judge Lee's order denying Appellants' Motion for Preliminary Injunction established the law of the case. Appellants adequately addressed these arguments in Appellants' Initial Brief. Appellants' Br. 8-12. No ruling on a temporary or preliminary injunction establishes the law of the case. It must be "an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Moreover, if her ruling finally determined Appellants' lack of standing, she would have dismissed the case. *See Dove v. Gold Kist, Inc.*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994) ("A court lacking subject matter jurisdiction, however, has no authority to act . . . ."); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). Judge Lee's preliminary finding that Appellants lacked standing could not be a final determination such that it became law of the case because there would be no case.

Second, Respondents argue Appellants lack standing, including public importance standing. Although this Court is very familiar with public importance standing and Appellants addressed public importance standing in Appellants' Initial Brief (Appellants' Br. 26-28), Appellants will further address standing herein.

Respondents assert several "additional sustaining grounds" to affirm the dismissal of this action. They contend the following:

(A) Appellants' claims are moot;

(B) Appellants' claims present non-justiciable political questions; and

(C) Appellants claims fail to state facts sufficient to constitute a cause of action.

(1) Appellants do not have right to challenge the payment of the attorneys' fees;

(2) the Attorney General had authority to pay the fees;

(3) the Attorney General did not need judicial approval; and

(4) Appellants' constructive trust and restitution claims fail as a matter of law.

Appellants address each of these "additional sustaining grounds" herein.

ARGUMENT

I. JUDGE LEE'S "RULING" ON STANDING IS NOT LAW OF THE CASE, NOR COULD IT POSSIBLY BE.

Respondents argue Judge Lee's order denying Appellants' Motion for Preliminary Injunction established the law of the case. Appellants have already addressed these arguments in Appellants' Initial Brief. Appellants' Br. 8-12. No ruling on a temporary or preliminary injunction establishes the law of the case. It must be "an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 785.

Moreover, if her ruling finally determined Appellants' lack of standing, she would have dismissed the case. *See Dove*, 314 S.C. at 238, 442 S.E.2d at 600 ("A court lacking subject matter

jurisdiction, however, has no authority to act . . . ."); *see also Arbaugh*, 546 U.S. at 514 ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."). Judge Lee's preliminary finding that Appellants lacked standing could not be a final determination such that it became law of the case because there would be no case at that point.

II. APPELLANTS HAVE STANDING.

A. Appellants have public importance standing.

In challenging Appellants' public-importance standing, Respondents misconstrue the law and ignore facts upon which Appellants rely.

First, they argue that "Appellants have not and cannot meet their burden to show that resolution of its claim 'is needed for future guidance.'" Respondents' Br. 19. In this regard, they ignore applicable law as well as the facts on which Appellants rely. In so arguing, they portray this case as a "challenge to a one-time payment of in this particular and unique situation and pursuant to this specific Litigation Retention Agreement." *Id.*

In this regard, Respondents fail to discuss the holding in *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020), where it addressed multiple factors in determining whether future guidance is needed:

> A resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds, a prompt decision is necessary, and it is likely the situation will occur in the future ***if*** and when Congress approves additional education funding in response to the continued COVID-19 pandemic.

Adams, 432 S.C. at 236, 851 S.E.2d at 708-09 (internal citations omitted) (emphasis added).

These factors are the relevant considerations to determining whether future guidance is needed, not merely whether the situation will recur in the future. Indeed, in light of their brief, Respondents concede that this case involves the conduct of government entities, the expenditure

of public funds, and that a prompt decision is necessary. Respondents only challenge whether "the situation will occur in the future." Respondents' Br. 19-20. However, that requirement is not the sole consideration, and it is not as exacting as Respondents suggest. As shown by *Adams*, the requirement can be met where a future event is far from certain to recurring, particularly where the other factors are present. *See Adams*, 432 S.C. at 236, 851 S.E.2d at 708-09.

Respondents also completely ignore the facts on which Appellants rely to show that it is likely this same situation will occur in the future. As noted in Appellants' opening brief, the Attorney General *regularly* retains special counsel pursuant to contingency fee agreements. These fee agreements are publicly available on the Attorney General's website. The active contingency fee agreements are available at this link: https://www.scag.gov/litigation-retention-agreements/. However, a simple search for "retention agreements" shows that there are tens of prior contingency retention agreements between the Attorney General and special counsel. The number of contingency retention agreements demonstrates that it is a regular, routine practice for the Attorney General to enter into such agreements.

As shown by the agreements themselves, they have similar structure and terms, including provisions contemplating court-approval of attorneys' fees awards. *See* Litig. Retention Agrmt. for Special Counsel Appointed by the S.C. Atty. Gen. as to the "Sonny" Mevers Found. (Feb. 13, 2020) available at https://www.scag.gov/media/fj5m1l1l/mevers-foundation-lra-02226082xd2c78.pdf; Litig. Retention Agrmt. for Special Counsel Appointed by the S.C. Atty. Gen. as to Insulin Pricing (July 13, 2021) available at https://www.scag.gov/wp-content/uploads/2021/07/Insulin-Fully-Executed-Litigation-Retention-Agreement-02641866xD2C78.pdf. Accordingly, Appellants have met their burden of showing that future guidance is needed in this instance.

Respondents' second reason that Appellants cannot demonstrate public importance standing reiterates a recurring and false theme throughout their brief. Respondents repeatedly assert throughout their brief something similar to what appears here: that Appellants "seek to appear after the fact and take any attorneys' fees not paid to the Respondent Law Firms for themselves." Respondents' Br. 20-2; *see also id.* at 1-2 (characterizing this case as "all for the sole purpose of obtaining a portion of the fees earned by and paid to the Respondent Law Firms" and referring to it as a "'money grab'"). Nothing could be further from the truth as shown by the fact that Appellants assert public importance standing and seek to bring this case derivatively on behalf of the State of South Carolina. Obviously, any recovery by this action will be paid to the State, not Appellants. *See, e.g.*, *Patterson v. Witter*, 425 S.C. 213, 232, 821 S.E.2d 677, 687 (2018) (distinguishing direct from derivative claims based, in part, on "who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually"). Accordingly, Respondents' second argument for why Appellants lack public-interest standing is utterly baseless.

As a third reason for why public-importance standing is lacking, Respondent claims that Appellants cannot obtain standing as to them "[b]ecause there is no South Carolina authority to support the public importance exception against private litigants." Respondents' Br. 21. However, there is also no authority to prevent the Court from finding public importance standing in this instance 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. 2016) (internal quotation marks omitted). Their argument also ignores the fact that pursuant to the Litigation Retention Agreement, the Law Firms are Special Counsel to the Attorney General, and therefore, they are agents and attorneys of the State of South Carolina. Accordingly, they are far from being "private litigants" as they assert. Finally, this argument ignores the fact that Appellants assert an equitable

claim for constructive trust over the money in dispute, which was transferred to them under questionable circumstances after this lawsuit was commenced.

B. Appellants have derivative standing.

Respondents' brief represents a fundamental misunderstanding of derivative lawsuits. They repeatedly claim that Appellants need a particularized injury to allege a derivative lawsuit. Respondents' Br. 22-24. That is a misstatement of the law, and it litters this section of their brief. By its nature, a derivative suit is brought on behalf of the entity to enforce its rights. *See Richardson v. Blackburn*, 41 Del. Ch. 54, 187 A.2d 823, 823 (1963) (explaining that "[t]he right sought to be enforced belongs primarily to the State"); *see also Patterson*, 425 S.C. at 232, 821 S.E.2d at 687 (distinguishing direct from derivative claims based, in part, on "who suffered the alleged harm, the corporation or the suing stockholders, individually"); *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (explaining that "[a] derivative action is a suit brought by a stockholder to enforce a corporate right." and that "[a] suit brought by a stockholder is a derivative action if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder"). That is the case here, where Appellants seek to assert the state's rights on its behalf because the Attorney General has refused to do so. Accordingly, as with Appellant's assertion of public importance standing, no particularized injury is required for Appellants to maintain a derivative lawsuit on behalf of the State.

Respondents also assert that *Ex parte Hart* does not apply to actions brought on behalf of the state because it is a sovereign entity. Respondents Br. 23. The authorities cited by Respondents are inapposite because none of them deal with actions on behalf of the state. *Id.* Moreover, Respondents' distinction that the State is the sovereign again ignores the very nature of a derivative claim. In such case, the State is not a defendant per se; rather, the plaintiff stands in the shoes of the State to assert the State's claim. *See Johnson v. Baldwin*, 221 S.C. at 149, 69 S.E.2d at 588

("The stockholder in an action of this kind is only a nominal plaintiff, the corporation being the real party interest.")

In this regard, the Delaware Chancery Court has explained that "[t]he right sought to be enforced belongs primarily to the State" in a case brought on behalf of the State by a taxpayer asserting derivative standing. *Richardson*, 41 Del. Ch. at 55, 187 A.2d at 823-24.[1] "Otherwise stated, it is the State's money which is allegedly involved," and "[p]laintiffs sue only derivatively as members of the taxpayer class because the State through the then Attorney General refused to sue." *Id.* South Carolina courts have previously looked to Delaware law in deciding matters dealing with derivative lawsuits. *See Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000).

Next, Respondents incorrectly argue that body politics are not subject to derivative suits. Respondents' Br. 23. In this section of their brief, they fail to address, much less distinguish, *Ex parte Hart*. Instead, they ask the Court to overrule it without any good reason. *Ex parte Harte* dealt with taxpayers' ability to pursue derivative claims on behalf of a county, which is indisputably a body politic. *Ex parte Hart, Appeal of Bowen*, 190 S.C. 473, 2 S.E.2d 52, 53-54 (1939) (holding 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" (emphasis added)); *Gaud v. Walker*, 214 S.C. 451, 471, 53 S.E.2d 316, 325 (1949) ("A 'municipal corporation' in its broader sense, is a body politic, such as a state and

[1] South Carolina courts have looked to Delaware law in deciding matters dealing with derivative lawsuits. *See, e.g.*, *Patterson*, 425 S.C. at 232, 821 S.E.2d at 687; *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000).

each of the governmental subdivisions of the state, such as *counties*, parishes, townships, hundreds, New England 'towns,' and school districts, as well as cities and incorporated towns, villages, and boroughs." (emphasis added)); *Lombard Iron Works & Supply Co. v. Town of Allendale*, 187 S.C. 89, 196 S.E. 513, 518 (1938) (discussing states, counties, and lesser municipal bodies as political bodies).

Although the reasoning in their brief is not entirely clear, Respondents apparently do so based on their misreading of several cases, including *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). That case merely stands for the proposition that a disaffected member of a governing body cannot sue the governing body when that member is outvoted. *Newman*, 480 S.E.2d at 73 ("The dispositive issue in this appeal is whether a member of the governing board of a special purpose district has standing to bring a declaratory judgment action challenging passage by the board of a resolution which the member opposed."). It barely addresses taxpayer standing and does so without any meaningful discussion at all. *Id.* at 74-75. The other cases on which Respondents simply stand for the same basic proposition, discussed earlier, that taxpayer standing requires a concrete and particularized injury. As discussed, that requirement, by necessity, does not apply to derivative lawsuits. Otherwise, the taxpayer would have direct claims. *Patterson*, 425 S.C. at 232, 821 S.E.2d at 687 (distinguishing direct from derivative claims). For a derivative suit, all that is required is for the State to have suffered a concrete and particularized injury, which Appellants allege it has. Appellants' constitutional standing is *derivative of* the State's constitutional standing. *See id.*

Finally, in addition to arguing twice that Appellants need a particularized injury, Respondents argue that Appellants have no standing because they have not alleged that the State has a "plain" claim. Respondents' Br. 24. Respondents' argument fails to address Appellants'

allegations, much less the evidence in the record supporting the same, and instead relies simply on their conclusory statement that, therefore, "Appellants cannot proceed with respect to the State." Indeed, if Respondents truly wanted to show that Appellants lacked a plain claim, the Law Firms would have submitted their itemized time records below and/or to this Court.[2] They did not and instead purportedly rely on a self-serving, aggrandizing narrative of the case at the outset of their brief that lacks any substantive information as to whether their fee is reasonable. Nonetheless, without the benefit of any discovery, Appellants' allegations and supporting evidence show that the State has a plain claim against the Law Firm. (R. pp. 83-84; 594-607; Appellants' Br. 15, 17-23; *see also infra* Part V).

C. *Ex parte Hart* should be controlling on the issue of standing.

Appellants invite the Court to consider a trio of Supreme Court cases arising from Greenville County: *Ex parte Hart*, *In re Bowen*, 186 S.C. 125, 195 S.E. 253 (1938); *Ex parte Greenville County*, *Appeal of Bowen,* 190 S.C. 188, 2 S.E.2d 47 (1939); and *Ex parte Hart*, *Appeal of Bowen*, 190 S.C. 473, 2 S.E.2d 52 (1939).

In that matter, two Greenville County attorneys, Bowen and Stover, performed extra work for Greenville County. The General Assembly had allocated money to the County so that it could pay for such additional legal services. To claim the payment for services, Bowen and Stover were

[2] *See In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 658 (E.D. La. 2010) ("To confirm that the determined percentage-fee value in this case is appropriate, the Court believes it is important to conduct a lodestar cross-check."); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 751 (S.D. Tex. 2008) ("The purpose of a lodestar cross-check of the results of a percentage fee award is to avoid windfall fees, i.e., to ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple." (internal quotation marks omitted)); *see also* Vaughn R. Walker & Ben Horwich, The Ethical Imperative of A Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases, 18 Geo. J. Legal Ethics 1453, 1455 (2005) (suggesting that "courts using a "reasonable percentage" approach to set common fund fees at the end of the litigation may be ethically bound to apply a lodestar cross-check).

required to file an action in Circuit Court. On June 2, 1937, believing Greenville Judge Dewey Oxner was out of the circuit, they went to Spartanburg to file their petition for compensation. Judge Sease, the resident circuit judge in Spartanburg, heard the petition and granted it.

On June 3, 1937, Bowen and Stover learned that Judge Oxner had **not** been away from Greenville when they went to Spartanburg on June 2, but instead was out of town on June 3. Accordingly, on June 3, they went back to Spartanburg and asked Judge Sease to reconfirm his findings and rulings from the previous day, which he did. The orders from June 2 and June 3 were filed in Greenville County, and based on those orders, the County paid the attorneys' fees.

Both the June 2 and June 3 hearings were conducted ex parte and without notice to Greenville County officials.

On June 11, 1937, J. Ed. Hart, "a citizen and taxpayer of Greenville County, on behalf of himself and all others similarly situated" presented a verified petition to Judge Sease in his chambers in Spartanburg, requesting to have Bowen and Stover show cause why the orders dated June 2 and June 3 should not be "declared void, vacated and set aside." *Ex parte Greenville County*, 190 S.C. 188, 2 S.E.2d at 49.

Several Greenville County officials were served with notice of Hart's petition, but they did not respond or participate. Bowen and Stover filed their return. Judge Sease held a hearing on Hart's petition on June 17 in Spartanburg. Judge Sease ruled that because Judge Oxner had actually been in Greenville on June 2, the June 2 Order was void, and thus, the June 3 Order confirming the June 2 Order was likewise void.

Bowen and Stover appealed. The Supreme Court of South Carolina ruled that the case was a Greenville County matter, but the *Hart* hearing was held in Spartanburg. The parties had not shown that no Greenville Judge was available either June 11, when Hart petitioned, or June 17,

when Judge Sease heard the rule to show cause. *Ex parte Hart*, 186 S.C. 125, 195 S.E. at 255-57. Accordingly, Judge Sease's June 17 Order was void for lack of jurisdiction, and incapable of overturning the June 2 and 3 orders. *Id.* The Supreme Court issued its opinion on February 7, 1938.

Thereafter, the then-current Greenville County Attorney, Mr. Earle, filed suit in Greenville County to have the June 2 and 3 Orders overturned. In the hearing, the secretary of the Greenville County Board of Commissioners testified that she did not know whether the Greenville County Board of Commissioners had authorized Mr. Earle's lawsuit. Judge Rice, presiding in Greenville County, found the testimony of the secretary to the Board of Commissioners to be insufficient "to overcome the presumption that the county attorney was authorized to take the action he did." *Ex parte Greenville County*, 190 S.C. 188, 2 S.E.2d at 50.

Also in the hearing, Earle admitted that the Greenville County Board of Commissioners had not specifically authorized or instructed him to file suit. Nevertheless, Judge Rice ruled that the June 2 and 3 orders were null and void because they had been issued in Spartanburg. Bowen and Stover appealed again.

The Supreme Court ruled that because Earle admitted that the County Board of Commissioners had not specifically authorized or instructed him to file suit, Earle did not have authority to bring the lawsuit. The Supreme Court reversed Judge Rice's ruling. *Ex parte Greenville County*, 190 S.C. 188, 2 S.E.2d at 52.

When Greenville County Attorney Mr. Earle filed suit, Hart also filed suit, this time in Greenville County, again challenging the June 2 and June 3 orders from Judge Sease. Hart again stated that he was suing as a citizen and taxpayer of Greenville County, for himself and all others similarly situated. Judge Rice again ruled that the June 2 and 3 orders were null and void. Bowen

and Stover appealed. This time, the Supreme Court affirmed. *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 56.

In light of the foregoing cases, Appellants will further address standing and the "additional sustaining grounds" of the Respondents. Respondents argue that Appellants have no right to challenge the payment of the attorneys' fees in this case.

Respondents argue that Appellants have no right to challenge the payment of the attorneys' fees in this case. Similarly, Bowen and Stover argued that Hart "had no right to institute the proceeding to vacate and set aside the judgment rendered in favor of [Bowen and Stover]." The Supreme Court rejected this argument in *Ex parte Hart*:

> 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. In such case it is proper to make the corporation a defendant as trustee for all of its members.** 14 Am. Jur., page 237, Sec. 77; *Zuelly v. Casper*, 160 Ind. 455, 67 N.E. 103, 63 L.R.A. 133 [(1903)]; *Clark v. George*, 118 Kan. 667, 236 P. 643 [(1925)]; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 247 S.W. 129 [(1922)]; *Gosso v. Riddell*, 123 Or. 57, 261 P. 77 [(1927)]; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N.W. 460, 90 Am. St. Rep. 867 [(1902)]; *Webster v. Douglas County*, 102 Wis. 181, 77 N.W. 885, 78 N.W. 451, 72 Am. St. Rep. 870 [(1899)]; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, 75 N.W. 964, 69 Am. St. Rep. 915 [(1898)].

Ex parte Hart, Appeal of Bowen, 190 S.C. 473, 2 S.E.2d at 53-54 (emphasis added).

The Court continued with the following:

> In such cases, **where officers neglect to do their duty, the wrong need not by any means go unredressed, so long as there is a single taxpayer with courage and public spirit enough to set the judicial machinery in motion. He may stand in court in place of the unfaithful public officials.** The court, in him, will recognize the interests of the corporation as a whole, and with the evidence produced before it, calling for action by its decree, compel the performance of duty by all within its reach.

Id. (emphasis added). The Court further reasoned as follows:

> Ordinarily we readily concede that the duty of determining when a suit should be brought being vested in the county board, it cannot be controlled or exercised by a taxpayer. The discretionary power is vested in the county board of determining when a suit shall be brought, but that means legal discretion. **Where it clearly appears that that power is abused, the governing body places itself outside the protection of the rule stated, and may be compelled to act, or in some instances further remedies may be resorted to.** As was said in *Land, Log & Lumber Co. v. McIntyre*, supra [100 Wis. 245, 75 N.W. 967]: "If a county or other corporation has a plain cause of action for an injury done to it, that should be enforced for the protection of its members, and its governing body refuses to perform its plain duty in the premises, our system of jurisprudence is by no means so weak that justice can thereby be defeated. On the contrary, **any member of the corporation, by reason of his indirect interest therein, suing in behalf of himself and all similarly situated, may set judicial proceedings in motion, making the corporation a defendant, as trustee for all of its members, and thereby enforce the rights of the corporation."**

Id. (emphasis added).

Like Hart, the Appellants in the case at bar are "taxpayer[s] with courage and public spirit enough to set the judicial machinery in motion. [They] may stand in court in place of the unfaithful public officials." *See id.* at Appellants have claimed public interest standing, rather than taxpayer standing. *See* Appellants Br., pp. 8-9. But the rationale is similar. Misuse of public funds by public officials, a situation that may recur, is an issue of great public importance.

> **A resolution for future guidance is needed here because this case involves the conduct of government entities and the expenditure of public funds**, a prompt decision is necessary, and it is **likely the situation will occur in the future** if and when Congress approves additional education funding in response to the continued COVID-19 pandemic. *See S.C. Pub. Interest Found. [v. S.C. Dep't. of Transportation]*, 421 S.C. [110,] 119, 804 S.E.2d [854,] 859 [(2017)](finding although a "close call," the balance of the policy concerns weighed in favor of conferring public importance standing where the matter involved the conduct of a government entity and the expenditure of public funds and there was evidence the entity would undertake the conduct at issue again); *Breeden v. S.C. Democratic Exec. Comm.*, 226 S.C. 204, 208, 84 S.E.2d 723, 725 (1954) (finding the question of who is the nominee of the Democratic party for public office "is not only of public interest, but one which should be promptly decided"). **Accordingly, Petitioners have public importance standing to bring this claim.**

Adams v. McMaster, 432 S.C. 225, 236, 851 S.E.2d 703, 708-09 (2020) (emphasis added).

The case at bar "involves the conduct of government entities and the expenditure of public funds . . . and it is likely the situation will occur in the future." *Id*. According, Appellants should be granted "standing to bring this claim." *Id*.

III. APPELLANTS' CLAIMS ARE NOT MOOT.

As an "additional sustaining ground," Respondents first argue that because the Attorney General paid $75 million to the lawyers just prior to the hearing in the Circuit Court, this whole matter is moot and beyond the authority of this Court to provide any remedy or correct any wrong. *Ex parte Hart* rejected a similar argument:

> **It is contended that payment** by the county treasurer of the compensation directed in the order of Judge Sease, of date June 3, 1937, **extinguishes the judgment**, and that any issue thereabout as to its validity is **academic. This argument necessarily presupposes that the judgment was valid in the first instance against Greenville County, and that it was voluntarily paid**. . . . **A void judgment, paid by county officials, not with their own, but with taxpayers' funds, is not a voluntary payment, and does not bind the county.**

Id., 2 S.E.2d at 55-56 (emphasis added).

Similarly, in this case, the Attorney General paid $75 million dollars of taxpayer funds, without notice and a hearing, without authority from a court, and without authority from the General Assembly. This payment was improper and therefore void. It was not paid from the Attorney General's funds. It was paid with funds owned by the people of South Carolina. The people of South Carolina did not make a voluntary payment, and the payment does not bind the State or its people. Accordingly, this case is not moot.

IV. APPELLANTS' CLAIMS PRESENT JUSTICIABLE LEGAL QUESTIONS.

Respondents also argue that the Attorney General's payment of the $75 million is an action of the executive branch, which makes this dispute a political question. In effect, they argue that the Attorney General speaks for the executive branch. This assertion ignores the fact that the Governor wrote to the Attorney General strongly opposing the payment of this outrageous amount

of money. The Governor is the chief officer of the executive branch. "The supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of South Carolina.'" S.C. Const., art. IV, § 1. As demonstrated above, the Attorney General acted beyond his authority, which makes the issue a constitutional issue of separation of powers. This Court is the ultimate arbiter of constitutional issues, including the questions of separation of powers. *See Williams v. Bordon's, Inc*., 274 S.C. 275, 262 S.E.2d 881 (1980). If this Court rules on the unlawful actions of the Attorney General, that ruling does not set it in conflict with the executive department.

This is a matter of defining the powers of the different departments of government; it is not a matter of politics. Appellants have articulated specific violations of the Constitution and violations of the laws of the State, and this Court is the appropriate forum in which those issues should be addressed. Accordingly, Appellants have presented justiciable legal questions.

V. APPELLANTS' CLAIMS STATED VALID CAUSES OF ACTION.

A. Appellants assert the illegality of the contract; they do not claim a private action for a violation of the Rules of Professional Conduct.

This payment of alleged attorneys' fees is the result of an unreasonable, illegal, and unenforceable contract, and therefore well within the authority of this Court to remedy. *See* Appellants' Br., pp. 12-17.

> Regardless of any theoretical preference for one method of fee calculation over another, **the overriding benchmark for awards of attorneys' fees** under both the state action statute and the general premise of the common fund doctrine **is that attorneys' fees must be "reasonable."** *See [Pennsylvania v.] Del. Valley Citizens' Council for Clean Air*, 478 U.S. [546,] at 562, 106 S. Ct. 3088[(1986)]. In light of the circumstances of this case, we hold that an award of $8.66 million in attorneys' fees is entirely unreasonable.

Layman v. State, 376 S.C. 434, 455, 658 S.E.2d 320, 331 (2008) (emphasis added).

Respondents misconstrue the claims of the Appellants. Appellants do not claim a private right of action for a violation of the Rules of Professional Conduct. Rather, Appellants assert that the violation of the Rules of Professional Conduct confirm that the contract is unreasonable and unenforceable.

B. The attorneys' fees must be deposited into the General Fund, and the Attorney General lacked authority to appropriate from the General Fund.

The Attorney General himself strongly affirmed that he has **no authority** to distribute any of the $600 million, but rather, the General Assembly allocates all funds. As Appellants argued in their initial brief (at pages17-19), requiring "all monies . . . awarded the State of South Carolina . . . must be deposited in the general fund of the State" and requiring the Attorney General's costs of litigation to be "awarded by court order or settlement." S.C. Code Ann. § 1-7-85; § 1-7-150(B).

Respondents now argue that the Attorney General has authority in and of himself to decide whom to pay, and how much. Appellants contend that the Attorney General has usurped the authority of the General Assembly. *See* Appellants' Br. 12-18.

C. In the alternative, the Attorney General needs judicial approval to pay the fees.

In the absence of General Assembly action, the Attorney General needs, at a minimum, a proper judicial hearing on the matter and a court order. *See* Appellants' Br. 17-26. As argued in Appellants' opening brief, the Litigation Retention Agreement between the Attorney General and the Law Firms clearly contemplates that "the attorneys' fees and costs awarded to Special Counsel shall be approved by a Court of competent jurisdiction. (*See* Appellants' Br. 15; R. p. 602). It is clear from the Litigation Retention Agreement that "a Court of competent jurisdiction" means one in the State of South Carolina. In that regard, the Litigation Retention Agreement between the Attorney General and the Law Firms provides as follows:

> **This Agreement shall be administered in the State of South Carolina** and shall be interpreted under the laws of the State of South Carolina. **Special Counsel consents to complete jurisdiction in the appropriate courts of the State of South Carolina.** This Agreement and any claims arising in any way out of it shall be governed by the laws of the State of South Carolina. **Any litigation** arising out of or **relating in any way to this Agreement or the performance thereunder shall be brought in state courts of appropriate jurisdiction in the State of South Carolina**, and Special Counsel hereby irrevocably consents to such exclusive jurisdiction.

(R. p. 605 (emphasis added)).

Additionally, the findings and reasoning of this Court in *Ex parte Hart* are instructive. In *Ex parte Hart*, there was at least what purported to be a hearing and judicial award, flawed though it was for lack of notice to Greenville County. This Court ruled that the ex parte hearing was insufficient to protect the rights of the real party in interest, Greenville County, which received no notice of the hearing on June 2 or June 3, and no opportunity to be heard. Here, the interests of the South Carolina taxpayer received **less protection** than Greenville County did in *Ex parte Hart*. There was no court hearing at all prior to the award and payment of the $75 million in attorneys' fees. It was totally behind the scenes and underhanded.

In the second *Ex parte Hart* case, the Supreme Court explained as follows:

> It is necessary only to refer to the case of Ex parte Hart et al., 186 S.C. 125, 195 S.E. 253, to show that the order of June 2nd is void.
>
> It is likewise our opinion that the order of June 3rd is invalid. **The proceedings were wholly ex parte, and the order resulting therefrom undertook to pass upon the interest of Greenville County, when it was not a party and not before the court**.
>
> We are not concerned with the merits of the contention that the fees allowed and paid the appellants on account were excessive and unreasonable. We are not to be understood as expressing or intimating any opinion as to the merits of that question. **The appellants**, although the then duly appointed attorneys for Greenville County, **occupied an adversary relation to the** county when making their ex parte motion for the allowance of fees. And in our opinion, regardless of good faith, it is **contrary to fundamental principles of judicial action** to hold under these circumstances that Greenville County was not entitled to **legal notice of the hearing as a matter of law.** As the county was not made a party to that proceeding,

> Judge Sease had **no jurisdiction** of the county, and therefore **his order is void** as to it.

Id., 2 S.E.2d at 54-55 (emphasis added).

In the case at bar, the Respondents were acting adversely to the State of South Carolina in attempting to award the $75 million in attorneys' fees, especially for unsuccessful litigation (losing four cases). Further, the Attorney General acted contrary to the interests of the people of South Carolina in paying such an outrageous sum for meager legal results, particularly when the settlement was a political settlement, brought about by political officials, who had political connections to politicians in Washington. Accordingly, in the case at bar, as in *Ex parte Hart*, it is "contrary to fundamental principles of judicial action to hold under these circumstances that [the people of South Carolina were] not entitled to legal notice [and a] hearing as a matter of law." *Id.*, 2 S.E. 2d at 55.

D. Appellants stated valid claims for constructive trust and restitution.

This Court has power over the Respondents, who are officers of this Court. They are also parties before this Court. This Court is properly equipped with equitable powers to impose a constructive trust and to impose equitable remedies, including recission and restitution. *See* Appellants' Br. 9-12.

After the Attorney General paid the money to the Law Firms, Appellants filed an Amended Complaint adding the Law Firms as defendants and seeking to impose a constructive trust over the disputed funds. (R. pp. 89-91). A constructive trust arises "whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *SSI Medical Servs. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990); *McNair v.*

Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (S.C. App. 1998); *see also Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) (constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995) (constructive trust results from fraud, bad faith, abuse of confidence, or violation of fiduciary duty which gives rise to obligation in equity to make restitution).

In addition, Appellants have pled a cognizable claim for restitution. Am. Compl. Count III. In *Trotter v. Merchants & Farmers Bank*, 180 SC 449, 186 S.E. 371 (1936), the South Carolina Supreme Court ruled that the recipient of funds paid under a mistake of law is required to make restitution to the lawful title holder. *Trotter* involved the improper payment of funds by a court appointed receiver to a creditor of an insolvent corporation. The trial judge explained, "I do not think a receiver can make a voluntary payment of money under a mistake of law when he had no title to the money, and it is not his own and he has no beneficial interest in same. The receiver paid the money to the defendant, but title to same did not pass, and his successor is entitled to restitution of the amount so paid with interest from the date on which demand for return of same was made." *Id*. *See also*, *United States v. Wurts*, 303 U.S. 414, 416, 58 S. Ct. 637, 638, 82 L. Ed. 932 (1938) (holding that it is a well-established principle that the Government generally can "recover funds which its agents have wrongfully, erroneously or illegally paid"); *Alsco-Harvard Fraud Litig.,* 523 F. Supp. 790, 806 (D.D.C. 1981) (finding that this common law basis for recovery of funds runs against a person "who received them by mistake and without rights").

"A void judgment, paid by county officials, not with their own, but with taxpayers' funds, is not a voluntary payment, and does not bind the county." *Ex parte Hart*, 190 S.C. 473, 2 S.E.2d at 56. Accordingly, Appellants stated valid claims for a constructive trust and for restitution.

CONCLUSION

Appellants respectfully request that this Court reverse the decision of the Circuit Court, rule that the Appellants possess public importance standing in this case, rule that the Complaint stated valid causes of action, rule that Attorney General Wilson lacked authority to pay Law Firms, and remand the case to the Circuit Court for further proceedings.

Respectfully submitted,

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November 15, 2021

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Nov 15 2021
S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY

R. Kirk Griffin, Circuit Court Judge

Supreme Court Case No. 2021-000472

Court of Appeals Case No. 2021-000343

Lower Court Case No. 2020-CP-40-04603

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 & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A.,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Reply Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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