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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000794
Trial Court Case No. 2016-CP-40-02875

South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated, ... Petitioners,

v.

Richland County,..... Respondent,

And

Central Midlands Regional Transit Authority……..Intervenor/Respondent

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PETITION FOR WRIT OF CERTIORARI

James G. Carpenter, S.C. Bar No. 1136
THE CARPENTER LAW FIRM, PC
819 E. North Street
Greenville, South Carolina 29601
(864) 235-1269 (telephone)
(864) 331-3083 (facsimile)
Jim@CarpenterLawFirm.net
Attorney for Petitioners

Other Counsel of Record:
Andrew Lindemann
Lindemann, Davis & Hughes, P.A.
Post Office Box 6923
Columbia, South Carolina 29260

Elizabeth Gray
Rob Tyson
Alexis K. Lindsay
PO Box 11449
Columbia, SC 29211

CERTIFICATION OF COUNSEL

The undersigned attorney hereby certifies that he filed a petition for rehearing with the Court of Appeals, and the Court of Appeals denied the petition on November 4, 2021.

QUESTION PRESENTED FOR REVIEW

Is the "continued operation of mass transit services" a proper capital expenditure under the Optional Methods for Financing Transportation Facilities Act[1] and this Court's decision in *Richland County v. South Carolina Department of Revenue*, 422 S.C. 292, 811 S.E.2d 758 (S.C. 2018)?

STATEMENT OF THE CASE

Petitioners South Carolina Public Interest Foundation and William B. DePass, Jr. petition the Court for writ of certiorari to the Court of Appeals pursuant to SCACR 242.

South Carolina Public Interest Foundation is a not for profit corporation organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper application and enforcement of the South Carolina Constitution and statutes (R. pp. 69-70). William B. DePass, Jr. is a citizen, resident, taxpayer, and registered elector of Richland County (R. pp. 69-70).

This case arises out of the same factual background as *Richland County*. This Court's opinion provides a statement of the background facts.

> Through the Optional Methods for Financing Transportation Facilities Act (Transportation Act), the General Assembly has authorized the governing body of a county to "impose by ordinance a sales and use tax in an amount not to exceed one percent within its jurisdiction for a single project or for multiple projects and for a specific period of time to collect a limited amount of money." S.C. Code Ann. § 4-37-30(A) (Supp. 2017). This is commonly

[1] S.C. Code Ann. §§ 4-37-10 to -50 (Supp. 2017).

> referred to as the "penny tax." The types of projects permitted to be funded with such a tax are "highways, roads, streets, bridges, mass transit systems, greenbelts, and other *transportation-related projects*." *Id*. § 4-37-30(A)(1)(a)(i) (emphasis added).
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> * * *
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> At some point after the Penny Tax became effective, DOR received information concerning the County's possible misuse of Penny Tax funds. In April 2015, DOR initiated an audit to determine the County's compliance with state tax laws, specifically including the Transportation Act.
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> * * *
>
> The County did not object to the audit or to DOR's authority to conduct it.
>
> Following the audit, DOR informed the County that it had uncovered (1) evidence of public corruption; (2) evidence of criminal violations of state tax laws and (3) unlawful expenditures of Penny Tax revenues by County Council.
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> DOR identified specific expenditures it believed were problematic.
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> * * *
>
> Faced with these dubious expenditures, the County put forward the position that all these expenditures were properly characterized as "administrative costs" under the Ordinance.
>
> Nevertheless, the day following the audit, the County responded that it was "shocked and alarmed" and expressed a willingness to "immediately invoke measures to protect and preserve county money and assets" and reimburse any inappropriate expenditures of Penny Tax funds that may have occurred. Over the next several months, officials from DOR and the County continued written and in-person discussions regarding the results of DOR's audit.

Id., 422 S.C. 292, 297-302, 811 S.E.2d 758, 761-63 (*footnotes omitted*) (*italics in original*).

The County had been employing virtually no limit on unrelated and unauthorized expenditures. The Department of Revenue ("DOR") and the Court noted that Richland County had been using penny tax funds to establish and staff the County-wide Small Local Business Enterprise ("SLBE") Program, in violation of the state statute's specification that penny tax revenue be spent on transportation-related projects.

Richland County used penny tax revenues to pay for public relations services and "mentoring." *Id.* 422 S.C. 292, 302, 811 S.E.2d 758, 763 (S.C. 2018). Furthermore, the public relations spending from penny tax funds was excessive in relation to similar services offered by substantially similar firms.

When discussions between the DOR and Richland County broke down, the DOR stopped remitting the tax proceeds to Richland County. Richland County filed suit against the DOR requesting mandamus relief ordering the DOR to make the monthly payments. The DOR counterclaimed for declaratory judgment that certain expenditures were unlawful.

As the DOR and the County were discussing the audit, and before Richland County filed suit, SCPIF, Edward D. Sloan, Jr.,[2] and DePass filed a Complaint and later an Amended Complaint against Richland County (R. pp. 69-79, 106-115) alleging seven causes of action arising from Richland County Ordinance Number 039-12HR, the penny tax ordinance:

1. Ordinance Number 039-12HR exceeds the scope of S.C. Code Ann. § 4-37-30.
2. Violation of S.C. Code Ann. § 11-35-50.
3. Procurements Exceed the Scope of S.C. Code Ann. § 4-37-30.
4. No Annual, Independent, Public Audit.
5. No Annual Budget.
6. No Annual, Independent Audits of Agencies Receiving Appropriations.
7. Violation of S.C. Code Ann. § 4-37-25

Because the Petitioners were challenging the legality of funding the "continued operation of mass transit services," the Central Midlands Regional Transportation Authority ("CMRTA") moved to intervene as a Defendant. (R. pp. 80-92).

[2] Sloan died during the pendency of this appeal.

The County and CMRTA both moved to dismiss and for judgment on the pleadings. (R. pp. 103-105, 116-118). The Circuit Court denied the motions to dismiss and the motions for judgment on the pleadings. (R. pp. 21-38).

The *Richland County* case quickly moved to this Court. The parties below were aware of the proceedings in *Richland County* and understood the factual and legal similarities. For much of the time that the case below was pending before the Circuit Court, *Richland County* was pending at this Court. The parties were awaiting a decision from this Court. No party issued any discovery requests, but Petitioners had issued FOIA requests and had received more than 2,000 pages of public records.

Later, CMRTA and the County moved for summary judgment. The County also moved to dismiss for failure to prosecute. (R. pp. 174-185). The Circuit Court granted CMRTA's motion for summary judgment and dismissed Petitioners' case against the County for failure to prosecute. (R. pp 4-18).

In ruling for CMRTA, the Circuit Court held that the Transportation Act authorized the expenditure of penny tax revenues for "continued operation of mass transit services provided by [CMRTA]." (R. p. 17).

Petitioners had argued that penny tax revenues must be used only for capital expenditures. The Circuit Court summarized Petitioners' arguments.

> [Petitioners] allege CMRTA's use of penny tax revenues for operating expenses or administrative expenses is unlawful. They allege this use of funds exceeds the scope of § 4-37-30. Also, [Petitioners] take exception to the language in Section 2 of Ordinance 039-12HR describing the mass transit systems project, "continued operation of mass transit services." [**Petitioners] maintain these penny tax revenues must be used solely on capital costs** for transportation facilities and **not the continued operation of the system**.

(R. pp. 16-17) (emphasis added). The Circuit Court accurately stated Petitioners' contentions.

The Circuit Court rejected Petitioners' interpretation of the Transportation Act.

> But if one used the [Petitioners'] interpretation of the statute, the penny tax revenues could be used for mass transit systems, but **only for expenditures on capital costs**. This interpretation goes beyond the plain language of the statute and would result in the expenditures being used **only to buy buses or construct facilities related to the mass transit system**.

(R. p. 17) (emphasis added). Again, the Circuit Court's description of Petitioners' position was accurate.

Just prior to its Conclusion, the Circuit Court summarized its findings:

> The Court finds that the legislative intent is clear from the enabling Act itself. There is no statutory language that states expenditures of penny tax revenues are limited to "capital costs". Further, the legislature's preamble and findings lead to an opposite result -- penny tax revenues may be expended on the operation of transportation-related projects, which the statute specifically defines to include mass transit systems, such as the CMRTA.

(R. p. 18).

Petitioners moved to alter or amend both rulings. (R. pp. 285-296). While the Motions to Alter or Amend were pending, this Court issued its *Richland County* decision, which ruled that penny tax revenues could be used **only for capital expenditures** related to specific transportation projects. Petitioners filed a Supplemental Memorandum in Support of Motions to Alter or Amend (R. pp. 301-307), based upon this Court opinion. Nevertheless, the Circuit Court denied both Motions to Alter or Amend. (R. pp. 1-3).

Petitioners appealed.

The Court of Appeals reversed the dismissal for failure to prosecute: "As far as we can discover, no case upholds a dismissal with prejudice for this sort of pre-trial failure to prosecute. Thus, we reverse the judgment dismissing the claims against the County and

remand for further proceedings." *South Carolina Public Interest Foundation, et al., v. Richland County, et al.*, Op. No. 5865, (Ct. App. filed October 6, 2021), p. 2 (Davis Adv.Sh. No. ____at ___)

The Court of Appeals also ruled that "continued operation of mass transit services" was a proper use of penny tax revenues. The Court of Appeals stated its thesis: "Put simply, we believe running a mass transit system falls under 'the administration of a specific transportation project.'" *Id*. The Court of Appeals concluded, "the statute authorizes spending funds on operating transportation-related projects, not just transportation-related facilities." *Id*. p. 5.

Twice, the Court of Appeals quoted a sentence from this Court's *Richland County* opinion, stating that proper expenditures from the penny tax "must be tethered to a specific transportation-related capital project *or* the administration of a specific transportation project." Both times, the Court of Appeals emphasized the word "or," and both times the Court of Appeals focused on the phrase "the administration of a specific transportation project." Petitioners respectfully suggest that the Court of Appeals misread this phrase in an opinion that says repeatedly that **all** penny tax expenditures must relate to **capital** costs.

ARGUMENT IN SUPPORT OF PETITION

This Court should grant the Petition for Writ of Certiorari. Rule 242(b) lists five "considerations governing review" of a Petition for Writ of Certiorari, including "Where the decision of the Court of Appeals is in conflict with the prior decision of the Supreme Court." Petitioners respectfully suggest that the Court of Appeals decision conflicts with the main holding of *Richland County*.

In *Richland County*, this Court ruled repeatedly that penny tax funds must be used for capital costs. *Id.*, 422 S.C. 292, 811 S.E.2d 758 (2018).

> The revenues generated from [the penny] tax must be used in accordance with statutory restrictions imposed by the General Assembly—namely, proceeds **must be used for the capital costs** of the types of transportation projects identified in the Transportation Act. *Id.* § 4-37-30(A)(15).
>
> * * *
>
> The local ordinance must specify the projects for which the proceeds of the tax are to be used; the length of time for which the tax is to be imposed; "the estimated *capital cost* of the project or projects to be funded in whole or in part from proceeds of the tax." *Id.* § 4-37-30(A)(1) (emphasis added). At issue in this case is **whether** and to what extent **certain costs qualify as "capital costs**" and thus **are considered proper expenditures** of penny tax revenues.

Id., 422 S.C. 292, 297-302, 811 S.E.2d 758, 761-63 (*footnotes omitted*) (*italics in original; bold and underlining added*).

This Court also said, "[T]he Transportation Act, . . . requires a nexus between expenditures and a transportation-related capital project." *Id.*, 422 S.C. 292, 311, 811 S.E.2d 758, 768.

Ordinance Number 039-12HR purported to use the penny tax to fund "continued operation of mass transit services provided by the Central Midlands Regional Transit Authority." *Id.*, Section 2. (c), Project 2. The "continued operation of mass transit services

provided by Central Midlands Regional Transit Authority" is not a capital cost by any definition.

Ordinance Number 039—12HR authorized the payment of certain administrative costs.

> Subject to annual appropriations by County Council, sales and use tax revenues shall be used for the costs of the projects established in this Ordinance, as it may be amended from time to time, *including, without limitation, payment of administrative costs of the projects*, and such sums as may be required in connection with the issuance of bonds, the proceeds of which are applied to pay costs of the projects.

Id., 422 S.C. 292, 300, 811 S.E.2d 758, 762 (S.C. 2018) (*italics in original*).

The proper definition of "administrative costs" was at the heart of the dispute between Richland County and the SCDOR. The County asserted that all of its "dubious costs" were "administrative costs." In discussions with the County, "DOR informed the County that . . . only those costs allowable under the Transportation Act were proper expenditures of penny tax funds. However, DOR also acknowledged this might include certain limited transportation-related administrative costs." *Id.*, 422 S.C. 292, 302, 811 S.E.2d 758, 763-64 (2018).

I. *Richland County* Allows Only Costs that Can Be Capitalized.

The DOR equated "administrative costs [that] may be properly allowable under the law" with "capital costs." *Id.* 422 S.C. 292, 303, 811 S.E.2d 758, 763-64 (2018). DOR contended that the "administrative costs" must relate to capital expenditures. Allowable costs had to be "administrative costs" that could be properly "capitalized," not "expensed."

DOR explained to Richland County how to define "capital costs." The DOR suggested that IRC §§ 263 and 263A, or a similar definition, which defined capital costs, should guide the County's allowable expenditures from the Penny Tax Fund. *Id.*, 422 S.C.

292, 312, 811 S.E.2d 758, 768 (2018). IRS Code sections 263 and 263A distinguish between capital and non-capital expenditures. SCDOR suggested these sections could help the County determine which costs were proper administrative capital costs under the Transportation Act.

Section 263 is entitled: "Capital Expenditures." It governs federal income tax and disallows deductions from federal income tax for capital expenditures. The "General Rule" is "No deduction shall be allowed for . . . Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." *Id.* It distinguishes in great detail between capital expenditures which must be "capitalized," and expenses, which may be deducted from income as they are incurred.

Similarly, section 263A addresses "costs" and distinguishes between those costs that must be capitalized and those costs that may be deducted as "expenses." Section 263A is entitled "Capitalization and inclusion in inventory costs of certain expenses." *Id.* It addresses the "Nondeductibility of certain direct and indirect costs." *Id.*

This Court agreed with the DOR that the distinction governing deductibility applied to those costs that were allowable expenditures from the penny tax. Those that could be capitalized were allowable, but those costs that were classified as expenses and could not be capitalized were not permitted expenditures from the penny tax.

This Court explained what it meant by proper administrative costs:

> Primarily, **DOR correctly asserted** the County's expenditure of Penny Tax funds on "administrative costs" that were unrelated to any specific transportation project were improper as they exceeded the scope of the Transportation Act. DOR informed the County that regardless of what "administrative costs" the County's Penny Tax Ordinance purported to allow, **only those costs allowable under the Transportation Act were proper expenditures** of Penny Tax funds. However, DOR also acknowledged this **might include certain limited transportation-related**

administrative costs:

> While some administrative costs may be appropriate expenditures under the [T]ransportation [Act], **the use of the term "capital costs" in the statute gives some guidance on what administrative costs may be properly allowable under the law**. The term "capital cost" is not defined in the law. However, "capital costs" are generally considered one-time costs incurred for the creation or improvement of tangible property, either real or personal, such as buildings, infrastructure[,] and equipment . . . . **The concept of "capitalized costs" for tax purposes is described in detail in Internal Revenue Code (IRC) §§ 263, 263A**, and the accompanying regulations . . . . Since the [Transportation Act] does not define "capital costs," these Internal Revenue Code principles can be used to provide guidance as to **which costs are properly allowable under the [T]ransportation [Act]**.

Id., 422 S.C. 292, 302-03, 811 S.E.2d 758, 763-64 (S.C. 2018) (emphasis added). Again, this Court ruled that the SCDOR "correctly asserted" these matters.

This Court ordered the parties to develop guidelines such as the Internal Revenue Code §§ 263 and 263A, "or some other acceptable alternative," which explained the meaning of capital expenditures. In other words, the allowable administrative expenditures must be properly categorized as capital expenditures under IRC 263/263A or some acceptable similar authority.

> In light of the County's many suspect expenditures of Penny Tax funds, DOR requested an injunction against the County prohibiting the further expenditure of Penny Tax funds **until the County "adopts IRC 263/263A or some other acceptable alternative** as a standard to be used to determine **when expenditures are proper** within the [Transportation] Act." Under these compelling circumstances, **we find an injunction is appropriate**. To ensure objective criteria establishing compliance with the Transportation Act, the County **shall be subject to guidelines** for determining **whether expenses are properly allocable** to a specific transportation project, or the direct administration of a specific transportation project. Accordingly, **the County is hereby enjoined from violating the Transportation Act**. We direct the circuit court, no later than thirty days following remand, to enter the preliminary injunction in accordance with this opinion.

Id., 422 S.C. 292, 311, 811 S.E.2d 758, 768-69 (S.C. 2018) (emphasis added).

Upon remand from this Court, SCDOR and Richland County did develop Guidelines, which temporarily allowed the continued funding of the operations of the bus system, in the context of a preliminary injunction. The Guidelines were the product of negotiation and compromise. The issue had not been explicitly litigated or ruled on by this Court. Upon remand, the case was pending before a Circuit Judge, who had already ruled adversely on this issue in Petitioners' case, and the Department of Revenue knew that Petitioners were litigating the issue overtly and explicitly. Finally, knowing these Petitioners, the Department of Revenue had every confidence that the issue would be fully litigated in the case at bar.

For a fuller explanation of the Guidelines and the Department of Revenue's actions, please see the Brief of Amicus Curiae South Carolina Department of Revenue, filed in the Court of Appeals in this action August 12, 2019.

II. The Context of the Phrase at Issue Allows only Costs that Can Be Capitalized.

As noted above, the Court of Appeals quoted a particular phrase twice and relied upon it. Petitioners suggest it would be helpful to examine the context of the phrase. The paragraph containing the phrase is as follows:

> It is axiomatic that the County's Ordinance may not expand the scope of expenditures authorized in the enabling provisions of the Transportation Act, which requires **a nexus between expenditures and a transportation-related capital project**. . . . A proper expenditure of Penny Tax funds must be **tethered to** a specific transportation-related **capital project** or the **administration** of a specific transportation **project**.

Id., 422 S.C. 292, 311-312, 811 S.E.2d 758, 768 (S.C. 2018) (emphasis added).

This Court repeatedly declared that the penny tax may be used only for capital expenditures. Accordingly, the context of the phrase indicates that it should be *understood* as follows:

> "A proper expenditure . . . must be tethered to a . . . project or the administration of a . . . project." *Id.*
>
> What kind of project?
>
> A **capital** project, as stated throughout the opinion.

Such an understanding is consistent with the rest of the opinion, especially those repeated holdings quoted above.

Black's Law Dictionary defines "capital expenditure" as "an outlay of funds to acquire or improve a fixed asset." Black's Law Dictionary, Seventh Edition, West Group, St. Paul, Minnesota, 1999. Black's Law Dictionary defines "capital expense" as "an expense made by a business to provide a long-term benefit; a capital expenditure. A capital expense is not deductible, but can be used for depreciation or amortization." *Id.*

This Court ruled that although some "administrative costs" were allowed under the Transportation Act, those "administrative costs" must be directly related to specific "capital costs." In the case at bar, **continued operation** of the Transit Authority is not a capital project, nor is it a proper administrative expenditure that can be capitalized. Under this Court's analysis, and the plain language of the Transportation Act, penny tax revenues may not be used for the "continued operation" of the bus system. Accordingly, the Court of Appeals' holding conflicts with this Court's holding in *Richland County*.

III. The Ordinance Exceeds the Statutory Authority.

The South Carolina General Assembly enacted Title IV, Chapter 37 of the South Carolina Code Annotated entitled "Optional Methods for Financing **Transportation**

Facilities" (emphasis added), which authorizes counties to adopt an ordinance imposing a sales and use tax for "financing transportation **facilities**" (emphasis added). Further, the authorizing statute establishes the kinds of "transportation facilities" for which such "optional methods of financing" may be used: "highways, roads, streets, bridges, mass transit systems, greenbelts, and other transportation-related projects **facilities** including, but not limited to, drainage **facilities** relating to the highways, roads, streets, bridges, and other transportation-related projects" S.C. Code Ann. 4-37-30(a)(1) (emphasis added).

Richland County adopted Ordinance Number 039-12HR ("Ordinance") to levy and impose a 1% sales and use tax, pursuant to S.C. Code Ann. § 4-37-30 (R. p. 204). The County Ordinance exceeded the Transportation Act's purpose, scope, and grant of limited authority. As demonstrated above, the Transportation Act does not authorize penny tax revenues for the "continued operations" of the CMRTA.

The County argued that the County alone was empowered to determine which expenditures were permitted under the Transportation Act. This Court disagreed.

> [W]e also find the County has woefully failed to demonstrate a likelihood of success on the merits with regard to its interpretation of the Transportation Act. *See, e.g.*, *Sinkler v. County of Charleston*, 387 S.C. 67, 76–78, 690 S.E.2d 777, 781–82 (2010) . . . . To the contrary, DOR has presented a compelling prima facie case that **some of the County's expenditures of Penny Tax revenues are in violation of the Transportation Act**.

Id., 422 S.C. 292, 311, n. 7, 811 S.E.2d 758, 768 (S.C. 2018) (emphasis added). The County may not expand the scope of the Transportation Act by ordinance.

Ordinance Number 039-12HR exceeds the scope of the state enabling statute, because the ordinance seeks to allow broad payment of expenses that the enabling Act does not permit. The Act is very asset-specific and requires the County's enabling ordinance to specifically list "the estimated **capital costs** of the project or projects to be funded in whole

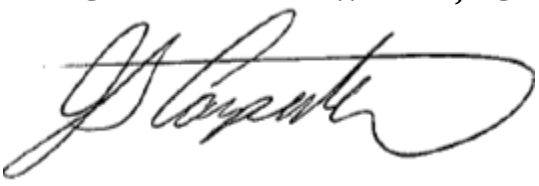
or in part from the proceeds of the tax." S.C. Code Ann. § 4-37-30(A)(1)(c) (emphasis added). Under the statute, the expenditures must be used for facilities (tangible assets) and not general County operating expenses, and the expenses incurred must be related to the facilities themselves.

The Transportation Act was for "financing transportation facilities." The "continued operation" of the CMRTA is not "facilities. It is not a "one-time cost." It is not a capital expenditure. It is not an administrative cost that can be capitalized. *Id.* at 292, 302-03. Accordingly, it is not a proper administrative or capital expenditure, and it violates the Transportation Act.

CONCLUSION

Petitioners pray the Court to issue a writ of certiorari, reverse the ruling of the Court of Appeals, and rule that the funding of the "continued operations" of the CMRTA from the penny tax is not a proper administrative or capital expenditure under the Transportation Act, in accord with this Court's ruling in *Richland County v. SCDOR*.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC



James G. Carpenter
S.C. Bar No. 1136
819 East North Street
Greenville, SC 29601
(864) 235-1269
Attorney for the Petitioners